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Pilot Games, Inc.
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April 4, 2019

The Honorable James LaFave
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

Via: Hand-Delivery

**Re: In the Matter of the Proposed Rules of the Gambling Control Board;
OAH Docket No. 60-9017-35616**

Rebutal to written comments submitted by Shakopee Mdewakanton Sioux Community, Prairie Island Indian Community, Lower Sioux Indian Community, and Complaint Gaming, LLC.

Dear Judge LaFave:

Pilot Games, Inc. (Pilot Games) submits this letter in rebuttal to the above-referenced written comments (collectively, the "Commentators") received by your office with respect to the Minnesota Gambling Control Board's (Board) proposed rules which were the subject of the hearing held on March 8, 2019. Pursuant to Chapter 7864 of the Minnesota Rules, Pilot Games is a Minnesota-based licensed manufacturer of "electronic bingo devices", "electronic pull-tab devices", and a "linked bingo game provider" (as each is defined by Minnesota Statutes, Chapter 349). Pilot Games is the largest supplier (95% of all sales) of electronic bingo and pull-tab products to Minnesota's lawful charitable gambling market. Based upon Q1 2019 sales, net receipts garnered from Pilot Games' sales account for over \$20 million annually in tax revenues to the Minnesota treasury. These tax funds support payment of the bond obligation of the State in connection with construction of the U.S. Bank Stadium – home of the Minnesota Vikings and events like the NFL Super Bowl, and this week the NCAA Final Four.

It is in this context that you should consider the Board's proposed rules and the agency's authority to adopt a reasonable interpretation of Chapter 349 statutory language in making the proposed rules. In 2012, the Minnesota Legislature was struggling with finding an appropriate mechanism for financing the construction of the proposed new Vikings stadium. When faced with the probability of the NFL moving the Vikings due to unacceptable stadium conditions, the Legislature eventually turned to the bonding being backstopped by tax payments to be received from an expanded form of the charitable gambling long conducted legally in Minnesota – electronic pull-tabs and bingo games. In doing so, the Legislature wanted to ensure the growth and success of the electronic charitable gambling products in order to assuage taxpayers and bond investors that no general fund revenues would ever be needed to meet the State's bond obligations. The intent of the Legislature, as supported by MN Department of Revenue

projections, expert testimony to the Legislature and bond sale documents, was to create a new tax stream for the purpose of funding one of the largest public works projects in Minnesota history, not simply to make available a paper-less pull tab ticket or bingo card to the charitable gambling market..

Accordingly, the Legislature chose statutory language intended to meet this goal by broadly authorizing electronic pull-tabs and bingo games¹. Because of developments in the Indian Country gaming market under the Indian Gaming Regulatory Act (IGRA), Pub. L. 100-497, 102 Stat. 2467, over the decade before the Legislature was considering the legislation, it was well known that –“Class II” electronic bingo and pull-tab products were functionally and legally distinct from traditional slot machines or video games of chance, which constitute “Class III” gaming under IGRA. In this respect, there was then, and there is even more now, ample developed federal court decisions and agency determinations demonstrating that such “Class II” electronic (i.e. server-based) bingo and pull-tab products are not considered to be “facsimiles” of slot machines or games of chance – decisions made over U.S. Department of Justice objections that these products have the same look and function of video slot machines because they have patron interfaces with animated game result reveal features.²

Unlike Class II products, Pilot Games product systems utilize “handheld and portable” devices rather than traditional stationary cabinet-sized terminals. As testified by Andrew Kozak at the hearing, this mobile device-only delivery system in Minnesota was the main request of tribal interests when the Legislature was designing the legislation.

Since the statute’s effective date of July 1, 2012, the Board has adopted Manufacturing Standards and promulgated multiple iterations of Rules related to electronic bingo and pull-tab products. The subject of the March 8th Hearing is merely the latest (and strictest) version of Rules that

¹ “A pull-tab dispensing, electronic bingo device, and electronic pull-tab device permitted under this chapter and by board rule is not a gambling device within the meaning of sections 609.75 to 609.76 and chapter 299L.” Minn. Stat. §349.13. *See also* Minn. Stat. §349.12, subdivisions 12a, 12b, 12c, 12d and 25c.

² *See e.g.*, *U.S. v. 103 Electronic Gaming Devices*, 223 F.3d 1091 (9th Cir. 2000)(electronic bingo games are Class II); *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000)(electronic bingo games are Class II); *Diamond Game Enterprises, Inc. v. Reno*, 231 F.3d 365 (D.C. Cir. 2000)(electronic pull-tabs machine is Class II); *United States v. Santee Sioux Tribe*, 324 F.3d 607, 613-15 (8th Cir. 2003)(electronic pull-tab devices are Class II); *Seneca Cayuga Tribe v. NIGC*, 327 F.3d 1019, 1025 (10th Cir. 2003) (electronic pull-tab devices are Class II); *State of California v. Iipay Nation of Santa Ysabel*, Case No. 3:14-cv-02724-AJB-NLS (S.D. Cal. December 12, 2016)(server-based electronic-linked bingo gaming systems expressly deemed to be class II). *See also* 25 CFR Part 547.2 definition of “Class II gaming system” and NIGC Office of General Counsel letters advising that “linked bingo systems” (i.e. electronic server-based bingo systems) are Class II. *See e.g.* September 23, 2003 NIGC Advisory Letter re: Reel Time Bingo, pp. 8-9; September 26, 2003 NIGC Advisory Letter re: Mystery Bingo, pp. 18-19; April 4, 2005 NIGC Advisory Letter re: Nova Gaming Bingo System, pp. 13-14 – each available at NIGC website: <https://www.nigc.gov/general-counsel/game-classification-opinions>.

have been promulgated by the Board. All of these regulatory actions have been completed in open meetings with written and oral comments from the public allowed and encouraged by the Board. These meetings and actions are well publicized on the Board website. To claim that the Commentators have been excluded in these processes is factually incorrect.

The Board's proposed rules would merely continue to formalize the standards for these products consistent with the statutory requirements and past Board practice and interpretation. In our view, the proposed rules do not in any fashion exceed or alter the statutory requirements for electronic bingo and pull-tab products permitted to be supplied to licensed operations benefiting Minnesota charities and the State's Vikings stadium bond obligations. In this light, the Commentators attempt to get the Board to adopt an overly narrow interpretation of the Chapter 349 statutory language applicable to electronic bingo and pull-tab products is inconsistent with the express statutory language and the Legislature's intent for these products, as well as the interpretation followed by the Board and upon which charities and manufacturers have relied for years.

For example, the main premise of the Commentators for objecting to the proposed rules is based upon a badly mistaken and overly narrow reading of Minn. Stat. §348.13 – that any electronic bingo or pull-tab device having an “animated” game result reveal feature on the patron interface screen of the mobile device is not permitted because the device “may not display or simulate any other form of gambling or entertainment, *except as otherwise allowed under this chapter.*” (emphasis added). In making this argument, the Commentators conflate the “display” of “*other forms of gambling or entertainment*” with electronic bingo games or pull-tabs played with *any* animated feature that the patron may find “entertaining.”

It was never the Legislature's intent to restrict electronic bingo games or pull-tabs in such a manner, particularly given what the Legislature knew at the time it was considering the legislation and its concern for making sure these products were successful enough to support the State's Vikings stadium bond obligations. Rather, what this phrase means, as the Board knows and consistent with its long-standing interpretation, was that any handheld and portable device provided to the charitable gambling market in Minnesota would be limited to allowing the patron to play only: (1) an electronic bingo game or (2) an electronic pull-tab game;³ and such a mobile device could not be used by the patron to access “other forms of gambling or entertainment” – *i.e.* the device could not have the functionality to permit the patron to access a simulated game of poker, craps, keno, traditional slot play, *etc.* or other forms of entertainment like video games (Call of Duty, Halo), news outlets, ESPN and sports streaming services, movie streaming services, *etc.*

It is telling that the *only* restriction the Legislature placed on handheld and portable devices with respect to electronic bingo and pull-tab products used in the Minnesota charitable gambling market *applied solely to the display feature* on the patron interface screen *for electronic pull-tab games*, but not to electronic bingo games. And this “display” restriction for pull-tabs itself was

³ See Minn. Stat. §349.12, subd. 12a(5) and subd. 12b(6).

limited in nature, focused on the video display of a slot machine – that is, simply requiring the display of the pull-tab device have “no spinning reels or other representations that mimic a video slot machine.”⁴ That the Legislature used the word “representations” here rather than a form of “functionality” that it used elsewhere in Chapter 349⁵ drives home the point that the Board’s proposed rules are a reasonable interpretation of the statutory language. Even though electronic pull-tab games are permitted to have an “animated” game result reveal feature on the patron interface screen of the mobile device, the “displays must not simulate *spinning reels* or nonstraight win line graphic *representations*” of the sort traditionally displayed on video slot machine patron interface screens. In this context “simulate” is synonymous with “mimic.”⁶ Thus, the Board’s proposed rules for *both* electronic linked bingo games and electronic pull-tab games do precisely what the statutory language says is “otherwise allowed under [Chapter 349]”: permit an “animated” game result reveal feature on the patron interface screen of the mobile device in connection with play of the game as long as the patron screen does not display simulated spinning reels or non-straight win line graphic representations. For this reason, the proposed rules should be adopted without amendment or further modification.

If the Board were to adopt the view of the Commentators, it would be contrary to express statutory language and lead to the widespread diminishment of use of electronic bingo and pull-tab products in the Minnesota charitable gambling market – greatly jeopardizing the State’s ability to satisfy its Viking stadium bond obligations without having to raid the general fund, to the detriment of all Minnesota taxpayers. Even now, with the benefit of the increased tax revenues arising principally from the success of the electronic bingo and pull-tab products over the last few years, the sums received are still substantially below the amounts the State projected should be received by this point. Moreover, the health of many VFW and American Legion posts and other main street businesses, and the thousands of jobs they support in every community in every corner of Minnesota, would be negatively impacted. And the local charities in these communities that benefit the most from the success of electronic bingo and pull-tab products used in the Minnesota charitable gambling market will suffer the most.

As demonstrated by the Board’s Statement of Need and Reasonableness, with its rule-by-rule analysis, the Board has appropriately addressed both the process and legal grounds for adopting the proposed rules, particularly with respect to the electronic game format. For the foregoing reasons, Pilot Games requests that the ALJ recognize the Board’s authority to adopt a reasonable interpretation of Chapter 349 statutory language in making the proposed rules and approve the proposed rules as drafted. Thank you for your consideration of this rebuttal.

⁴ See Minn. Stat. §349.12, subd. 12b(5) and subd. 12c(9); and compare with Minn. Stat. §349.12, subd. 12a, which has no such provision.

⁵ See Minn. Stat. §349.12, subd. 12a(5) (“has no additional function”) and subd. 12b(6) (“has no additional function”).

⁶ See Google Dictionary definition of “simulate” – listing “mimic” as one of its synonyms.

Sincerely,

Jon Weaver
CEO
Pilot Games, Inc.

April 2, 2019

VIA E-FILING

Hon. James E. LaFave
Administrative Law Judge
Office of Administrative Hearings
P.O. Box 64620
St. Paul, MN 55164-0620

Re: Response of the Shakopee Mdewakanton Sioux Community Related to Comments Submitted by the Minnesota Gambling Control Board in OAH Docket No. 60-9017-35616; Revisor's ID 4555

Dear Judge LaFave:

On behalf of the Shakopee Mdewakanton Sioux Community ("the Community"), I submit the following response to the written comments of the Minnesota Gambling Control Board ("the Board") in Docket No. 60-9017-35616. In Section A of this response, I will focus on the Board's comments related to Part 7861.0270, Subp. 3a, Part 7863.0270, subp. 18a, and 7864.0230, Subp. 6. In Section B, I will focus on the Board's comments related to Part 7861.0235, Subp. 4, and in Section C, will respond to the Board's comments relating to Part 7864.0235, Subp. 18.

A. Part 7861.0270, Subp. 3a; Part 7863.0270, Subp. 18a; and Part 7864.0230, Subp. 6

These proposed rules authorize the use of animated win determinations in electronic bingo games. In support of inclusion of animated win determinations, the Board argues that the statutory requirements and prohibitions placed on electronic bingo devices should not be applied to electronic linked bingo games themselves. This contention is unreasonable because it ignores explicit statutory guidance and leads to an absurd result.

Minn. Stat. 349.12, Subd. 12a provides the statutory definition of electronic bingo devices. It provides, among other things, that such devices may have no additional functions as an amusement or gambling device other than as an electronic pull-tab game.

Hon. James E. LaFave
April 2, 2019
Page 2

The Board's contention that the requirements of Minn. Stat. 349.12, Subd. 12a do not apply to the electronic bingo games themselves is unsupported by law. The term "electronic bingo game" is undefined in statute. In fact, the only statutory guidance that electronic bingo games must follow is provided in Minn. Stat. 349.12, Subd. 12a. It is unreasonable to ignore explicit statutory guidance and to create different requirements for a term, electronic bingo game, that is undefined in statute.

The Board's position also relies on the fiction that game play for electronic bingo games is not discussed in statute. Minn. Stat. 349.12, Subd. 12a(1) details exactly how electronic bingo devices can be used to play electronic bingo games. It provides that electronic bingo devices shall be used by a bingo player to: play an electronic bingo game that is linked with other premises; activate numbers announced or displayed, to compare the numbers to the bingo faces previously stored in the memory of the device; identify winning bingo pattern or game requirements; and play against other bingo players. This provision provides clear guidance on how the results of an electronic bingo game should be displayed.

Minn. Stat. 349.12, Subd. 12a contains provisions clearly meant to govern the use of the device and requirements for game play. If the Legislature did not intend for the requirements of Minn. Stat. 349.12, Subd. 12a to apply to electronic bingo games themselves, it would have included exclusionary language in the statute or, at the very least, would have included a separate definition of electronic bingo games that includes requirements unique from requirements for electronic bingo devices.

Application of the Board's logic to other requirements of Minn. Stat. 349.12, Subd. 12a show that the Board's contention is unreasonable and would lead to absurd results. For example, the same statutory provision that prohibits the use of electronic devices for amusement functions also prohibits the use of such devices as gambling devices. By the Board's logic, this prohibition does not apply to electronic bingo games and such games could be used as gambling devices in any form. Likewise, the requirement of Subd. 12a that bingo be played against other bingo players would not be applicable to electronic bingo games under the Board's logic. Therefore, such games could be played against the computer or game system itself. Both of these examples highlight the absurdity of the Board's contention, and demonstrate that its proposed language is unreasonable.

There are other statutory provisions that support application of Minn. Stat. 349.12, Subd. 12a to electronic bingo games. Subds. 12b and 12c include statutory definitions of electronic pull-tab devices and electronic pull-tab games. These provisions show that the Legislature knows how to create separate statutory definitions for games and devices. Additionally, the only reasonable construction of these provisions is to read

Hon. James E. LaFave
April 2, 2019
Page 3

them together. The requirements placed on electronic pull-tab devices in Subd. 12b apply in conjunction with the requirements for such games in Subd. 12c. With respect to the question at hand, the requirements placed on electronic bingo devices control what can be displayed on electronic bingo games. Animated win determinations are not authorized by statute and run counter to the game play requirements listed in Minn. Stat. 349.12, Subd. 12a(1).

During the hearing, the Community provided video of a game that has already been approved by the Board and is in use in bars in Minnesota. The video itself highlights the error in the Board's interpretation of the statute. The video included a flash bingo game that displayed the results of the bingo game in a fashion similar to a video slot machine. Under the Board's reasoning, this game is legal because the prohibition against using electronic bingo devices as amusement or gambling devices does not apply to electronic bingo games themselves. This would allow the statutory requirements to be ignored as long as the features in question occur in game play.

B. Part 7864.0235, subp. 4

This proposed rule discusses bonus game features. In support of the language, the Board states that bonus features are authorized by statute which allows multiple seal games and cumulative games.

The general authorization for multiple seal and cumulative games in Minn. Stat. 349.1721 does not trump the more specific requirements placed on electronic pull-tab devices and electronic pull-tab games in Minn. Stat. 349.12. Minn. Stat. 349.12, Subd. 12c requires pull-tab games to be facsimiles of pull-tab tickets. Subd. 12b requires the player to activate each electronic pull-tab ticket by individual line, row, or column. In both of these regards, the requirements placed on electronic pull-tab games are more stringent than they are on paper pull-tab games. If bonus games are authorized by statute, they must still conform with the requirements of Minn. Stat. 349.12. This would require the bonus features to be facsimiles of paper pull-tab tickets and require the player to activate each individual line, row, and column. The bonus games in the video played by the Community at the hearing do not look or play like paper pull-tab tickets. Instead, the bonus features are much more akin to video games played on a gaming console.

C. Part 7864.0235, subp. 18

The language in this proposed rule authorizes the use of animated win determinations in electronic pull-tab games. In support of inclusion of animated win

Hon. James E. LaFave
April 2, 2019
Page 4

determinations, the Board argues that the statutory requirements placed on electronic devices in general should not be applied to electronic pull-tab games themselves. This contention is unreasonable because it ignores explicit statutory guidance and leads to an absurd result.

Minn. Stat. 349.12, Subd. 12b includes the statutory definition of electronic pull-tab devices. Minn. Stat. 349.12, Subd. 12c includes the statutory definition of electronic pull-tab games. Minn. Stat. 349.13 includes prohibitory provisions that apply to all electronic game devices, which includes electronic pull-tab devices.

The Board mischaracterizes the Community's objections as applying game requirements for electronic linked bingo devices to electronic pull-tab devices. The Community's testimony at the hearing, as well as a careful reading of the commentary submitted by the Community, shows that the Community relies on Minn. Stat. 349.13, which includes game requirements for all electronic devices.

Minn. Stat. 349.13 governs lawful gambling and limits the types of games that can be played on electronic devices, including electronic pull-tab devices. Minn. Stat. 349.13 excludes application of the Criminal Code to games permitted under Minnesota's lawful gambling laws. The exclusion is premised on games being operated in compliance with statutory requirements. But for the exclusion, electronic pull-tabs would be considered gambling devices under Minnesota law and prohibited. It necessarily follows that games that are not conducted pursuant to statutory law do not fall under the exclusion listed in Minn. Stat. 349.13. If a game does not fall under the exclusion, it would be considered an electronic game of chance and prohibited under the Criminal Code. Minn. Stat. 349.13 prohibits electronic devices from displaying or simulating any other form of gambling or entertainment not authorized by statute. Thus, animated win determinations in pull-tab games would only be allowed if they are authorized and conducted in compliance with statute.

Animated win determinations are not authorized in Minn. Stat. 349.12. Minn. Stat. 349.12 includes clear requirements on what can be displayed on electronic pull-tab devices and games. Minn. Stat. 349.12, Subd. 12c requires that electronic pull-tab games must be facsimiles of pull-tab tickets. Minn. Stat. 349.12b(7) states that electronic pull tab devices may include auditory or visual enhancement as long as such enhancements do not affect the outcome of the game or display the results of the game. At the hearing, the Community provided a video of an electronic pull-tab game that has already been approved by the Board. The graphics included in the video do not display facsimiles of pull-tab tickets but rather, are much more akin to displaying an electronic slot machine.

Hon. James E. LaFave
April 2, 2019
Page 5

The video shown during the hearing also highlighted a serious issue that has resulted from the Board's failure to follow explicit statutory guidance. In the video, the player pressed the play button once and all of the rows and columns of the electronic pull-tab ticket were uncovered. This form of gameplay is in direct contravention of Minn. Stat. 349.12, Subd. 12b(3). Subd. 12b(3) expressly requires the player to activate each individual line, row, or column of an electronic pull-tab ticket.

Conclusion

The Board is tasked with faithfully implementing the statutory requirements placed on electronic devices that are used for lawful gambling. The commentary submitted by the Board and the way the Board has implemented the statute, as portrayed in the videos discussed above, demonstrates that the Board has failed to comply with the statutory requirements. Based on the evidence and arguments submitted by the Community, the Administrative Law Judge should disapprove the rules that are the subject of the Community's objections and grant the relief requested by the Community in its March 28, 2019 Comments.

Sincerely,

s/ Skip Durocher

Skip Durocher

SD:llt