

## CALIFORNIA GAMBLING CONTROL COMMISSION



### *Supplement to the Detailed Response to Tribal-State Association Objections to Minimum Internal Control Standards (MICS) (CGCC-8)*

The purpose of this supplement is to add the Commission's response to four timely letters from tribes, tribal gaming agencies, or commissions to the CGCC's Detailed Response, dated October 9, 2008.

At its September 4, 2008 meeting, the Tribal-State Association voted to disapprove proposed regulation CGCC-8 Minimum Internal Control Standards (MICS), based upon the objections stated in the Association Task Force Report, dated February 13, 2008. In addition, at the time of the vote, according to the official minutes, (1) Jackson Rancheria Tribal Gaming Agency, (2) Picayune Rancheria of the Chukchansi Indians, (3) Rumsey Indian Rancheria of Wintun Indians, and (4) United Auburn Indian Tribal Gaming Agency indicated "they would submit written objections in support of their vote." Apparently, five tribes or tribal gaming agencies provided to the host Tribe Paskenta Band of Nomlaki Indians written comments at the September 4, 2008 meeting; (1) Jackson Rancheria Tribal Gaming Agency, (2), Picayune Rancheria of the Chukchansi Indians, (3) Rumsey Indian Rancheria of Wintun Indians, (4) United Auburn Tribal Gaming Agency and (5) Cher-Ae Heights Indian Community of the Trinidad Rancheria Tribal Gaming Commission. Of these five letters, only Rumsey Indian Rancheria of Wintun Indians provided a copy to the Commission's delegate at the meeting.

These letters were apparently attached to the minutes of the meeting. However, the copy of the minutes that was sent to the Commission via facsimile from the Tribal Gaming Commission of the host tribe, Paskenta Band of Nomlaki Indians on October 2, 2008 included no attachments and there was no notation on the cover page that the minutes were being sent without attachments. Although Paskenta representatives indicated at the California Gambling Control Commission meeting on October 14, 2008 that the minutes with the attachments were emailed to the Commission's delegate(s), neither the email nor the attachments containing the four letters were received by the Commission's delegate(s) or alternates or, to the best of our knowledge, anyone else at the Commission until October 14 and 15, 2008.<sup>1</sup>

We amend the list of the tribes, tribal gaming agencies, or commissions that sent in timely comments in order to add the above-mentioned four tribes to the other tribes that sent in letters and provide herein a detailed response to those letters. These four additional comment letters are

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<sup>1</sup> Under section 3 of the Tribal-State Association Protocol for Submission of Proposed State Regulatory Standards to the Association (Amended January 21, 2004), "[n]otice to delegates as required herein shall mean notice in writing provided to each Delegate on the Association Roster via certified mail, overnight mail or facsimile followed by first class mail."

attached as Exhibits “A9-A12” respectively.<sup>2</sup> As will be seen from this supplement to the response, no new or different comments were received from these tribes that were not previously raised and answered in the Commission’s October 9, 2008 Detailed Response to Tribal-State Association Objections to Minimum Internal Controls (MICS) CGCC-8.

As noted in the Commission’s Detailed Response, Compact section 8.4.1 sets out procedures for the State Gaming Agency (SGA) to propose uniform statewide regulations governing Class III gaming operations and for the Association of Tribal and State Gaming Regulators (Association) to approve or disapprove them.<sup>3</sup> Section 8.4.1 (b) provides that the SGA may re-adopt a regulation in its original or amended form after disapproval by the Association, and then submit the regulation to each individual tribe, provided that the SGA prepares a detailed, written response to the Association’s objections.<sup>4,5</sup> Compact section 8.4.1(e) states that tribes may

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<sup>2</sup> The letter from Picayune Rancheria of the Chukchansi Indians is Exhibit “A.9,” the Jackson Rancheria Tribal Gaming Agency letter is Exhibit “A.10,” the Cher-Ae Heights Indian Community of the Trinidad Rancheria Tribal Gaming Commission is Exhibit “A.11” and the United Auburn Tribal Gaming Agency letter is Exhibit “A.12.”

<sup>3</sup> Compact section 8.4.1, subsection (b) provides:

“Every State Gaming Agency regulation that is intended to apply to the Tribe (other than a regulation proposed or previously approved by the Association) shall be submitted to the Association for consideration prior to submission of the regulation to the Tribe for comment as provided in subdivision (c). A regulation that is disapproved by the Association shall not be submitted to the Tribe for comment unless it is readopted by the State Gaming Agency as a proposed regulation a proposed regulation in its original or amended form with a detailed written response to the Association’s objections.”

<sup>4</sup> The Compact is a contract, or form of contract, between the State and signatory tribes subject to ordinary rules of contract construction. (*New York v. Onieda Nation of New York* (N.D.N.Y. 1999) 78 F. Supp.2d 49, 60-61. See also *Pueblo of Santa Ana v. Kelly* (10<sup>th</sup> Cir. 1997) 104 F.3d 1 546, 1556; *American Greyhound Racing, Inc. v. Hull* (D.Ariz.2001) 146 F.Supp.2d 1012, 1043, 1046, vacated on other grounds (9<sup>th</sup> Cir. 2002) 305 F.3d 1015;) Thus, state contract law is applied to interpret Compact terms. (See *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for West. Dist. of Mich.* (W.D.Mich. 2002) 198 F. Supp.2d 920, 937-938.)

Moreover, although the State does not believe there is any ambiguity (see footnote 5), the canon of Indian law that ambiguous provisions are to be interpreted to the benefit of the Indians applies only to federal statutes that are enacted for the benefit of Indians. (See *Artichoke Joe’s California Grand Casino v Norton* (9<sup>th</sup> Cir. 2003) 353 F.3d 712,729.) The Compact was a government to government negotiation between equal parties.

<sup>5</sup> Language in a contract must be interpreted as a whole (Civ. Code § 1641), and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. (*Bank of the West v. Superior Court*, (1992) 2 Cal.4<sup>th</sup> 1254, 1265.) The State believes that the language in section 8.4.1, subsection (b) is not ambiguous and provides a clear exception to the general proposition in subsection (a) of 8.4.1 that the regulation has to be approved by the Tribal-State Association. This readoption and response procedure constitutes a clear exception to the general requirement that the Association approve a regulation before it may be effective. Any other interpretation would render subsection (b) mere surplusage, and such a construction must be avoided. (*Boghos v. Certain Underwriters at Lloyd’s of London* (2005) 36 Cal.4<sup>th</sup> 495,503 [language in a contract must be interpreted as a whole and constructions that render contractual provisions surplusage are disfavored].)

object to a proposed statewide uniform regulation on any of four enumerated grounds: that is, that the regulation is “unnecessary, unduly burdensome, conflicts with a published final regulation of the [National Indian Gaming Commission], or is unfairly discriminatory . . .”

This document is the supplement to the Detailed Written Response to the Association’s objections which included and incorporated the rationale for the CGCC-8 text (dated October 1, 2008) and the Commission’s Response to the Task Force Report dated April 23, 2008. Part I of the Detailed Written Response is not repeated in this supplement, but is nonetheless incorporated by reference.

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## **PART II. ASSOCIATION’S OBJECTIONS**

### **1. AUTHORITY TO PROMULGATE MICS REGULATION**

Regarding the legal authority of CGCC-8, in addition to the comments from Dry Creek, Paskenta, Rincon, Rumsey, Torres Martinez, and the Task Force, Jackson, United Auburn, Trinidad and Picayune also argued that there was no authority for CGCC-8 in the Compact. These comments contended that only a TGA is vested with the authority to promulgate and enforce rules. The CGCC incorporates all the earlier responses to this objection.

In addition, Picayune specifically mentions that IGRA provides that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands,” citing 25 U.S.C. section 2701. We note that 25 U.S.C. section 2710(d)(3) provides that for class III gaming activity the tribe shall negotiate with the State for the purpose of entering into a Tribal-State compact and section 2710(d)(5) states that “nothing in this subsection [d] shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands *concurrently with the State*, except to the extent that such regulation *is inconsistent with or less stringent than the State laws and regulations made applicable by any Tribal-State compact.*” (Emphasis added.) Thus, under IGRA, the right to regulate gaming activity is not exclusive to tribes when there is a compact involved. Further, the Compact expressly grants to the SGA the authority to promulgate regulations concerning matters encompassed by Sections 6.0, 7.0 and 8.0 in order to foster uniformity of regulation of Class III gaming operations throughout the state. Therefore the Commission has authority concurrent with the tribes in this instance to set minimum internal controls and to require that the NIGC MICS be the minimum required.

See also Part I of the Detailed Response, Section 4, pages 3-5, for further discussion of the State Gaming Agency’s authority.

Jackson, Trinidad, and United Auburn referred to the 2006 compact amendments, contending that the existence of a MICS-related section in the amendments proved that the State is aware of the lack of authority to implement MICS under the 1999 Compact. This was previously answered in the Detailed Response. See pages 13-14.

Jackson, Trinidad and United Auburn also asserted that CGCC has no authority to conduct “some sort of review of financials of gaming operations (of unclear scope or consistency).” We interpret this to be the same comment as the assertion that CGCC has no authority to conduct “full financial audits.” CGCC-8 does not contemplate financial audits such as those found at 25 U.S.C. section 2710(b)(2)(C). In response to concerns raised by a number of tribes, the version of CGCC-8 approved by the CGCC (March 27, 2008) for consideration by the Association contained specific language eschewing such authority. In any event, the regulation re-adopted by CGCC on October 14, 2008 amended CGCC-8 subsection (h) to delete the term “full” and to restructure the subsection to clarify the intent of the regulation. CGCC-8 neither purports to require nor requires that financial audits be conducted by the SGA.

## 2. NEED FOR REGULATION

Picayune and United Auburn assert that there is no need for the State to adopt a regulation setting minimum internal control standards and that there is no “void” because these tribes have amended their ordinances to allow the NIGC to monitor and enforce MICS. As explained, the Commission believes that the *CRIT* court by deciding that NIGC did not have authority to regulate Class III gaming operations did not so much leave a “void,” but rather clarified that Congress intended to leave Class III gaming regulation to the State and the tribes, including independent, non-tribal oversight of Class III gaming operations by the State. In response to widespread disagreement with that assertion and in response to language suggested by the Rumsey Rancheria, the Commission modified the Statement of Need and the Purpose section of CGCC-8 (subsection (a)) to reflect the other aspect of the need and purpose of the regulation: to provide an effective and uniform manner in which the SGA can conduct the compliance reviews contemplated in Compact Sections 7.4 and 7.4.4. The reviews include assuring tribal (and TGA) compliance with the requirements of Compact Sections 6.1 and 8.1 – 8.1.14.

Picayune asserts that the current version of the regulation does not address the *CRIT* decision. The Commission listened to the comments throughout the Association process and deleted references to *CRIT* in CGCC-8 because it became apparent that the citations themselves were unnecessary, although the regulation itself is nonetheless a valid exercise of authority under the Compacts.

Picayune asserts, as others did, that tribes employ many persons as regulators and spend a great deal of money in self-regulation. While no doubt true, that is not a reason for the State to neglect to exercise its oversight authority given the outcome of protection of the integrity of the gaming operation and the need to assure gaming is conducted honestly and fairly. As explained above, compliance with the requirement that independent CPA testing occur, which measures the gaming operation’s compliance with the tribe’s internal control standards can be satisfied by performing the required yearly independent financial audits at the same time.

United Auburn asserts as others did that in the case in which a tribe pays a flat fee<sup>6</sup> under amended Compacts, that the State has no interest in securing its revenue share through the

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<sup>6</sup> There are only five such tribes.

compliance reviews proposed in CGCC-8. There are, however, as noted earlier, provisions of the MICS that are applicable even to a flat fee tribe. Proper accountability of the number of machines in operation is essential. The NIGC MICS contain detailed processes, which in themselves cause an accounting of the number of machines operated.<sup>7</sup> Further, the MICS contain standards relative to information technology that protect the integrity of the data produced.<sup>8</sup> Another MICS section relates to the preservation of records, which is essential to validate the tribe's assertion of machines operated.<sup>9</sup> Additionally, all those compacts implementing a flat fee system also contain unique compact obligations relating to gaming devices in which MICS are invaluable for the tribe in carrying out its obligations. In the broadest sense, the NIGC MICS facilitate the credible operation of the gaming activity, which interest goes beyond the State's revenue share concerns, and is fundamental to the integrity of the entire gaming operation. The argument that flat fee tribes do not need MICS oversight is belied by the fact that so many have amended their ordinances to voluntarily allow NIGC oversight. (See also Section 6. "Unnecessary.")

Picayune and United Auburn suggested that adopting the NIGC MICS by way of ordinance and providing for NIGC oversight eliminates the need for CGCC-8. These ordinance amendments, however, are clearly voluntary actions; we are unable to identify any basis in federal law for the NIGC to disapprove deletion of this kind of an NIGC enforcement provision from an ordinance if a tribe so requests.<sup>10 11</sup> (See Detailed Response Part 1, Sections 6 (iii and iv) and 7, Duplicative, for further discussion of this suggested alternative.)

## 1. REGULATION OR COMPACT AMENDMENTS

Picayune, United Auburn, Trinidad, and Jackson argued that CGCC-8 is an unauthorized or premature renegotiation of the Compacts and that separate government-to-government

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<sup>7</sup> NIGC MICS, 25 CFR 542.13(h)(7), (10), (14) &(15); (m)

<sup>8</sup> 25 CFR 542.16(a), (b) & (f)

<sup>9</sup> 25 CFR 542.19(k)

<sup>10</sup> See letter from United Auburn to NIGC Chairman dated November 29, 2007 from the Tribal Chairperson in which she indicates that the United Auburn Indian Community "*consents* to the jurisdiction of the NIGC" (emphasis added) with respect to the MICS and also that they "believe federal regulatory standards promote and support strong regulatory practices at Indian casinos and strengthen the public's confidence in the integrity of Indian gaming." (Attached as Exhibit "G.1")

<sup>11</sup> Although the NIGC "approved" these amended ordinances as it related to MICS compliance, the letters from the NIGC Chairman clearly show the acceptance of them as "consistent with" or "not in conflict with" IGRA, rather than as required by IGRA. As an example, see letter to United Auburn dated January 11, 2008, attached as Exhibit "G.2" wherein the Chairman states "the amended ordinance [making NIGC's MICS applicable to the casino] ... is consistent with the requirements of the Indian Gaming Regulatory Act and the Commission's regulations and is therefore approved." See also letter to Cabazon Band of Mission Indians dated February 28, 2008 from NIGC providing that "[t]his letter constitutes approval of the amendment because nothing herein conflicts with the requirements of the Indian Gaming Regulatory Act and the Commission's regulations." (Attached as Exhibit "G.3".) Compare with the earlier letter to United Auburn dated February 24, 2000 in which the Chairman stated "[w]e note that the Tribe and/or Tribal Gaming Agency *must* promulgate tribal MICS that are at least as stringent as the NIGC MICS found at 25 C.F.R." (Emphasis added.) (Attached as Exhibit "G.4".)

negotiations should be undertaken. Memoranda of Agreement were suggested as a separate negotiation.

From the Commission's perspective, Compact negotiations are not needed because the SGA's compliance review authority is clearly established in the existing Compact. While individual agreements could accomplish the same purpose, a uniform regulation adopted in accordance with the Compact provisions specifically authorizing such a regulation is much more efficacious. It ensures uniformity and fairness in SGA compliance review and, by taking into account the scope of individual gaming operations, assures a level playing field for all tribes and prevents arbitrariness. Both the tribe and the State are sovereigns. Each has sovereignty the other must respect; each has the right to demand that the other sovereign comply with its responsibilities and obligations as mutually agreed to in the Compact.

The Compact provides the State with the authority (and responsibility) to review tribal standards to ensure compliance with the Compact. Neither tribal regulatory activities, nor NIGC regulatory activities can take the place of State Compact authorized compliance reviews.

See also Part I. sections 4, Authority, and 6 (iv) (Alternatives).

## 2. "UNFAIRLY DISCRIMINATORY"

Picayune indicated that because the State has not yet imposed MICS requirements in cardrooms, CGCC-8 is "unfairly discriminatory". See Part I, Section 6(ii) for a response to this comment.

## 3. "UNDULY BURDENSOME"

Comments from United Auburn, Jackson and Trinidad indicate that CGCC-8 is "unduly burdensome."

The Commission reiterates that CGCC-8 has not and does not increase any obligation on the tribes related to audits beyond that already provided for in Section 8.1.8 of the Compact.

While any outside review necessarily entails the use of some gaming operation staff time and resources, the Commission is fully committed to working with individual TGAs through consultation on a case-by-case basis to conduct compliance reviews in the most efficient manner possible and therefore minimize any impact on tribal gaming operations, TGAs, and California taxpayers. The Commission's ability to efficiently conduct meaningful compliance reviews depends of course to a large extent on the cooperation of individual TGAs and gaming operation personnel.

## 6. "UNNECESSARY"

Comments from United Auburn, Jackson and Trinidad contended that CGCC-8 is unnecessary and Picayune asserts that the State has "yet to identify any actual need or concern that would require or justify the implementation of CGCC-8."

The NIGC has identified many instances of non-compliance in the limited number of MICS compliance reviews that it has conducted. See Part I, Section 6 (vi) and Exhibit “C” page 6). Additionally, there are some areas in which MICS non-compliance has been observed by CGCC staff during Special Distribution Fund audits, including violations of Drop and Count standards and Surveillance standards.<sup>12</sup>

## 7. DUPLICATIVE

Comments from Picayune, United Auburn, Jackson and Trinidad argue that if tribes adopt ordinances containing NIGC enforcement of MICS, then CGCC-8 is “duplicative.”

As has been made clear at the Task Force meetings and as Chairman Shelton made clear at the March 27, 2008 Commission meeting, the CGCC has and will continue to make every effort to coordinate with the NIGC. However, SGA compliance reviews are not duplicative of NIGC reviews; they are a legitimate exercise of the State’s authority under the Compact.

As stated in NIGC Chairman Philip Hogen’s April 17, 2008 written testimony to the U.S. Senate Indian Affairs Committee Oversight Hearing:

“To put the regulation of tribal gaming in proper context, we need to appreciate that the vast majority of the regulation of tribal gaming is done by the tribes themselves, with their tribal gaming commissions and regulatory authorities. In many instances, *where tribes conduct Class III or casino gaming, state regulators also participate in the [regulatory] process.* NIGC has a discrete role to play in this process and is only one partner in a team of regulators.” (Emphasis added.)

The SGA focus is Compact compliance; by contrast, the NIGC has no interest in, nor authority with regard to Compact compliance. Further, to assert that because the NIGC has an oversight role with regard to internal controls, that the State should therefore forbear from exercising its compliance review authority under the Compact would to ignore the State’s role as a sovereign Compact signatory.

The fact that tribes may have already put into place standards “at least as stringent as NIGC MICS” does not make CGCC-8 duplicative. Nor does the fact that a number of tribes have changed their gaming ordinances or entered into agreements purporting to grant the NIGC “authority” to monitor and enforce tribal compliance with those standards. The loss of such federal authority as a result of the *CRIT* decision highlighted the need for the State to more actively exercise pre-existing compliance oversight authority. The authority for such oversight has always existed in the Compact – the State had not previously deemed it necessary to exercise it.

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<sup>12</sup> Although the State believes the regulation is necessary for the reasons stated, it is the State’s position that the under the Compact the burden to show the regulation is unnecessary is on the tribes (Section 8.4.1 (e)), not on the State to show it is necessary.

The Commission expects that the vast majority of gaming tribes have standards in place and run their gaming operations according to those standards in compliance with the Compact. However, that does not diminish the State's clear authority to conduct compliance reviews. Further, from the perspective of the SGA, the State has not only the authority, but also the responsibility to conduct compliance reviews. The public as well as the legislative and executive branches of state government have made that clear. CGCC-8 simply outlines a process and sets a uniform benchmark for such reviews. The State has not arrogated to itself any authority not already found in the Compact.

## 8. ALTERNATIVES TO MICS REGULATION

United Auburn and Picayune advocated eliminating SGA compliance review via CGCC-8 or that an exemption from such review should be allowed if the tribe and the NIGC agreed to NIGC oversight through either MOU/MOAs or changes to tribal gaming ordinances. Neither of these approaches takes into account the State's sovereignty as a signatory to the Compact. The SGA authority to inspect the gaming facility and all gaming operation or facility records relating thereto (Section 7.4) and the SGA's authority to be granted access to papers, books, records, equipment or places where such access is reasonably necessary to ensure compliance with the Compact (Section 7.4.4) are based on express Compact provisions. These State powers are not and cannot be made dependent upon the statutory authority of the NIGC, or upon other arrangements between the NIGC and individual tribes. The State's authority is not secondary to the federal government's non-existent legal authority over Class III gaming operations; the State's is not obliged to delegate its authority to NIGC.

CGCC-8 does *not* require any tribe to adopt the NIGC MICS in carrying out its responsibilities under Compact Sections 6 and 8. CGCC-8 rather requires that whatever internal controls standards a tribe may choose to adopt meet or exceed the requirements of the NIGC MICS. Further, CGCC-8 provides for variances (subsection (l)) and for consultation between the SGA and individual tribes and the Association as a whole regarding the effect of changing technology on compliance matters (subsection (m)).