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February 11, 2011

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The National Indian Gaming Commission
1441 L Street, NW Suite 9100
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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.

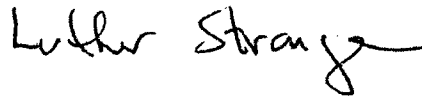
⁶ In *Barber v. Jefferson County Racing Association*, 960 So. 2d 599 (Ala. 2006), the Supreme Court addressed a system of terminals linked by a server that, instead of purporting to play “bingo,” purported to run a “sweepstakes.” The court nonetheless held that the game was illegal under a common-sense 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,

A handwritten signature in black ink that reads "Luther Strange". The signature is written in a cursive, flowing style.

Luther Strange
Attorney General

LS/htr