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August 26, 2013

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

Re: National Indian Gaming Commission request for public comment ("notice") to reinterpretation of electronic one touch bingo ruling

Dear Commission Members:

The State of Michigan opposes any reinterpretation of Chairman Hogen's 2008 ruling concerning the Melakatla Indian Community's request to amend its tribal gaming ordinance to define class II gaming to include one touch bingo. Michigan supports the comments submitted to you concerning this issue by Alabama's Attorney General Luther Strange.

Michigan believes that the analysis included in your June 25, 2013 notice does not comport with the language of the Indian Gaming Regulatory Act's definition of class II gaming. That analysis focuses on certain descriptive factors mentioned in 25 U.S.C. § 2703(7), but ignores the overriding definitional requirement that class II gaming means "the game of chance *commonly known as bingo* . . ." While this phrase in § 2703(7) is followed by game rules that help define what is meant by Congress's reference to common bingo (e.g., played with cards bearing numbers for prizes won by the first person covering a previously designated arrangement of such numbers), these rules should not be applied in a vacuum to authorize a class II game that clever engineers design around bingo logic, but which looks and plays like a slot machine and not the game commonly known as bingo.[1]

[1] Michigan acknowledges that the Ninth Circuit Court of Appeals has rejected a similar argument, *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1093 (9th Cir. 2000), but the State respectfully disagrees with that decision which, while claiming to adhere to the text of IGRA, flatly ignores the first and most important words in the definition of class II gaming.

One touch bingo, as it is described in your notice and as best we understand it, is just such a clever perversion of common bingo. It is by all appearances a machine that both generates and plays a complete bingo game (assuming that is truly what it does) once it is activated by a single press of a button. Thereafter, all stages of the game undeniably occur inside the machine:

1) The machine creates a card or cards bearing numbers.
2) The machine draws the numbers.
3) The machine covers the numbers on the cards.
4) Even if there is more than one live player, the machine plays the game for *every* player.
5) The machine decides when the game is over and a player has won.
6) The machine awards the prize to a winner and informs other players they have lost.

The absence of any non-electronic bingo play is dispositive. IGRA expressly excludes from the definition of class II gaming "electronic or electromechanical facsimiles of *any* game of chance . . .". 25 U.S.C. § 2703(7)(B)(ii) (emphasis added). Bingo would undoubtedly be included in "any" game of chance; a "facsimile" is a copy of the real thing. Since all aspects of one touch bingo after the button push are electronic — i.e., virtual — events, it is nothing more than an electronic facsimile of a game of chance. It therefore cannot satisfy the definition of class II gaming.

While IGRA does permit electronic "aids" for the play of bingo, one touch bingo is not such an aid. The NIGC's notice suggests that a machine is an aid as long as it allows more than one player, but there is nothing in IGRA that supports this notion, nor does it make any sense. Bingo is commonly played as a social game in a "parlor" or a "hall" where players interact with each other and with the game operators. A bingo aid might increase the effective size of the room by allowing more participants to be linked to the game from other bingo halls, S. Rep. No. 446, 100th Cong., 2d. Sess. 9 (1988). The mere existence of more than one player however, does not itself transform a facsimile into an aid. Michigan strongly disagrees with the statement in your notice that there is an "exception" to the prohibition on electronic facsimiles of games of chance for such facsimiles merely because they may "broaden" player participation. IGRA allows technologic aids to the play of a *real* bingo game; it in no uncertain terms prohibits facsimiles of bingo, whether or not they may broaden player participation by allowing more than one player. There is no exception to this prohibition.

And while your notice states that one touch bingo participants compete with other players, no evidence of this was identified in the notice, nor was it presented to the court in a recent case where electronic bingo was challenged by the State of Alabama. *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 87 (Ala. 2009)

("There is no evidence indicating that this 'linkage' of individual machines to the server means that the players of the different electronic machines are playing against one another.") It seems unlikely that real competition is even possible. If, in fact, electronic "bingo" games can be played every six seconds ("an entire 'bingo game' takes approximately six seconds . . .", *id.* at 87), how could players realistically play each other? There is no information in your notice that gives even a suggestion that there is a game operator who gathers players and starts a new game. The distinct impression is that individual players push a button on a one touch machine whenever they have credits available, regardless of whether anyone else is playing in that particular "game" of bingo. Michigan has attempted to obtain a copy of the software for one touch bingo (including requesting it from the NIGC) for purposes of conducting a technical analysis to inform these comments, but it has been unable to acquire such a copy. Based on the information available to us, however, we believe that no person walking into a room where one touch bingo is being conducted would be able to discern that what is being played is the game "commonly known as bingo." One touch bingo looks and plays like a slot machine.

Even if an analysis of the software established that there is some nominal competition, this is still a game played entirely by a machine, which, as detailed above, creates and plays the "bingo" game from start to finish *for any and every participant* without exception. It is no different than if the machine created "virtual" competitors since whatever playing occurs is conducted solely by the machine. And if the court in *Barber* is correct that the losers don't even learn who won the game – suggesting that players aren't aware of other player's participation – what does it matter that there is competition if it is really against the machine that is playing the game? In a directly analogous situation involving an electronic facsimile of a paper pull tab game, the D.C. Circuit held that the electronic version of pull tabs was a facsimile and hence a class III game, even though the machine permitted competition among other players. *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, 637 (D.C. Cir. 1994). There is no basis for distinguishing the pull tab machine in *Cabazon* from one touch bingo, except perhaps that the competition element in the *Cabazon* case was more readily apparent than it is here.

Michigan also believes that electronic bingo is specifically designed to play just like a class III slot machine. The *Barber* Court confirmed this. "From the officer's testimony, it seems the machines operate almost exactly like slot machines." *Barber,* 42 So. 3d at 86. Congress expressly excluded slot machines from the definition of class II gaming. 25 U.S.C. § 2703(7)(B)(ii). Your notice suggests a willingness to read the three bingo rules stated in the class II gaming definition broadly to find that one touch is bingo, but it expends little effort to determine whether one touch bingo is a prohibited slot machine. This is a necessary step to declaring any machine class II gaming. If the same generous

interpretation were applied to the question of whether one touch was a prohibited slot machine, based on all the evidence, it would be difficult to conclude that one touch is anything but a class III game. As Alabama points out in its comments, these games are promoted to casinos precisely because they look and play just like slot machines. The only purpose for perverting the game commonly known as bingo so it can be played in six seconds is not to attract traditional bingo players, but rather to attract players who want to play slots. Even without a liberal interpretation, it is clear that Congress intended that machines like one touch bingo would be considered class III gaming.

This conclusion is even clearer considering that Congress intended to apply the exclusion to slot machines "of *any kind.*" *Id.* "Any kind" is a *very* broad category. This would surely include a machine that looked and played like a slot machine, whether or not the internal system that creates the player's experience is based on bingo or some other logic. The determination that it is class II gaming where gamblers can play a full game of one touch bingo in the amount of time it takes to pull the lever or press a button on a slot machine is an obvious attempt to circumvent the broad IGRA exclusion. IGRA excludes any kind of slot machine from class II gaming and did so with a full understanding that slot machine technology would evolve beyond simple mechanical devices with spinning wheels. Otherwise, it would not have used the all-encompassing terms "any game of chance" and "slot machine of any kind."

And one touch bingo contains all of the characteristics of a slot machine. It should make no difference whether those attributes are conducted on a stand-alone machine or a server. Server based slots were approved by the Nevada Gaming Commission in April of 2007 and are the new wave of Class III gaming.[2] Moreover, many states, like Michigan, broadly define slot machine gaming in their compacts, penal codes, and commercial gaming laws.[3] An Idaho court defined slot gaming as gambling devices "which, upon payment by a player of required consideration in any

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[2] http://casinogambling.about.com/od/slots/a/server.htm; http://www.asgam.com/features/item/1716-the-server-based-revolution.html.

[3] " '[S]lot machine' means a mechanical device, an essential part of which is a drum or reel which bears an insignia and which when operated may deliver, as a result of the application of an element of chance, a token or money or property, or by operation of which a person may become entitled to receive, as a result of the application of an element of chance, a token or money or property." MCL 750.303(3). " 'Slot machine' means a type of electronic gaming device." Mich. Admin. Code. R. 432.1107(b). " 'Electronic gaming device' means an electromechanical device, or electrical device or machine which, upon payment of consideration, is available to play or operate as a gambling game." Mich. Admin. Code. R. 432.1102(j).

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." *MDS Investments, L.L.C. v. State*, 65 P.3d 197, 203 (Idaho 2003). These definitions encompass class III slot type gaming and one touch easily fits within their meaning. It follows that defining one touch bingo as class II gaming blurs the distinction between class II and III gaming. In fact, a 180 degree reversal of NIGC's interpretation here does nothing but create more ambiguity and a very slippery slope that will likely result in a multitude of lawsuits and disputes across the nation. Allowing one touch bingo machines to be played as class II gaming based on a hyper-technical interpretation of IGRA is nothing less than an end run around Congress's express requirement that slot machines not be included in the definition of class II gaming.

For these and the additional reasons detailed in Alabama's comments to you, Michigan objects to the proposed reinterpretation of NIGC's 2008 decision that correctly held that one touch bingo is not class II gaming.

Please feel free to contact me or Assistant Attorney General Louis Reinwasser at 517-373-7540 if you have any questions.

Sincerely,

Bill Schuette
Attorney General