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Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, DC 20503
FAX (202) 395-6102

"Comments on Technical Standards,"
National Indian Gaming Commission,
1441 L Street, NW., Washington, DC 20005
Attn: Michael Gross, Associate General Counsel

Re: Comments on the burden, estimates and other aspects of the information collection requirements for the proposed Class II technical standards, 72 Fed. Reg. 60508 (October 24, 2007), and the proposed Class II game classification standards, 72 Fed. Reg. 60483 (October 24, 2007).

On behalf of Kickapoo Traditional Tribe of Texas, we submit the following comments on the burden, estimates and other aspects of the information collection requirements of the Paperwork Reduction Act of 1995 for the National Indian Gaming Commission's (NIGC) proposed Class II technical standards, 72 Fed. Reg. 60508 (October 24, 2007) (the "Technical Standards"), and proposed Class II game classification standards, 72 Fed. Reg. 60483 (October 24, 2007) (the "Classification Standards").¹

¹ On November 28, 2007, the NIGC extended the comment period on the burden, estimates and any other aspects of the information collection requirements for NIGC's proposed Technical Standards and Classification Standards from November 23, 2007 to January 24, 2008. 72 Fed. Reg. 67251 (Nov. 28, 2007). On January 17, 2008, the NIGC extended the general comment period for the Classification Standards and Technical Standards from January 24, 2008 to March 9, 2008, but maintained the January 24, 2008 deadline for comments on the Paperwork Reduction Act aspects of the proposed regulations. 73 Fed. Reg. 3224 (Jan. 17, 2008).

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq., requires federal agencies to consider four primary factors when promulgating federal regulations. As detailed below, the NIGC has failed to adequately consider those factors:²

1. *The NIGC improperly evaluated whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.*

The proposed Classification Standards and Technical Standards are contrary to the Indian Gaming Regulatory Act (IGRA), and the NIGC has failed to provide any reasoned explanation for their need or considered alternatives in accordance with Executive Orders 12866 and 13175. Taken together, the proposed regulations are unwarranted "major rules," and "significant regulatory actions" that at the NIGC's last estimate would impose devastating costs of well over a billion dollars per year. Because these standards are contrary to law and impose dramatic costs that would effectively destroy the industry, the information collection burdens they impose are not necessary.

2. *The NIGC's estimate of the burden of the proposed collection of information is inaccurate.*

Even if the standards were legally justifiable, the NIGC has vastly underestimated the information collection burdens they would impose.

To begin with, the NIGC fails to recognize that the Classification Standards would impose an significant information collection burden on tribes. In its Paperwork Reduction Act Analysis, the NIGC fails to mention tribes at all, focusing entirely on manufacturers and testing laboratories. This overlooks the enormous burden these regulations would impose on tribes.

The Classification Standards would impose a fundamentally new regulatory regime on tribes with regard to Class II gaming which is fundamentally at odds with the IGRA and existing regulations. Significantly, the Classification Standards would, for the first time, require that tribes create and maintain, and submit to the NIGC, a detailed, centralized, and comprehensive inventory of each piece of equipment in their Class II gaming facilities they have authorized for play. Under proposed 546.9(c), the rules would require:

(c) The tribal gaming regulatory authority shall maintain a current listing of each electronic, computer, or other technologic aid including servers, player interfaces, and each game program it has authorized for play under the classification standards governed by this part, indicating that all such games meet the classification standards established by this part and any additional standards established by the tribe. The listing will show the asset identification

² We reserve the right and will comment on the substantive aspects of the proposed rules which are due on March 9, 2008. Because comments on the Paperwork Reduction Act aspects of the proposed rules are due January 24, 2008, we offer the following comments at this time.

number(s) of each electronic, computer, or other technologic aid including servers and player interfaces and the manufacturer's name; version number(s), game theme titles and other unique identifier(s), of the game operating software, for the games authorized for play as documented in a certification report(s) issued by a testing laboratory.

Under proposed 546.10(d), tribes would have to submit the list to the NIGC. Taken together, these provisions would require tribes to create a comprehensive database of all their equipment, submit it to the NIGC, and then maintain and update the database as each piece of equipment is authorized for play.

The NIGC's Paperwork Reduction Analysis makes no mention of this requirement, and no estimation as to the burdens it would impose.

Second, the NIGC presumes that independent laboratories will have the legal expertise required to certify games as meeting their new Classification Standards, and that they will in fact make such certifications. Leaving aside the legality of such a scheme, several labs have testified to the NIGC that they lack the expertise to make such determinations, which under the IGRA is properly the function of Tribal Gaming Regulatory Authorities (TGRAs) as the primary regulators of Class II gaming. The NIGC makes no estimation on the information collection burden on TGRAs.

Third, the NIGC assumes a 20 percent turnover rate in games per year, and a useful life of 2 to 5 years. While this might not be unreasonable for the software component of the game itself as it is contained in software, it vastly underestimates the useful life and turnover rate of hardware. Because both rules impose a fundamentally new set of standards that will take effect all at once, they will likely lead to significantly higher number of games and gaming systems being turned over all at once, and thereby impose a much more significant burden than has been estimated by the NIGC.

3. *The quality, utility and clarity of the information to be collected can only be improved through a fundamental reevaluation of the need for the regulatory scheme.*

As discussed above, the NIGC has failed to adequately justify the legality or its need for the proposed rules, and has made several fundamental errors and omissions in its estimates on the burdens they would impose for the purposes of the Paperwork Reduction Act. Without a fundamental reevaluation of the regulations and the NIGC's underlying assumptions with regard to the burdens they impose, there is no meaningful way to offer suggestions to improve the quality, utility and clarity of the information to be collected.

4. *The NIGC has failed to take steps to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology*

The NIGC has failed to take any steps to minimize the burden of the collection of information on the tribes, labs and manufacturers who must comply with its new regulatory regime. For example, the NIGC has failed to provide for the use of any automated information collection techniques, and failed to provide avenues for the electronic maintenance and submission of information to the NIGC.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: 

Elliott A. Milhollin