STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

April 25, 2012

The National Indian Gaming Commission
1441 L Street, NW Suite 9100
Washington, DC 20005

Dear Commission Members:

Thank you for the opportunity to provide comment to the National Indian Gaming Commission concerning the Commission's proposed revisions to 25 CFR Part 543 Minimum Internal Control Standards for Class II Games and Part 547 Minimum Technical Standards for Gaming Equipment Used in the Play of Class II Games. On February 11, 2011, I urged you to use your comprehensive review of existing regulations to "make clear that Native American Indian tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama law." After reviewing the discussion drafts for Part 543 and Part 547, I fear that the Commission may miss an important opportunity to do just that.

Slot machines cannot be operated by a Native American Indian tribe on land located in a State like Alabama that has not agreed to a compact with that tribe. As you know, when Congress enacted the Indian Gaming Regulatory Act ("IGRA"), it envisioned two distinct types of gaming – the traditional game of bingo on the one hand and casino halls filled with slot machines on the other. *See, e.g.*, Disapproval Letter from Commissioner Philip Hogen to Mayor Karl S. Cook at 7 (June 4, 2008). That is why IGRA distinguishes between "technological aids" that may be used with Class II games like bingo, which can be operated without a compact, and Class III games such as "slot machines," which cannot be operated without a compact. In fact, IGRA expressly provides in no uncertain terms that "'class II gaming' does not include . . . electronic or electromechanical facsimiles of any game of chance or slot machines *of any kind*." 25 U.S.C. § 2703(7)(b)(2) (emphasis added).

After IGRA was enacted, slot machine manufacturers and tribes went to great lengths to conflate Class III slot machines with *bona fide* "technological aids" used to play the traditional game of Class II bingo. By 2006, this Commission was rightly "concerned that the industry is dangerously close to obscuring the line between Class II and III" altogether. *See* Proposed Rule, 25 CFR Part 502 and 546, Classification Standards, Class II Gaming, Bingo, Lotto, et al., 71 Fed. Reg. 30238 (May 25, 2006). For that reason, the Commission proposed the regulations that eventually became Part 543 and Part 547 as part of a package of reforms designed to enforce the

statutory distinction between Class II and Class III games. *Id.* Although I do not agree with each and every element of those proposed reforms, I do agree with the Commission's original goal of enforcing IGRA's clear line between Class II and Class III games.

Unfortunately, the Commission gutted those reforms. It abandoned any effort to enforce the statutory line between "technological aids" and "facsimiles" of games of chance through a meaningful regulation. Instead, the Part 543 and Part 547 that were ultimately enacted "do not attempt to draw such a line" between Class II and Class III gambling devices, but simply "assume that such a line already exists." 73 Fed. Reg. 60523 (Oct. 10, 2008). When it failed to adopt the proposed regulation, the Commission promised to "address . . . classification issues through a combination of training, technical assistance, and enforcement actions." *See* Withdrawal of Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using ''Electronic, Computer, or Other Technologic Aids," 73 Fed. Reg. 60490, 60491 (Oct. 10 2008).

Given this background, I have four specific comments on the Commission's current discussion drafts of Part 543 and Part 547.

First, the Commission's minor edits to Part 543 and Part 547 do nothing to give teeth to the important distinction between Class II "technological aids" and Class III slot machines. The main problem when these regulations were first proposed was the proliferation of Class III slot machines under the guise of Class II "technological aids," but Part 543 and Part 547 as they presently exist have done little to solve it. In Alabama, the Poarch Band of Creek Indians operate three Indian casinos that offer ostensibly Class II gambling that approximates the same kind of slot machine gambling that one might find in Las Vegas or Atlantic City.[1] The Tribe's ability to "obscure[] the line between Class II and III" makes it harder for my office to enforce Alabama law outside of Indian land. Alabama citizens are understandably confused when Indian tribes are allowed to call their Class III slot machines "bingo," but gambling promoters within the State's jurisdiction cannot use the same gimmick. The solution to this problem is *not* for my office to relax or disregard the State of Alabama's gambling laws; the solution is for the Commission to strictly enforce federal law on Indian lands.

Instead of the minor changes that the Commission has proposed, I believe that the Commission should consider returning to the Class II classification standards that were originally proposed as a complement to Part 543 and Part 547. When the Commission withdrew the classification standards from its 2006 rulemaking proposal, the Commission believed that it could compel compliance with IGRA through enforcement actions instead. But, after reviewing the Commission's enforcement actions since 2006 on the Commission's website, my office has not uncovered a single action related to the difference between Class II and Class III games or

---

[1] The State concedes neither that the Poarch Band of Creek Indians is a proper-recognized tribe nor that the Department of the Interior had authority to take land into trust for the Tribe. *See Carcieri v. Salazar*, 555 U.S. 379, 387-388 (2009). But those issues are outside the scope of this comment.

the use of "technological aids." The Commission's lax enforcement is particularly troubling because, in 2008, the Commission warned that the problems arising from tribes' "exploitation of technology [that] erases, or is perceived to erase" the Class II/Class III distinction could be serious enough to compel action by the Department of Justice or Congress or both. *See* 73 Fed. Reg. at 60491. Were the Commission strictly enforcing the already-existing statutory distinction between "technological aids" and "electronic or electromechanical facsimiles," I would agree that regulatory classification standards would be unnecessary. But the Commission is not strictly enforcing IGRA.

Second, the Commission's reasons for withdrawing its classification standards from the original reform package were based on inaccurate information about Alabama. In withdrawing the previously proposed classification standards, the Commission cited the "terrific economic costs" that its reform would have on Indian gaming, "as set out in its two economic impact reports." 73 Fed. Reg. at 60491. But the Commission's economic impact report wrongly concluded that requiring the Poarch Band of Creek Indians to comply with IGRA would make the Tribe's gambling devices "inferior" to other gambling devices that, the Commission believed, were legal in Alabama, such as "electronic bingo machines at greyhound racetracks and sweepstakes machines." Alan Meister, *The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations* 27 (Feb. 1, 2008) at http://www.nigc.gov/Portals /0/NIGC%20Uploads/lawsregulations/proposedamendments/MeisterReport2FINAL2108.pdf. *See also* 73 Fed. Reg. at 60491 (erroneously stating that the State of Alabama has "expand[ed] legalized gaming within [its] own borders"). In fact, the Alabama Supreme Court has held that so-called sweepstakes machines and electronic bingo machines are *illegal*. *See Barber v. Jefferson County Racing Ass'n, Inc.*, 960 So. 2d 599 (Ala. 2006) (so-called sweepstakes machines); *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65 (Ala. 2009) (so-called electronic bingo machines). So enforcing the distinction between Class II and Class III gambling would not disadvantage the Poarch Band of Creek Indians in comparison with other Alabama residents.

Third, the discussion draft of Part 547 continues to state that "[n]othing in this part shall be construed to grant to a state jurisdiction over Class II gaming." But IGRA intended to grant the States considerable influence over Class II gaming. In fact, IGRA expressly conditions the legality of Class II gaming on whether that gaming is allowed under state law. As I made clear in my February 11th letter, "[i]t would make no sense for federal law to provide that the fundamentally different game of 'electronic bingo' is legal on Indian land simply because Alabama law allows the traditional game of bingo to be played for certain charitable purposes on certain non-Indian lands." The Commission should consider incorporating State standards and enforcement mechanisms into Part 543 and Part 547. If the Commission gave the States authority to enforce IGRA on Indian lands, I would put a stop to Class III slot machines masquerading as Class II "technological aids."

Fourth, at the very least, the Commission's regulations should not actively engender confusion between slot machines and Class II "technological aids." Unfortunately, that is what the discussion draft of Part 547 does when it contemplates that Class II "technological aids" will

be materially indistinguishable from slot machines. The Commission's "Minimum Technical Standards for Gaming Equipment Used in the Play of Class II Games" apply to a Class III slot machine just as naturally as they apply to a Class II bingo ball blower. For example, Part 547 allows Class II gambling devices to accept and dispense bills and coins into the face of the gambling device, *see* 547.7(g) & (k), defines "player interface" to include a "terminal" through which a player interacts with the automated game, *see* 547.2, and contemplates that the player may be notified of the results of the game through an "entertaining display," 547.9(d)(1). These are elements of slot machine gambling. *See, e.g.,* Ala. Code 13A-12-20(10)(defining slot machine as "[a] gambling device that, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value."); *MDS Investments, L.L.C. v. State*, 65 P.3d 197, 203 (Idaho 2003) ("Considering the technological changes, a slot machine is a gambling device which, upon payment by a player of required consideration in any form, may be played or operated, and which, upon being played or operated, may, solely by chance, deliver or entitle the player to receive something of value, with the outcome being shown by spinning reels or by a video or other representation of reels."). To the extent Part 547 authorizes or has been interpreted by the Commission to authorize the play of slot machines "of any kind" under the guise of Class II bingo, it exceeds the Commission's authority under IGRA.

In short, the status quo is unacceptable. Because the Commission has previously told me that I do not have authority over gambling conducted on Indian lands, I am requesting that the Commission act to enforce the bright line between Class II and Class III gambling that already exists in federal law. The Commission's regulations should either give me the authority to enforce the law or make clear that gambling devices that look and operate like slot machines are "facsimiles" of games of chance under IGRA, regardless of whether they purport to aid in playing the game of "bingo."

If the Commission needs any further comment or information related to this matter, do not hesitate to contact my office.

Sincerely,

LUTHER STRANGE
ATTORNEY GENERAL

LS/mrh

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

February 11, 2011

The National Indian Gaming Commission
1441 L Street, NW Suite 9100
Washington, D.C. 20005

Dear Commission Members:

Thank you for the opportunity to provide comment to the National Indian Gaming Commission as the Commission conducts a comprehensive review of all regulations promulgated to implement the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq*. Any changes made to the rules that regulate Native American Indian tribal gaming could have a definite impact on the State of Alabama and its citizens. I urge you to make clear that Native American Indian tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama law. It is out of this concern that I write this letter so that you will know, without any doubt, what the law is in Alabama.

The Alabama Constitution of 1901 imposes a strict prohibition against gambling in the State. Article IV, § 65 of the Alabama Constitution of 1901, provides:

> The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.

ALA. CONST., art IV, § 65.

Slot machines and other gambling devices, as defined in Ala. Code § 13A-12-20 (1975), are also patently illegal in all 67 Alabama counties under § 13A-12-27 of the Code of Alabama and § 65 of the Alabama Constitution.[1] While several local constitutional amendments have authorized "charity bingo" in certain Alabama counties, absolutely no amendment to the Alabama Constitution has authorized slot machines or other illegal gambling devices in any county. Machines that accept cash or credit and then dispense cash value prizes based upon chance are slot machines under Alabama law

[1] *See State ex rel. Tyson v. Ted's Game Enterprises*, 893 So. 2d 376, 380 (Ala. 2004) ("[W]e hold that Article IV, § 65, means what it says, and *prohibits the Legislature from authorizing* 'lotteries or gift enterprises' that involve games *or devices* in which chance predominates the outcome of the game, even if 'some skill' is involved" (emphasis added)).

and are not made legal by any bingo amendment. Likewise, no local bingo rule, regulation or ordinance can legally authorize slot machines. Two trial judges in Alabama have issued rulings holding as much in the last two years.[2] For reasons of their own, the gambling interests consciously chose not to appeal the rulings in either case.

Moreover, even putting aside the question of the slot-machine statute, the Alabama courts have repeatedly held, in no uncertain terms, that the term "bingo" in these local constitutional amendments references only the game commonly or traditionally known as bingo. The Court's ruling in the recent *Barber v. Cornerstone*[3] case considered the application of that principle to the "electronic bingo" issue. The Court laid out six factors that, at a minimum, a game must possess to be considered legal "bingo" for purposes of these amendments. These factors include the following:

> 1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
>
> 2. Alphanumeric or similar designations are randomly drawn and announced *one by one*.
>
> 3. In order to play, each player *must pay attention* to the values announced; if one of the values matches a value on one or more of the player's cards, the player *must physically act by marking his or her card accordingly*.
>
> 4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.
>
> 5. A player must recognize that his or her card has a "bingo," i.e., a predetermined pattern of matching values, and in turn *announce to the other players* and the announcer that this is the case before any other player does so.
>
> 6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact.[4]

---

[2] *See State v. American Gaming Sys.*, No. CV 08-1837 (Jefferson Cnty. Cir. Ct. Oct. 26, 2009) (Vowell, P.J.) (slip op. at 9–12); *Dep't of Tex. Veterans v. Dorning*, No. 07-S-2144-NE (N.D. Ala. Sept. 28, 2009) (Smith, J.) (slip op. at 29–52). Copies of these opinions can be provided if necessary.
[3] See *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65 (Ala. 2009).
[4] *Id.* at 86.

The Supreme Court also held that "the bingo amendments are exceptions to the lottery prohibition, and the exception should be narrowly construed."[5] These factors cannot be changed, diluted, waived, redefined or reinterpreted by local rule, local regulation, or local definitions. As the emphasized portions of those factors indicate, it appears to be impossible that the fully automated game called "electronic bingo" can be legal "bingo" for these purposes of these amendments. Indeed, in *Cornerstone* itself, the Alabama Supreme Court found that gambling interests had not even established a reasonable probability of showing that "electronic bingo" was in fact the game of bingo that is authorized in certain localities under Alabama law.

Because these machines are illegal under Alabama law, they are illegal under IGRA. Section 2701 of the IGRA provides "The Congress finds that...(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if* the gaming activity ... is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." (Emphasis added.) The Commission should make clear that Native American Indian tribes located in Alabama cannot operate so-called "electronic bingo machines" and other gambling devices which look like, sound like, and attract the same class of customers as conventional slot machines, but play a six second game of "bingo" in cyberspace using software that allows card-minders and auto daub features that are specifically designed to recreate a slot machine experience for the player with little to no human interaction.[6]

I would also ask that any regulations make clear that the mere fact that traditional bingo is allowed in certain parts of this State does not mean that "electronic bingo" is legal on Indian lands in this State. As the Alabama Supreme Court made clear in the *Cornerstone* case, the traditional game of bingo, with all its qualities of human interaction and skill, is qualitatively different from the game that has come to be called "electronic bingo." The most obvious difference between the two games is in the costs they impose on society. In light of the speed at which "electronic bingo" is played, it is much more likely to lead to addiction, severe economic losses, and the other societal harms traditionally associated with gambling. In contrast, the traditional game of bingo cannot be played so swiftly as to cause serious debts and gambling addiction. Indeed, it

---

[5] *Id.* at 78.

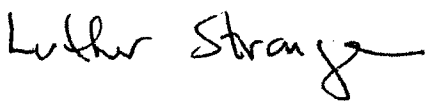
[6] In *Barber v. Jefferson County Racing Association*, 960 So. 2d 599 (Ala. 2006), the Supreme Court addressed a system of terminals linked by a server that, instead of purporting to play "bingo," purported to run a "sweepstakes." The court nonetheless held that the game was illegal under a common-sense application of the term "slot machine." *See id.* at 614. The court looked to "the substance and not the semblance of things, so as to prevent evasions of the law." *Id.* at 611 (internal quotation marks omitted). The court focused on whether the machines "are slot machines as to those who pay to play them." *Id.* at 615. Employing this realistic approach, the court found illegal "a system composed of what were formerly slot machines, which look like, sound like, and attract the same class of customers as conventional slot machines, and, when integrated with the servers, serve essentially the same function as did the slot machines." *Id.* at 616.

is precisely for that reason that gambling interests prefer to offer so-called "electronic bingo" to their customers: "electronic bingo" is much more profitable to casinos than bona fide traditional game of bingo. It would make no sense for federal law to provide that the fundamentally different game of "electronic bingo" is legal on Indian land simply because Alabama law allows the traditional game of bingo to be played for certain charitable purposes on certain non-Indian lands.

With the gambling interests constantly looking for loopholes and ambiguities to exploit, it is essential that this Commission maintain a consistent and cohesive posture in enforcing and clarifying Native American Indian gambling laws in a way that clearly demarcates legal and illegal gambling activities. These laws must be strictly written and enforced without exception. Any other alternative is simply unacceptable.

If this Commission needs any further comment or information related to this matter, do not hesitate to contact my office.

Sincerely,



Luther Strange
Attorney General

LS/htr