IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
and	)	
	)	
THE CITIZEN POTAWATOMI NATION, *et al.*,	)	
	)	Case No. CIV-19-1198-D
	)	
Plaintiffs/Intervenors,	)	
	)	
vs.	)	
	)	
J. KEVIN STITT, *et al.*,	)	
	)	
Defendants.	)	

OKLAHOMA'S RESPONSE TO THE AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT WITH BRIEF IN SUPPORT BY INTERVENOR-PLAINTIFF WICHITA AND AFFILIATED TRIBES

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While the Motion submitted by the remaining Tribes ("Plaintiffs' MSJ," Dkt. No. 125) focuses on a few core issues, the Wichita and Affiliated Tribes' (the "Wichita Tribe") Motion (Dkt. No. 128) ("Wichita Tribe MSJ") is anything but focused, advancing multiple baseless arguments the Court must flatly reject.

Part 15(B) is clear and unambiguous. The Compact expires on January 1, 2020, something the Wichita Tribe does not contest, unless the State takes an affirmative action *following* the effective date of the Compact (for the Wichita Tribe, April 6, 2009) to authorize electronic gaming by organization licensees or other nontribal entities. The Wichita Tribe argues the Compact renews if electronic gaming is authorized for anyone in Oklahoma on January 1, 2020 (*i.e.*, unless all State gaming legislation has been repealed). This is contrary to the plain language of Part 15(B) and does not give effect to all its words and phrases. Moreover, the five additional actions identify by the Wichita Tribe that occurred after April 6, 2009, do not qualify as actions of the "State," do not "authorize" "electronic gaming," and/or do not relate to "organization licensees" or "others," as each of those terms is defined in the Compact and the STGA. The only conclusion is that the Compact has expired, and Oklahoma is entitled to summary judgment.[1]

RESPONSE TO THE WICHITA TRIBE'S STATEMENT OF "FACTS"

Oklahoma generally objects to the Wichita Tribe's Statement of Material Facts ("Facts") because it is improperly "filled with irrelevant information, legal arguments, and conjecture." *See Cady v. Sheahan*, 467 F.3d 1057, 1060 (7th Cir. 2006). Specifically, Fact

[1] Oklahoma will use defined terms herein as they are defined in Oklahoma's MSJ (Dkt. No. 126).

Nos. 18-42 largely contain only citations to, or quotations and/or paraphrasing of, various statutes, regulations and related documents. For the purposes of the instant motion, Oklahoma does not dispute the factual statements contained in the Wichita Tribe's Fact Nos. 1-2, 4, 8, 10, 12-14, 16, 18, 20-23, 26-42 to the extent consistent with the evidentiary materials and sources cited therein. Oklahoma disputes, however, that each of these facts necessarily support the Wichita Tribe's summary judgment arguments or is material to the issues presently before the Court with regard to interpretation of Part 15(B) of the Compact. Specifically, facts related to the Governor's position on renewal (No. 14), the Oklahoma Tax Commission ("OTC") (Nos. 21-23), the Oklahoma Lottery Commission ("OLC") and the State Lottery (Nos. 26-27, 31-35, 38-42), and retail liquor sales (Nos. 28-30) are clearly immaterial to the issue of whether the Compact expired or renewed.

3. Fact No. 3 is undisputed in part and disputed in part. It includes a defined term "covered games" under the Compact. That language is controlling rather than the paraphrased language advanced by the Wichita Tribe in this paragraph of its Facts.

5. Fact No. 5 is undisputed in part and disputed in part. It describes two (but not all) of the requirements for a Compact to become effective. *See* Oklahoma's Response to Plaintiffs' MSJ (Dkt. No. 141) at 5 n.2.

6. Fact No. 6 is undisputed in part and disputed in part. The STGA ***required*** the OHRC to license organization licensees once certain criteria were satisfied. *See* 3A O.S. § 262(A) (OHRC "***shall*** license organization licensees which are licensed pursuant to…this title to ***conduct authorized gaming as that term is defined by this act pursuant to this act utilizing gaming machines or devices authorized by this act***…") (emphasis added).

However, the STGA did not delegate "responsibility" to "authorize" gaming to the OHRC. The "authorization" to conduct "authorized gaming" derived solely from the STGA, approved by the people, enacted by the Legislature and signed by the Governor. *Id.*

7. Fact No. 7 is undisputed in part and disputed in part. It includes the defined term "authorized games" under the STGA, as well as the defined term "covered games" in the Compact. While similar, the definitions are not the same. The terms in the STGA and Compact are controlling, not the paraphrased language advanced by the Wichita Tribe.

9. Fact No. 9 is undisputed in part and disputed in part. The Wichita Tribe entered into a Compact pursuant to 3A O.S. § 280; *but see* Response to Fact No. 5.

11. Fact No. 11 is denied. It ignores requirements for the Compact to be effective, particularly when the start-up fee was paid (April 6, 2009). 3A O.S. § 281, Part 15(A)(3).

15. Fact No. 15 is disputed (for the reasons set forth generally, *infra*) and procedurally improper because it contains a legal conclusion and no admissible evidence is cited in support of the allegation. *See* Fed. R. Civ. P. 56(c)(1-4) (outlining procedural requirements for supporting assertion that fact cannot be genuinely disputed). "[T]he Court is not required to admit legal conclusions embedded in a party's statement of facts." *Doe I v. Evanchick*, 355 F. Supp. 3d 197, 214 (E.D. Pa. 2019); *see also Hailey v. City of Camden*, 2017 WL 2656011, at *7 (D.N.J. June 20, 2017).

7. Fact No. 17 is undisputed in part and disputed in part. Oklahoma does not dispute that certain agreements were entered but disputes that the Wichita Tribe accurately summarized the allegations in the State's Counterclaim at the referenced paragraph. For example, the words "represented," "unilateral," and "purported" are mere editorializing.

Further, Oklahoma disputes that the referenced Tribes are "organization licensees" or "others" as referenced in the Compact. *See infra*, at 22-23.

19. Fact No. 19 is undisputed in part and disputed in part. While the quoted language is included in 68 O.S. § 1503 (though immaterial to any issue presented), the Wichita Tribe does not quote the referenced statute in its entirety and fails to include identification of excluded text, which is particularly relevant to an understanding of the referenced "coin-operated devices." For instance, between the terms "an annual fee" and "[t]he annual fee" (quoted in the Wichita Motion without ellipses), the statute provides:

> A fee shall be required for each machine, regardless of the number of coin slots, if the machine, upon insertion of a coin, token or similar object, provides music, amusement or entertainment or dispenses one or more products separate and apart from any other provider of music, amusement or entertainment or dispenser of one or more products…

24. Fact No. 24 is undisputed in part and disputed in part, though it is immaterial to the issues presented. Oklahoma does not dispute that the OLC was "deemed to be an instrumentality of the state" pursuant to 3A O.S. § 704. The State disputes that 3A O.S. § 709, setting forth the powers of the OLC, supports this allegation. Furthermore, reference to the OLC is immaterial. *See* 3A O.S. § 703(9) (the definition of "lottery," or associated derivatives, specifically excludes the type of games authorized by the STGA).

25. Fact No. 25 is undisputed in part and disputed in part. Oklahoma does not dispute that the excerpted opinion from Attorney General Mike Hunter is accurately summarized, in so far as the Attorney General opined that (i) second chance promotions constituted a lottery and (ii) the OLC was not permitted to offer second chance promotions "through an internet-based web application" unless authorized by law. The State disputes

that the offering of second-chance drawings by the OLC constituted "electronic gaming," as defined by the STGA. 3A O.S. § 269(8). As provided in the AG opinion:

> To participate, a player enters certain information on the ticket or slip and sends it to the Commission via U.S. mail. In an effort to modernize this process, the Commission wishes to accept entries for second-chance drawings through an internet-based web application found on its website.

2017 OK AG 2 at ¶ 9. The opinion simply does not suggest that the submission of second-chance drawings over the internet constituted "electronic gaming," as defined by the STGA. *See also* Response to Fact No. 24 (definition of lottery excludes types of games authorized by the STGA). Finally, the referenced Attorney General Opinion was abrogated by statute the following year, rendering it moot. *See* 3A O.S. § 724.5. For these reasons, Fact No. 25 is disputed in part and immaterial to the issue before the Court.

43. Fact No. 43 is disputed. Section 200.1(9) of Title 3A defines an "organization licensee" as "any person receiving an organization license."

44. Fact No. 44 is undisputed in part and disputed in part. Specifically, the State's response to ¶ 69 of the Wichita Tribe's Complaint concerned Okla. Admin. Code § 325:80-1-1, which states: "The Rules in this chapter establish Standards and requirements for licensure, certification, registration, renewal and other approval ***under the State-Tribal Gaming Act***." (emphasis added). Accordingly, as to this part of Fact No. 44, Oklahoma does not dispute that the OHRC's power to license is authorized only by the STGA but disputes the allegation to the extent inconsistent herewith. The recitation of Oklahoma's responses to ¶¶ 70-77 of the Wichita Tribe's Complaint is not disputed.

ARGUMENT AND AUTHORITIES

The operative section of the Compact is Part 15(B), which provides:

> **[1]** This Compact shall have a term which will expire on January 1, 2020, and **[2]** at that time, **[3]** if **[a]** organization licensees or **[b]** others **[4]** are authorized **[5]** to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing **[6]** pursuant to any **[a]** governmental action of the state or **[b]** court order **[7]** following the effective date of this Compact, **[8]** the Compact shall automatically renew for successive additional fifteen-year terms; **[9]** provided that, within one hundred eighty (180) days of the expiration of this Compact or any renewal thereof, either the tribe or the state, acting through its Governor, may request to renegotiate the terms of subsections A and E of Part 11 of this Compact. (Emphasis added to included identifiers of clauses discussed herein).

Each clause within Part 15(B) is important, and each provides direction and context for reading the others.[2]

The unambiguous language of clause **[1]** of Part 15(B) creates an "Expiration-Unless" framework – the Compact "shall" (an imperative leaving no discretion) have a term that expires on January 1, 2020. However, the Wichita Tribe argues "the State took no action to de-authorize electronic gaming before January 1, 2020" (Wichita MSJ at 17), effectively a "Renewal-Unless" provision that is directly contrary to this express language.

The condition (clauses **[2]-[8]**) then states that, for the automatic renewal provision to be triggered, ***all three*** of the following questions must be ***answered in the affirmative***:

1. Are **[3][a]** organization licensees or **[b]** others **[4]** authorized **[5]** to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing **[2]** as of January 1, 2020?

2. Does the authority to conduct electronic gaming derive from some **[6][a]** governmental action of the State or **[b]** court order?

[2] These clauses are defined and described in more detail in Oklahoma's Response to Plaintiffs' MSJ, Dkt. No. 141, at 14-16.

3. Did the action that is the source of the authority occur **[7]** following the effective date of the compacts?

The condition clauses cannot support the Wichita Tribe's fundamental construction that the Compact renews on January 1, 2020, "if electronic gaming is authorized in the State of Oklahoma." Wichita MSJ at 1. The Wichita Tribe alternatively contends that the State took numerous actions "to expand the scope, availability, and amount of electronic gaming," which also caused the Compact to renew. *Id*. at 17. These actions include:

1. Various actions related to the Oklahoma Lottery (Wichita MSJ at 22);
2. Compact extension agreements entered between the Governor and certain Tribes (*id*. at 32);
3. Licensing actions of the OHRC (*id*. at 34);
4. A court order in a matter involving the Iowa Tribe (*id*. at 37); and
5. HB 3375 relating to gaming involving dice or roulette wheels (*id*. at 38).

As reflected in the following summary table, none of those actions is a government action of the State or court order following the effective date of the Wichita Tribe's Compact that authorized electronic gaming that would satisfy all three parts of the test.

Action	Wichita Tribe MSJ Pages	Date	*Question 1*: Did it authorize nontribal electronic gaming as of January 1, 2020?	*Question 2*: Is it a governmental action of the State or a Court Order?	*Question 3*: Did it occur following the effective date of Compact?
Oklahoma Education Lottery Act permits online games	24	11/2/2004	No, lottery is not identified as a form of "electronic gaming" in the STGA	Yes	No
Oklahoma Lottery Commission Emergency Rules	22-23	10/10/05	No, lottery is not identified as a form of "electronic gaming" in the STGA	No, State authorization does not include OLC action	No

Action	Wichita Tribe MSJ Pages	Date	*Question 1*: Did it authorize nontribal electronic gaming as of January 1, 2020?	*Question 2*: Is it a governmental action of the State or a Court Order?	*Question 3*: Did it occur following the effective date of Compact?
Oklahoma Lottery Commission Permanent Rules	22-23	6/25/06	No, lottery is not identified as a form of "electronic gaming" in the STGA	No, State authorization does not include OLC action	No
OLC licensed lottery retailers for CY 2020 (Wichita Tribe MSJ at 23-24)	23-24	2019	No, lottery is not identified as a form of "electronic gaming" in the STGA	No, State authorization does not include OLC action	Yes
HB 3538 authorized lottery games via internet and smartphones	24	11/1/2018	No, lottery is not identified as a form of "electronic gaming" in the STGA	Yes	Yes
OLC has allowed kiosks for the State lottery	29-31	4/18/2016	No, lottery is not identified as a form of "electronic gaming" in the STGA	No, State authorization does not include OLC action	Yes
SQ 792 authorizing liquor stores to become lottery retailers	31-32	10/1/2018	No, lottery is not identified as a form of "electronic gaming" in the STGA	Yes	Yes
Governor entered into "extension agreements" with two Indian tribes	32-33	12/27/2019	No, it related to gaming by Tribes, not organization licensees or others	Yes	Yes
OHRC issues gaming licenses for CY 2020	23	10/17/2019	No, it only issued licenses for 2020	No, State authorization does not include OHRC action	Yes
Court order in Iowa Tribe of Oklahoma v. Oklahoma, W.D. Oklahoma	36-37	4/18/2016	No, it related to internet gaming by Tribes found to have been permitted by Compacts, not electronic gaming by organization licensees or others	Yes	Yes

Action	Wichita Tribe MSJ Pages	Date	*Question 1*: Did it authorize nontribal electronic gaming as of January 1, 2020?	*Question 2*: Is it a governmental action of the State or a Court Order?	*Question 3*: Did it occur following the effective date of Compact?
HB 1836 amending the STGA	20	7/1/2017	No, it removed certain restrictions on weekly hours of operations for previously authorized games	Yes	Yes
HB 3375 amending the STGA	26-29	8/2/2018	No, it related to gaming by Tribes, not organization licensees or others	Yes	Yes

Such contentions run contrary to Part 15(B)'s mandatory expiration provision ("***shall*** expire"), and run afoul of the basic interpretive rule rejecting absurd results. Thus, the Wichita Tribe's MSJ should be denied, and Oklahoma's MSJ granted in its entirety.

I. Part 15(B) Cannot be Construed to Require the State to Repeal or Outlaw Electronic Gaming During the Term of the Compact to Avoid Renewal.

The Wichita Tribe's primary contention is that the Compact will renew so long as the State "continued to authorize electronic gaming in the State" on January 1, 2020. Wichita MSJ at 19. That is, the State would have been required – during the 15-year term of the Compact – to repeal the STGA (which authorized the Compact) to avoid renewal. If that was the intent, then Part 15(B) could have, but does not, read: "As long as the State authorizes electronic gaming in the State, this Compact will renew." The Wichita Tribe also contends the Governor cannot "decide specifically not to renew the Compact." *Id.* at 39. In truth, the Compact does not allow either party to "decide" not to renew (although Part 15(C) allows for mutual termination before January 1, 2020); instead, it expires on its own terms. Part 15(B) then prescribes express conditions for renewal. Moreover, this

position relies upon the false premise that the Compact includes a "Renewal-Unless" provision. As previously discussed, Part 15(B) contains an "Expiration-Unless" provision – a wholly unnecessary framework under the Wichita Tribe's proffered reading.[3]

The Wichita Tribe's argument does not end there. If the lottery is a form of "electronic gaming" that triggered renewal, *see, e.g.,* Wichita MSJ at 26, then the Oklahoma Education Lottery Act ("OELA") would also need to be repealed. Similarly, if the operation of "coin-operated devices" (also purported to be electronic gaming according to the Wichita Tribe, *id.,* Fact No. 19) had the same effect, the State would be required to outlaw arcade games and juke boxes. This cannot be the proper reading of Part 15(B).

The Wichita Tribe reads clauses **[6]** and **[7]** out of Part 15(B) entirely, ignoring the requirement of a "governmental action of the state or court order following the effective date of this Compact" **authorizing** "organizational licensees or others…to conduct

[3] Additionally, this interpretation contemplates potentially unconstitutional action by the State Legislature under both Art. I, § 10, cl. 1, of the United States Constitution, restricting states like Oklahoma from passing a "Law impairing the Obligation of Contracts," as well as Art. II, § 15 of Oklahoma Constitution, providing that no "law impairing the obligation of contracts, shall ever be passed" (the "Contract Clauses"). For example, compacting Indian tribes who made significant financial investment in class III gaming in Oklahoma would have no recourse if the State Legislature had passed a law in 2019 declaring class III gaming illegal. *See* Wichita MSJ at 4 ("In short, if Oklahoma's public policy changed during the initial 15-year Compact term so that gaming was outlawed, then the Compacts were designed to terminate at the end of their initial term."). By extension, existing contracts between compacting Indian tribes and their banks, vendors, and other third parties rendering services and/or providing materials to tribal casinos would have been impaired by the associated legislation. Surely this highly disruptive result was not the intention of the compacting parties as evidenced by the language of the Compact. There would simply be no reason or need to include an express "Expiration-Unless" provision on January 1, 2020, if the intent was for the legislature to effectively terminate the Compacts by outlawing class III gaming during the 15-year agreed-upon term.

electronic gaming in any form" as of January 1, 2020. Rules of construction require the Court to give effect to all the words of a contract, dooming the Wichita Tribe's claim that the Compact renews merely because authorized electronic gaming continues in the State.

II. Contrary to the Wichita Tribe's Arguments, "Electronic Gaming," as Used in Part 15(B) and Capable of Triggering Renewal, is a Precisely Defined Term.

The Wichita Tribe's MSJ focuses on the phrase "electronic gaming in any form," asserting that operation of virtually anything that plugs into a wall results in renewal. *Id.* at 21 *et seq.* It ignores the express definition of "electronic gaming" within the STGA, contending that the only "term of art" in Part 15(B) is "organization licensee." *Id.* at 19 n.13 (quoting 3A O.S. § 262(A)). However, "electronic gaming," like organization licensee, is a precisely defined term under the STGA (*i.e.*, the same source the Wichita Tribe relies on to define "organization licensee"). The STGA, 3A O.S. § 269(8), provides:

> "Electronic gaming" means the electronic amusement game, the electronic bonanza-style bingo game and the electronic instant bingo game described in this act, which are included in the authorized gaming available to be offered by organization licensees.

The definition is comprised of two parts. The first consists of the three types of games which **are** electronic gaming: the **electronic amusement game,** the **electronic bonanza-style bingo game** and the **electronic instant bingo game**. The second part makes clear that these three specific games are the games included in the "**authorized gaming available to be offered by organization licensees.**" Thus, the "electronic gaming," which must have been authorized to "organization licensees" or "others" after the effective date of the Compact must be a "form" of these precisely defined games.

A. The Three Categories of Games Comprising Electronic Gaming

The limitation of "electronic gaming" to three specific and technically defined games under the STGA confirms that the Wichita Tribe's use of "electronic gaming in any form" simply does not conform to the express terms of the Compact. The first category is an "electronic amusement game." "Electronic amusement game" means a game that is played in an electronic environment in which a player's performance and opportunity for success can be improved by skill ***that conforms to the standards set forth in this act***." 3A O.S. § 269(5) (emphasis added); 3A O.S. § 281, Part 3.10; *see also,* § 270 ("Electronic amusement games shall be played through the employment of player terminals…in a format in which a player's performance can be improved by skill."); § 271(A).[4] Video poker is the most common example of an electronic amusement game subject to the STGA. *See Primages Int'l of Mich. v. Liquor Control Comm'n*, 501 N.W.2d 268 (Mich. Ct. App. 1993) (video poker devices are "amusement device" under Michigan law).

The other two forms of electronic gaming recognized by the STGA and the Compact are forms of electronic bingo, "bonanza-style" and "instant" bingo.

> "Electronic bonanza-style bingo game" means a game played in an electronic environment in which some or all of the numbers or symbols are drawn or electronically determined before the bingo cards for that game are sold that conforms with the standards set forth in this act.

[4] Because the STGA does not set standards for the "mechanical claw" at the arcade, this clearly refers to casino-style games. The "Coin-Operated Device Guide," Wichita Amended Complaint, at ¶ 92 (and the basis for Fact No. 19), https://www.ok.gov/tax/documents/Coin-Op%20Guide%20(2018)%20Public_sm.pdf, reveals a number of examples of games not subject to STGA standards. For instance, the "Bay Tek Movie Stop" allows the player, regardless of age, to insert quarters into the machine with the potential for obtaining a movie or video game. *Id.* at 6.

3A O.S. §§ 269(6), 281, Part 3.11. This game is characterized by players competing against each other to win a prize by completing a previously designated pattern. 3A O.S. § 273.

> "Electronic instant bingo game" means a game played in an electronic environment in which a player wins if his or her electronic instant bingo card contains a combination of numbers or symbols that was designated in advance of the game as a winning combination.

3A O.S. §§ 269(7), 281, Part 3.12. In this form of bingo, players are not competing against each other, the winning numbers or combinations are determined in advance, and there can be more than one winner. *See* 3A O.S. § 274. These forms of bingo, in truth, are much more akin to the machines in Las Vegas casinos than to the games played in the historical bingo hall. *See, e.g., State ex rel. Stephan v. Parrish*, 887 P.2d 127, 136–37 (Kan. 1994) ("instant bingo has characteristics far more similar to slot machines, punchboards, and other forms of gaming").

By contrast, the Oklahoma Lottery does not fall within the definitions of "electronic bonanza-style bingo games, electronic instant bingo games or electronic amusement games." "*Lottery*" and associated derivatives are defined by the OELA as:

> an activity conducted by the [OLC] under the [OELA] through which prizes are awarded or distributed by chance…including, but not limited to, instant tickets and on-line games, but **excluding** charity bingo and games conducted pursuant to the Oklahoma Charity Games Act, poker, blackjack, slot machines, pulltab machines, card games, dice, dominos, roulette wheels, or other similar forms of gambling, *or electronic or video forms of these gambling activities*, or games where winners are determined by the outcome of a sports contest, or pari-mutuel betting…

3A O.S. § 703(9) (emphasis added).[5] Thus, the lottery products themselves expressly ***exclude*** the specific games comprising "electronic gaming" under the STGA.

Electronic gaming, regardless of which of the three types, is played in an "electronic environment," 3A O.S. § 269(5)-(7), utilizing a "player terminal." 3A O.S. §§ 271, 273, 274; § 269(11) (terminal on which "players play authorized gaming").[6] Additionally, "'[s]tandards' means the descriptions and specifications of electronic games or components thereof as set forth in this act." 3A O.S. § 269(12); *see also* §275(A) ("Player terminals used in connection with electronic games shall conform to the following standards…").[7]

B. These Games are Included in "Authorized Gaming" Available to be Offered by Organization Licensees.

The definition of "electronic gaming" (as utilized in Part 15(B)) is limited not only to the three specified types of games, but also to those games "which are included in **authorized gaming available to be offered by organization licensees.**" 3A O.S. § 269(8). This second clause further establishes the Wichita Tribe's boundless reading of "electronic gaming in any form" conducted by "anyone" is unfounded. Post-Compact authorization of "any form of electronic gaming" is irrelevant to renewal; it must be the precisely defined

[5] Additionally, as discussed in Oklahoma's MSJ and its Response to Plaintiffs' MSJ, rulemaking, licensing, and other administrative acts by the OLC, like those by the OHRC, do not satisfy *Question 1*.

[6] The Compact similarly provides: "'Player terminals' means electronic or electro-mechanical terminals housed in cabinets with input devices and video screens or electromechanical displays on which players play electronic bonanza-style bingo games, electronic instant bingo games or electronic amusement games." 3A O.S. § 281, Part 3(16).

[7] "'Standards' means the descriptions and specifications of electronic amusement games, electronic bonanza-style bingo games and electronic instant bingo games or components thereof." 3A O.S. § 281, Parts 3(23), 4(B).

games that constitute "electronic gaming" and which are included in "authorized gaming" – *i.e.*, video poker and other casino-style games. The following table is helpful for delineating between the differing definitions used by the STGA and Compacts.

Defined Term	Compact/Statute	Definition
Covered Game 3A O.S. § 281, Part 3.5	Only used in Compact (for tribal gaming)	"**Covered game**" means the following games conducted in accordance with the standards, as applicable, set forth in Sections 270 through 277 of this title: an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act; and upon election by the tribe by written supplement to this Compact, any Class II game in use by the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game…
Electronic Gaming 3A O.S. § 269(8)	Only defined term used in both STGA and Compact (only for organization licensees and others, not tribes)	"**Electronic gaming**" means the electronic amusement game, the electronic bonanza-style bingo game and the electronic instant bingo game described in this act, which are included in the authorized gaming available to be offered by organization licensees…
Authorized Games 3A O.S. § 262(C)(2); 3A O.S. § 269(1)	Not used in Compact (only for organization licensees and others)	Subject to the limitations on the number of player terminals permitted to each organization licensee, an organization licensee may utilize electronic amusement games as defined in this act, electronic bonanza-style bingo games as defined in this act and electronic instant bingo games as defined in this act, and any type of gaming machine or device that is specifically allowed by law and that an Indian tribe in this state is authorized to utilize pursuant to a compact entered into between the state and the tribe in accordance with the provisions of the Indian Gaming Regulatory Act 2 and any other machine or device that an Indian tribe in this state is lawfully permitted to operate pursuant to the Indian Gaming Regulatory Act, referred to collectively as "**authorized games**".

"Electronic gaming" is something narrower than "authorized gaming," as it is included within the definition of the latter. "Authorized games" are also expressly defined by the STGA, further confirming the limitations on what is covered by the statute. 3A O.S.

§ 262(C)(2).[8] Section 262(C)(2) begins by restricting the authorized games based on "the number of player terminals," *i.e.*, the physical boxes holding the screens and electronics necessary to play "authorized games." The provision then specifically includes the same three types of electronic games (electronic bonanza-style bingo games, electronic instant bingo games or electronic amusement games). The only portion of "authorized games" that is broader than "electronic gaming" relates to gaming machines or devices that are covered by Compacts (ensuring that the racetracks have the same class III gaming machines or devices that tribes have available) and those machines or devices available under IGRA (class II gaming machines, again ensuring balance between the racetracks and the tribes).[9]

Electronic games other than gambling conducted at casinos under the authority of the STGA are clearly not included in this definition. Yet, the Wichita Tribe's proposed definition is not so limited – it could cover anything with a power source (PlayStations,

[8] The Wichita Tribe completely miscites the definition of "authorized games" when it states: "'Authorized games' are those games Indian tribes may conduct either under the tribal-state gaming compact or the Indian Gaming Regulatory Act. *See* 3A O.S. § 262(C)(2)." Wichita MSJ at 34. Tribes are permitted to conduct "covered games" pursuant to Compacts, not "authorized games." In fact, the term "authorized games" is ***never*** used in the Compact. Rather, 3A O.S. § 262(C)(2) deals exclusively with nontribal gaming.

[9] As reflected in the table above, "electronic gaming" is defined in the STGA. The Compact only uses the term in one provision – Part 15(B). It is used to describe gaming conducted by "organization licensees or others" (*i.e.*, nontribal entities) which can give rise to renewal. In a clear attempt to distinguish between tribal (Compact) and nontribal (statute), the drafters chose a different term "covered games" for tribal games, which incorporated the three "electronic games" but not the term of art itself. That is, "covered games" explicitly includes "electronic bonanza-style bingo games, electronic instant bingo games or electronic amusement games," as well as "nonhouse-banked card games" and other games that might be later approved. 3A O.S. § 281, Part 3(5). This drafting choice was repeated throughout the Compact. *Compare* 3A O.S. § 269(11) and § 281, Part 3(16) (terminals); § 269(12) and § 281, Part(3)(23) (standards). This approach further confirms the drafters' narrow understanding of what comprises "electronic gaming."

speak-and-spells, Simon, etc.).[10] Indeed, the MSJ includes, but never relies upon, Facts No. 21-23, which appear to be predicated on allegations in the Amended Intervenor Complaint (Dkt. No. 103, ¶¶ 85-100). The Wichita Tribe's allegations and alleged facts that coin-operated games, like the Bay Tek Movie Stop, fall within the breadth of "any form" of electronic gaming which could trigger renewal reveal the absurdity of its proffered construction. Arguments and similar allegations like these cannot be taken seriously.

The scope of the defined term "electronic gaming" also helps give meaning to the term "others" in Part 15(B), *i.e.*, alternative parties who, if authorized to conduct electronic gaming, would trigger the Compact's renewal. Although a definition of "others" is not provided, the Compact and the STGA do provide definitions for a variety of other terms. The presumption of consistent usage, a general rule of statutory and contract construction, dictates that words carry their same meaning throughout the text. *See Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 990 (Fed. Cir. 2009) ("A proper interpretation of a contract generally assumes consistent usage of terms throughout the Agreement."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). Moreover, the Tenth Circuit has stated a preference for avoiding surplusage constructions – each phrase should have its own meaning. *See Navajo Nation v. Dalley*, 896 F.3d 1196, 1215 (10th Cir. 2018).

The principle of *ejusdem generis* (meaning "of the same kind") is also helpful in construing the word "others" here; this rule states that "when interpreting a general word

[10] Walmart has an entire section devoted to "electronic games." *See* https://www.walmart.com/browse/toys/electronic-games/4171_4191_133045.

that follows a series of specific words, 'those specific words restrict the meaning of the general.'" *Liberty Mut. Ins. Co. v. E. Cent. Oklahoma Elec. Co-op.*, 97 F.3d 383, 390 (10th Cir. 1996). Thus, in following "organization licensee," which has a specific definition and is named with specificity throughout the Compact, the term "others" should naturally be limited to those authorized to conduct the same forms of casino-style electronic gaming that Racinos are authorized to conduct under the STGA.

Considering these principles, each word should be assumed to have a distinct meaning that is consistently applied throughout the text. Because the drafters of the Compact used precise language to reference different parties – like "organization licensee" – "others" can reasonably be interpreted as including parties not otherwise enumerated by the Compact or the STGA who would carry the same or a similar status as an organization licensee. Its definition in the "ordinary or popular sense" can also be useful in creating a full understanding of the term. 15 O.S. § 160. "Other" is defined as a "different or additional one." Thus, the most reasonable interpretation of "others" in Part 15(B) would be "different or additional" parties, excluding organization licensees and other explicitly enumerated parties, who may be authorized to conduct casino-style electronic gaming.

The result of the Compact's use of such specific terminology – "electronic gaming" rather than "authorized games" or "covered games" – ensures the renewal provision is not triggered unless one of these three precise types of games is the subject of the State's post-Compact authorization. "Any form" of such "electronic gaming" (*i.e.*, those three types of games) will trigger the renewal provision. Electronic forms of games and amusements that

fall outside of this rubric cannot trigger the automatic renewal provided in Part 15(B) and the Wichita Tribe's MSJ completely fails to show otherwise.

III. None of the Five Actions Identified in the Wichita Tribe's MSJ Satisfy all Three Questions to Trigger Renewal of the Compact under Part 15(B).

None of the five additional actions (or categories of actions) presented by the Wichita Tribe is a governmental action of the State or court order following the effective date of its Compact authorizing electronic gaming that could cause the Compact to renew.

C. No Actions Related to the Lottery Caused the Compact to Renew.

The Wichita Tribe spends over 10 pages discussing the Oklahoma Lottery. Wichita MSJ at 22-32. The discussion has no bearing on the instant litigation. As to *Question 1*, the Oklahoma Lottery does not involve "electronic gaming" by "organization licensees" or "others" as used in clauses **[3]** and **[5]** of the Compact and the STGA. As addressed above, the Wichita Tribe's lottery argument is predicated entirely on the incorrect premise that "electronic gaming" is not a defined term, and, instead, "electronic gaming in any form" should be read without limitation to include lottery sales via electronic means such as the internet. *See* Wichita MSJ at 22, 25. In its MSJ, the Wichita Tribe does not point to a single lottery product as an example of an "electronic game," choosing instead to focus on the mechanism used to pay for and/or deliver physical lottery products to players.

Moreover, the STGA's definition of "electronic gaming," including the associated definitions of the games classified as electronic gaming (*e.g.*, electronic amusement games such as video poker and forms of bingo) requires participation in an "electronic

environment" using a "player terminal."[11] Irrespective of the manner in which a lottery product is paid for by or delivered to the player, the products themselves are not played in an "electronic environment" using a "player terminal," as those terms defined in the STGA.

In addition, neither the OLC nor lottery retailers are "others" as used in the Compact. As discussed above, "others" in clause **[3][b]** should be construed as "different or additional" parties, excluding organization licensees and other explicitly identified parties, who may be authorized to conduct casino-style electronic gaming. The Wichita Tribe's broad definition of "others" to include the OLC does not comport with its interpretation of the Compact as a perpetual document, capable of termination only if the legislature outlawed class III electronic gaming by anyone in Oklahoma prior to its fifteen-year term. Such a reading results in an absurdity, which the Court should not approve. If the OLC was an "*other*" under Part 15(B), authorized to conduct electronic gaming in the manner and form alleged by the Wichita Tribe, then to terminate the Compacts, the legislature would have had to repeal ***both*** the STGA ***and*** the OELA (and statutes related to various coin-operated devices).[12] Without repealing the OELA, the Compacts would have continued in

[11] For example, the Wichita Tribe argues that lottery kiosks are electronic games. Wichita MSJ, at 29-31. However, a lottery kiosk does not fit within the definition of "terminal" used by the STGA or the Compacts. *See* Exhibit 1, Affidavit of Jay Finks. The kiosk is simply a vending machine which allows the player to purchase scratcher cards or Powerball numbers without having to physically interact with a clerk. Among other reasons it does not fit in the definition of terminal, it is not used for: (1) an electronic amusement game, as a player's performance has no effect on the outcome; (2) an electronic bonanza-style bingo game, as one does not win by being the first to complete a bingo card; and (3) an electronic instant bingo game, as the winning numbers are not determined prior to the game. *Compare id.,* ¶¶ 7-8, 10-12 (describing lottery games) with "electronic games" defined above.

[12] Taken in its entirety, and with reference back to Proposition I, *supra*, the Wichita Tribe's interpretation would have required the Legislature to precisely and prospectively repeal

perpetuity as a result of the OLC's alleged authority to conduct electronic gaming pursuant to Part 15(B). In other words, to terminate the Compact, the legislature would have been required to repeal ***all*** gambling referendums passed by Oklahoma voters in 2004.

Clearly, this was not the intent of the State and compacting Tribes. The plain language of Part 11(E), the Compact's liquidated damages provision, reads as follows:

> In consideration for the covenants and agreements contained herein, the state agrees that it will not, during the term of this Compact [*i.e.,* before January 1, 2020], ***permit the nontribal operation of any machines or devices to play covered games or electronic or mechanical gaming devices otherwise presently prohibited by law*** within the state in excess of the number and outside of the designated locations authorized by the [STGA].

(emphasis added). The penalty for any associated breach was severe. *Id*.

By classifying the OLC as an "*other*" conducting "*electronic gaming*," as defined by the STGA, the Wichita Tribe has functionally alleged that the State breached (and continues to breach) the liquidated damages clause of the Compact by permitting operation of the legislatively authorized lottery. In fact, a plain reading of the Wichita Tribe's MSJ suggests that the breach dates back to the statutory and regulatory origins of the OLC – before the Wichita Tribe's Compact became effective. *See* Wichita MSJ at 24-25 (identifying the dates of the enactment of the OELA in November 2004, initial lottery sales in November 2005, and Governor approval of the OLC's initial rulemaking in June 2006).

If the Wichita Tribe truly believed the OLC was an "other," as used in Part 15(B), who was authorized to conduct "electronic gaming" as defined by the STGA, and had been

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both the STGA and OELA to avoid suits from third-parties for violation of the Contracts Clause, while simultaneously explaining to Oklahoma educators, as well as voters, why hundreds of millions of dollars in funding were being forfeited by the State.

doing so ***since 2006***, it would have raised the issue long before ***2020***. Plainly, the OLC was never understood to be an "other" as used in Part 15(B). "Other" always meant "nontribal" gaming operators. This is further supported by the plain meaning of Part 11(E), which limited the instances where a compacting Tribe could sue the State for liquidated damages to those involving nontribal operators. The Wichita Tribe's deliberate decision not to sue the State for breach due to conduct by the OLC confirms it did not consider the OLC to be conducting gaming contrary to the Compact. The OLC did not – and does not – constitute an "*other*," as used in Part 15(B) of the Compact.[13]

Finally, as to *Question 3*, the lottery was authorized by the legislature prior to the effective date of the Compact. In 2003, the Oklahoma Legislature determined that a state lottery should be put to the vote of the people. HB 1278 (2003). The November 2004 ballot included nine State Questions. Among those questions were SQ 705 and 706, relating to the State Lottery, and SQ 712, enacting the STGA. All three State Questions were passed and became law. 3A O.S. § 701 *et seq.*

As discussed at length in Oklahoma's MSJ, the State did not authorize organization licensees or others to conduct electronic gaming after the Compact was entered, as the authorization came from the enactment of the STGA. Similarly, the Lottery was not authorized ***after*** the Compact was entered, as it too was authorized by the passage of the

[13] Curiously, the Wichita Tribe contends not only is the OLC an "other," authorized to conduct electronic gaming, but it is also the "State," capable of acting in a manner to authorize gaming by others to satisfy Part 15(B). *See* Wichita MSJ at 25 (table). As discussed in detail with regard to the OHRC in Oklahoma's MSJ, at 29-35, state agencies such as the OLC are not the "State" as defined in the Compact whose actions can satisfy *Question 2*; nor is the OLC authorized to cause the Compact to renew.

OELA in 2004. The subsequent events addressed by the Wichita Tribe – the sale of lottery tickets (including purchasing via debit card), approval of regulations, licensure of lottery retailers (including liquor stores), and the use of computers or the internet to transmit information related to lottery games (*i.e.*, connecting retailers to central computers as required for Powerball and Mega Millions) – do not "authorize" the State Lottery but are necessary functions to carry out the legislation that previously authorized it. Further, they do not constitute "electronic gaming" – they are not conducted in an "electronic environment" utilizing a "player terminal."[14] *See also* n.5, *supra* (discussing specific requirements of three games comprising "electronic gaming" that are not met with the State Lottery). Again, the Wichita Tribe's strained interpretation (that the State agreed to automatically renew the Compact in perpetuity when the Compact included an "Expiration-Unless" provision) defies logic and is contrary to the express language of the Compact.

D. Compact Extension Agreements with Tribes Did not Trigger Renewal.

Despite having stated as recently as May 5, 2020, that the Governor is without the authority to bind the State in matters related to Compact terms (*see* Wichita Letter to DOI [Dkt. No. 131-1], at 4-5), the Wichita Tribe now argues that the Governor unilaterally renewed its Compact by agreeing to an extension with the Kialegee Tribal Town and the

[14] The Wichita Tribe also contends that "second-chance" promotions (raffles) and the use of the internet somehow combine and result in a post-Compact governmental action of the State. Wichita MSJ at 26-29. However, the cited AG opinion specifically finds that the "second-chance" promotion "is expressly permitted as a promotion under the [] Lottery Act" (i.e., that authorized in 2004). AG Opin. 2017-2. Moreover, House Bill 3538 simply allowed for the use of the internet to conduct the already authorized lottery games – it is a change in communication not in gaming. Regardless of the "electronic gaming" limitation (which rejects the Wichita Tribe's interpretation, *see* above), HB 3538 does not authorize any new games or otherwise trigger renewal.

United Keetoowah Band for the express purpose of providing time to reach a compromise for continuing gaming. Wichita MSJ at 32-34. In essence, the extensions formalized the period of renegotiation contemplated by Part 15(B).[15] They did not authorize anything; they merely extended the time for negotiation between the State and those tribes. These agreed compact extensions do not satisfy *Question 1*.

The Wichita Tribe's position is again predicated on a faulty reading of "others." As discussed above, the term "others," as utilized in Part 15(B), would address some different or additional parties, excluding compacting parties, organization licensees and other explicitly enumerated parties, authorized to conduct casino-style electronic gaming. The parties included the term "tribe," or some variation thereof, approximately 174 times in the Compact. Plainly, therefore, "others" would not include Indian tribes themselves. Had the parties intended for "others" to include Indian tribes, they would have said so. The two tribes are not "others" as contemplated by the Compact.

Moreover, no reading of the extension suggests it authorized electronic gaming. The phrase at issue itself – "if organization licensees or others are authorized to conduct electronic gaming" – defeats the Wichita Tribe's contention. As discussed *supra,* the authorization for such electronic gaming came from the STGA. The term "electronic gaming" is a term of art defined on the nontribal side of the legislation. Conversely, the original Compacts and the extensions exclusively addressed "covered games" conducted

[15] The extension expressly acknowledges the parties' legal dispute and provides its purpose is simply to maintain the status quo "while trying to settle their differences." https://www.governor.ok.gov/static-assets/documents/gamingcompacts/Kialegee_Gaming_Compact_Extension.pdf at 1.

by Indian tribes. The Compacts have no bearing on electronic gaming conducted by nontribal entities. The Wichita Tribe acknowledges the distinction in their summary table. *See* Wichita MSJ at 33 ("Electronic gaming in any form ● Compact 'covered games'"). Providing for an extension of certain Tribes' Compacts to conduct "covered games" is not the authorization of "others" to conduct "electronic gaming."

E. Organization and Other Forms of Licensing are not Governmental Actions of the State.

Licensing and authorizing are similar but distinct conceptions; licensing does not satisfy *Question 1*. As addressed in Oklahoma's MSJ, at 23-27, the STGA ***authorized*** electronic gaming at certain racetracks and the Compact ***authorized*** covered gaming on Indian lands under IGRA. To effectuate electronic gaming at the racetracks, the OHRC was required to establish rules and regulations and subsequently license organization licensees and others.[16] This is no different than the State prohibiting the operation of motor vehicles, unless the individual obtains the appropriate license. *See e.g.,* 47 O.S. § 6-101. Driving is thereby *authorized* by statute. Nonetheless, driving without a license is prohibited. The Department of Public Safety processes applications and conducts

[16] The Wichita Tribe quotes exhaustively from 3A O.S. § 262.1, which uses the term "authorize" repeatedly, albeit ***only*** in the context of "occupation licenses" (manufacturers, distributors, vendors, etc.) and not "organization licensees." Wichita MSJ at 39-41. A cursory reading of this section shows that authorization in this context is used differently than the repeated used of "authorized games" and "authorized by the statute (or STGA)" as found through numerous sections of the STGA. Once again, the parallels between the STGA for nontribal entities and the Compacts for the Tribes can been seen by comparing § 262.1 to 3A O.S. § 281, Part 10.

examinations necessary to obtain licenses. Issuing a drivers' license, however, is distinct from authorizing driving.[17] The same applies here.

The legislature empowered the executive branch, namely the OHRC, to administer and implement part of the STGA's new gaming policy by ensuring that nontribal entities properly apply for and obtain licenses and abide by the rules and regulations established to effectuate the legislative scheme. *See* Okla. Admin. Code § 325:80-1-1 ("The Rules in this chapter establish Standards and requirements for licensure, certification, registration, renewal and other approval under the State-Tribal Gaming Act."). The legislature initially created the OHRC, *see* 3A O.S. §§ 201(A), and authorized it to carry out the State's policy regarding horse racing, *id*. § 204; Okla. Admin. Code § 325:1-1-3 (OHRC is "an administrative body" created by statute, "whose powers and duties are prescribed by the Legislature."). With the adoption of the STGA, the legislature expanded the OHRC's duties to include licensing of nontribal entities to conduct authorized gaming under specific conditions and limitations, *i.e.*, those specifically designed to maintain and protect the substantial exclusivity afforded to compacting tribes. The legislature mandated that the OHRC "***shall*** license organization licensees which are licensed pursuant to [the STGA] to conduct authorized gaming as that term is defined by this act pursuant to this act utilizing gaming machines or devices authorized by this act…" *See* 3A O.S. § 262(A) (emphasis

[17] There are numerous examples of this distinction. For instance, the State has recognized the Board of Examiners for Nursing Home Administrators, which was established by statute and authorized to issue licenses to qualified persons, develop qualifications relevant to such licenses, and establish and carry out rules designed to implement qualifications. *See* 2004 OK AG 1, ¶¶ 2-3, 6.

added). But the legislature never authorized the OHRC to act to renew the Compact. The mandatory, perfunctory exercise of OHRC's administrative duties which was fully contemplated by both parties as part of the Grand Bargain does not – indeed cannot – constitute such renewal.

The Wichita Tribe quotes **one** use of the term "authorized" from 3A O.S. § 282(A) to argue that the OHRC "authorizes" organization licenses to conduct gaming. However, the Wichita Tribe fails to disclose how the term is repeatedly used in that section:

> A. The ***Oklahoma Horse Racing Commission is authorized*** to charge an application fee of Fifty Thousand Dollars ($50,000.00) to each organization licensee which desires to conduct gaming ***pursuant to the State-Tribal Gaming Act*** or which receives any funds as a "recipient licensee" as that term is ***defined by the State-Tribal Gaming Act*** and desires to conduct pari-mutuel wagering in this state. Such fee must be paid prior to any organization licensee being authorized by the Oklahoma Horse Racing Commission to conduct gaming ***pursuant to the State-Tribal Gaming Act***.
>
> B. In addition to the application fee authorized in subsection A of this section and the fees ***authorized in subsection F of this section***, the ***Oklahoma Horse Racing Commission is hereby authorized*** to assess a fee upon each ***organization licensee*** **AUTHORIZED** ***by the State-Tribal Gaming Act*** to conduct **gaming AUTHORIZED** ***by the State-Tribal Gaming Act*** to provide adequate funding…
>
> C. The assessment ***authorized by subsection B*** shall be proportional to the number of player terminals an ***organization licensee is licensed to operate*** pursuant to the State-Tribal Gaming Act.
>
> ***
>
> E. The application fee ***authorized in subsection A of this section*** and any assessment ***authorized in subsection B of this section*** and any fee ***authorized in subsection F of this section*** collected by the Commission…
>
> F. The Oklahoma Horse Racing Commission shall issue occupation gaming licenses and charge to the applicants therefore the related license

> application fees, investigative fees and fingerprint fees ***authorized in this subsection***…

3A O.S. § 282 (emphasis added). At least ten (10) times in this section, the STGA makes it clear that "authorization" is a function of the legislature via the STGA. *Id.* Even the excised language proffered by the Wichita Tribe establishes that OHRC licensing must be conducted pursuant to the STGA, which repeatedly provides the "authorization."

Because "authorizing" electronic gaming by organization licensees is a legislative function, only a legislative enactment is a governmental action of the State that could trigger the automatic renewal provision in Section 15(B). Conversely stated, subsequent administrative acts, such as the issuance of licenses or promulgation of rules related to the same, necessary to carry out the provisions of the STGA, **do not** "authorize" electronic gaming. Under the Wichita Tribe's desired interpretation, unelected commissions are given power to "enter into" perpetual Compacts that are binding on future legislatures (a highly disfavored result even when a legislature is the actor) through the issuance of licenses to organization licensees. This cannot be the proper interpretation.

F. The Order in Iowa Tribe of Oklahoma v. State of Oklahoma did not Trigger Renewal.

The Wichita Tribe also points to the Court's order in *Iowa Tribe of Oklahoma v. State of Oklahoma*, 5:15-CV-01379-R, 2016 WL 1562976 (W.D. Okla. Apr. 18, 2016). Wichita MSJ at 37-38. There, the tribe and the State arbitrated whether the Compact authorized the tribe to use the internet to conduct "covered games" by persons located outside the State. *Id*., at *1-2. The final arbitration award found that such activity ***was***

authorized by the Compact at the time it was entered (not by the arbitration decision); on a motion for summary judgment, the Court affirmed the award. *Id*., at *3.

The Wichita Tribe's position that this court order causes the Compact to renew fails for several reasons. First, the order (and underlying arbitration) simply determined that the Compact, as originally drafted, already included the use of the internet in its definition of "covered games." The question was not about expansion or addition of a new game, but rather whether the use of the internet fit within the existing definition of covered games available under the Compact. Nothing new was added as a result of the order. *Id.* Second, the Court addressed a Compact and the tribe's ability to conduct gaming thereunder. It did not address what organization licensees or others could or could not do. As discussed above, this distinction is illustrated by the fact that the dispute related to "covered games," a term found only in the Compact, rather than "electronic gaming," which is a term of art pertaining to activities available to organization licensees and referenced only in Part 15(B) of the Compact. Third, gaming via the internet is not "electronic gaming." Only "electronic gaming" – those operated by nontribal entities – and not "covered games," which were at issue in the *Iowa Tribe* litigation, can cause the Compact to renew.

G. House Bill 3375 Did not Authorize "Organizational Licensees or Others" to Conduct Electronic Games.

The Wichita Tribe makes an implausible argument regarding House Bill 3375 (2018), which permitted a form of ball and dice table games. Wichita MSJ at 38-39. The bill struck from the STGA "dice games, roulette games" and added "house-banked table games involving dice or roulette wheels." The Wichita Tribe contends that because the

replacement language included the word "table," tribes and organization licensees can now use electronic (non-table) games incorporating dice and wheels, an impossible outcome given the precise definitions of "electronic gaming" and "player terminals." *See supra.* The Wichita Tribe makes no effort to show how the conduct of "electronic covered games that incorporate dice and wheels" by Tribes fits within the definition of electronic gaming (applicable only to nontribal entities) or covered games available to tribes.

The greater oversight, however, is the failure to disclose an express caveat included in HB 3375. The bill is clearly intended to address tribal concerns, as it includes a Model Tribal Gaming Compact Supplement, codified at 3A O.S. § 280.1. The legislation expressly provides: "The offer contained in this section shall not be construed to permit the operation of any additional form of gaming by organization licensees or permitting any additional electronic or machine gaming within Oklahoma." 3A O.S. § 280.1(F). In short, it expressly provides that it is not approving additional gaming by organization licensees. The drafters were obviously contemplating the renewal provision and took carefully calculated steps to avoid action that could trigger renewal of the Compacts.

CONCLUSION

For the reasons set forth herein and in Oklahoma's MSJ, the Wichita Tribe's MSJ should be denied, and summary judgment granted for Oklahoma.

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ATTORNEYS FOR J. KEVIN STITT, AS GOVERNOR OF THE STATE OF OKLAHOMA, AND *EX REL.* THE STATE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I electronically transmitted the attached document to the Clerk of Court using the Electronic Filing System for filing. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

s/Phillip G. Whaley
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