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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 36751-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE GAMBLING COMMISSION,

Appellant/Cross Respondent,

v.

ZDI GAMING, INC.,

Respondent/Cross Appellant.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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PM 6/26/08

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Pursuant to the Commissioner's May 30, 2008 Amended Ruling, Appellant/Cross Respondent Washington State Gambling Commission (the Commission) files this Supplemental Reply Brief asking, pursuant to RAP 10.7 and 17.4, that the Court disregard (1) attached Appendices 1, 2, and 3 to ZDI's Brief and Cross Appeal (ZDI's Opening Brief) and (2) certain improperly supported factual assertions set forth with ZDI's Opening Brief, and that the Court deny ZDI's request for an award of attorney's fees on appeal. For ease of reference, objectionable portions of ZDI's Opening Brief are identified and catalogued in Appendix A, which is attached to this brief.

I. FACTS AND PROCEDURAL HISTORY

A. Appendices 1 Through 3 To ZDI's Opening Brief (collectively "the Appendices").

ZDI's Opening Brief is accompanied by three attached appendices that are not part of either the administrative or superior court records below. Appendix 1 is entitled "Tribal Lottery System player terminal history for the State of Washington Gambling Commission" and is dated July 13, 2005. This document was not offered or admitted as evidence during the administrative or superior court proceedings below.

Appendix 2 is entitled "Rule Up for Discussion and Possible Filing" and relates to a proposed rule change discussed at the Commission's March 14, 2008 meeting. Appendix 3 is a Petition for

Declaratory Order and OPMA Complaint, dated February 14, 2008, filed by ZDI and one of ZDI's owners against the State, the Commission, the Commission's director, an *ex officio* member of the Commission, and certain Commission members in their official and personal capacities.[1] Both of these documents post-date the administrative and superior court proceedings and are not part of the administrative or superior court records below.

B. ZDI's Improper Citation to Documentation That Was The Subject Of Its Unsuccessful Motion To Supplement The Record.

In addition to the Appendices, ZDI's Opening Brief repeatedly cites to supplemental documentation ZDI submitted to the superior court as part of an unsuccessful motion to supplement the record (the Supplemental Materials). CP 37-41, 44-323, 1079-80. *See* Appendix A. During the superior court proceedings, ZDI moved to supplement the Administrative Record with several hundred pages of materials Bates labeled "SUPP 966" through "SUPP 1225." CP 37-42, 44-233. The vast majority of the Supplemental Materials related to a Petition for Rule Change that ZDI filed with the Commission in the spring of 2006, and subsequently abandoned before the Commission had an opportunity to make a ruling. CP 423-26. Neither the Administrative Law Judge nor the

[1] Subsequently, Plaintiffs have filed an Amended Complaint that drops numerous individual defendants and the Open Public Meetings Act claim.

Commission considered the Supplemental Materials during the administrative proceedings below.[2] *See* 374-75; AR 1-965.

ZDI initially filed its Motion to Supplement the Record in Pierce County Superior Court. CP 37-41. The Pierce County Superior Court, however, transferred the case to the Thurston County Superior Court without addressing the motion. CP 4-5. On January 9, 2007, ZDI renewed its motion to supplement in Thurston County Superior Court, which the Commission once again opposed. CP 376-77; 389-95. On February 12, 2007, the trial court issued an order denying ZDI's Motion to Supplement the Record. CP 1079-80. Because the superior court denied ZDI's motion to supplement, these documents were not considered by the superior court during its deliberations.[3]

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[2] ZDI assigned error to the superior court's denial of the Motion to Supplement in its Opening Brief (page 2, ¶ 6), but does not refer to this motion in its procedural history of the case (pages 8-9) or offer any legal argument or citation to authority regarding supporting this assignment of error in its briefing. ZDI has also failed include in the appellate record a transcript of the verbatim proceedings relating to this assignment of error as required under RAP 9.2. An assignment of error unsupported by argument or supporting legal authority is deemed waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). Appellate courts need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). Because ZDI has failed to offer legal citation or argument supporting this assignment of error, it is deemed waived, and this Court should refrain from reviewing this issue on appeal.

[3] After the Pierce County Superior Court transferred the case to Thurston County, the Thurston County Superior Court Clerk's Office compiled all of the documents filed in Pierce County into a single file. As a consequence, the Commission had to include the supplemental documentation in the Clerk's Papers in order to appeal the Pierce County Superior Court's order granting a change of venue. *See* CP 4-373.

C. ZDI's Improper Citation To Appendices Attached To Its "Trial Brief" (collectively "the Trial Brief Appendices").

ZDI's Opening Brief also repeatedly cites to appendices attached to ZDI's "Trial Brief," which were the subject of a superior court order declaring that they were **not** part of the administrative record and that they had **not** been admitted by the superior court for evidentiary purposes. CP 722-25. *See* Appendix A. On March 19, 2007, ZDI filed a "Trial Brief" with the superior court that included twelve appendices containing nearly 200 pages of material from outside the Administrative Record (the Trial Brief Appendices). CP 459-84, 486-666. In response to the Commission's Motion to Strike (CP 669-73), the superior court entered an order holding that Appendices 1 through 6 (CP 486-648), 9 (CP 657-58) and 11 (CP 663-64) were "not evidence in this case and are not part of the administrative record," but allowed them to be considered for "illustrative purposes." CP 723. The superior court expressly struck from the record Appendices 7 (CP 649-50), 10 (659-62), and 12 (CP 665-66), along with documents Bates labeled SUPP 1200-1202 appearing in Appendix 8 (654-56). CP 724-25.

II. ARGUMENT

The Commission asks the Court to disregard Appendices 1 through 3 to Respondent's Brief, as well as factual assertions in Respondent's Brief that are supported by citation to documents that are not part of the

administrative or superior court records. Subject to certain limited exceptions, facts relevant to review of an administrative proceeding are established at the administrative hearing. *Den Beste v. State Pollution Control Hrgs. Bd.*, 81 Wn. App. 330, 332-33, 914 P.2d 144 (1996). *See* RCW 34.05.558. Generally, a party judicially challenging an agency order may not raise new issues on appeal. RCW 34.05.554(1).

A. The Appendices Do Not Comply With RAP 10.3(a)(8) Or The Administrative Procedure Act, RCW 34.05.

1. The Appendices do not comply with RAP 10.3(a)(8).

RAP 10.3(a)(8) provides that "[a]n appendix [to a brief] may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." RAP 10.4(c) authorizes parties to append to their briefs texts of statutes, rules and regulations, in addition to other documents that are part of the official record below. Absent this requisite permission, courts will not consider documents from outside the record that are appended to appellate briefs. *Hill v. Cox*, 110 Wn. App. 394, 409, 41 P.3d 495, *review denied*, 147 Wn.2d 1024 (2002).

RAP 10.3(a)(5) requires that an appellate brief contain "a fair statement of the facts and procedure relevant to the issues presented for review," and that a reference to the record must be included for each

factual statement. Briefing that does not comply with these requirements may be stricken and the filing party is subject to sanctions. RAP 10.7.

The Appendices are not part of the record below. Nor are they the text of a statute, rule, regulation, or any form of legal authority. Accordingly, ZDI should not have appended them to its brief without first seeking authorization of this Court. Absent such authorization, this Court should disregard the Appendices and all factual assertions in ZDI's Opening Brief supported by the Appendices. *See* Appendix A.

2. Inclusion of the Appendices violates RCW 34.05.562(1) of the Administrative Procedure Act (APA).

Inclusion of the Appendices with ZDI's Opening Brief also violates APA provisions governing the receipt of new evidence during judicial review. The APA provides that a court may receive new evidence only if two requirements are satisfied. First, the new evidence must "relate[] to the validity of the agency action at the time it was taken." RCW 34.05.562(1). Second, the evidence must be "needed to decide disputed issues regarding:"

> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

Id.

The Appendices do not meet these predicates. The Commission issued the Final Order in this matter in August 2006. AR 961-63. Appendix 2, an announcement for a meeting scheduled for March 2008, and Appendix 3, a Complaint filed in February 2008, both post-date the Commission's Final Order by more than sixteen months. Neither of these documents have any bearing on the validity of the Final Order the Commission issued over sixteen months earlier.

Second, none of the Appendices relate to the issues set forth in RCW 34.05.562 (a)–(c). Nowhere in ZDI's pleadings has it asserted that the Commission was unlawfully constituted, or that it followed an unlawful procedure or decision-making process. Nor does this case involve rulemaking, a brief adjudication, or any other proceeding for which augmentation of the agency record is necessary. For all the reasons set forth above, the Commission respectfully requests that the Court disregard the Appendices, and all factual assertions supported thereby.

3. Factual assertions supported by citation to the Supplemental Materials should be stricken.

ZDI supports numerous factual passages in its Opening Brief with citations to the Supplemental Materials expressly excluded from the superior court record when the superior court denied ZDI's Motion to Supplement the Record. *See* Appendix A. Pursuant to RAP 10.3(a)(5), an

appellate brief must contain "a fair statement of the facts and procedure relevant to the issues presented for review" and a reference to the record must be included for each factual statement. Briefing that does not comply with these requirements may be stricken and the party filing the brief is subject to sanctions. RAP 10.7. The Supplemental Materials are not part of the Administrative Record and were not admitted as evidence by the superior court. Accordingly, ZDI's reliance on the Supplemental Materials is inappropriate and this Court should disregard the Supplemental Materials and all factual assertions supported by citations to the Supplemental Materials in ZDI's Opening Brief. *See* Appendix A.

4. The Trial Brief Appendices are not part of the Administrative Record nor were they admitted as evidence in superior court.

The superior court declared that ZDI's Trial Brief Appendices were not part of the Administrative Record and refused to admit them as evidence on judicial review.[4] CP 722-25. *See* Appendix A. ZDI has not assigned error to the trial court's ruling on appeal and has not offered argument or legal citation in its Opening Brief regarding this issue. As

[4] The appendices attached to ZDI's Trial Brief were also objectionable because they did not satisfy RCW 34.05.562(1). As discussed above, new evidence may be admitted by the trial court only if it relates to the validity of the agency action at the time it was taken and if it goes to prove (a) the improper constitution of the decision-making body or grounds for disqualifying the decision makers, (b) unlawful procedure or decision-making process, and (c) material facts from proceedings not required to be determined on the agency record. None of the documents appended to ZDI's Trial Brief met these requirements. *See* CP 486-666.

these documents are not part of the record for review, ZDI's reliance on the Trial Brief Appendices is inappropriate, and this Court should disregard the Trial Brief Appendices, as well as all factual assertions in ZDI's Opening Brief supported by citation thereto. *See* Appendix A.

B. ZDI's Request For Attorney's Fees On Appeal Is Untimely.

Based on ZDI's unsuccessful attempt to file documents, pleadings and arguments based on a case currently pending before the Washington Supreme Court, the Commission anticipates that ZDI will argue for the first time in its Reply Brief that it is entitled to recover attorney's fees on appeal pursuant to the Equal Access to Justice Act (the EAJA), RCW 4.84.350. Consideration of any such argument would be improper. ZDI has failed to request recovery of such fees in its Opening Brief and is barred from requesting an award for the first time in its Reply Brief.

RAP 18.1(b) provides that a party seeking an award of fees on appeal must devote a section of their opening brief to that issue. A request submitted in a reply brief is late and may be disregarded. *Indus. Coatings Co. v. Fidelity & Dep. Co.*, 117 Wn.2d 511, 520, 817 P.2d 393 (1991); *In re Marriage of Mull*, 61 Wn. App. 715, 723-24, 812 P.2d 125 (1991).

ZDI's Opening Brief did not include a request for attorney's fees on appeal or any supporting argument for such an award and, therefore, failed to comply with RAP 18.1(b). The Commission anticipates that ZDI

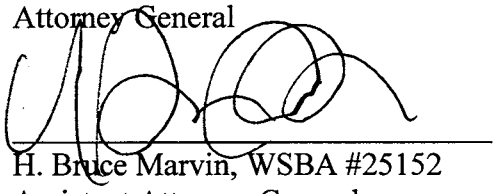
will argue that the final section of its Opening Brief asks for an award of fees on appeal. *See* ZDI's Opening Brief at 50. The argument in ZDI's Opening Brief, however, is limited to finding fault with the superior court's decision awarding ZDI less than the statutory amount of $25,000, below. While ZDI contends that a full award by the superior court is justified given the costs it has incurred on appeal, at no point does ZDI ever ask for – let alone present supporting argument or citation to authority – an award of attorney's fees and costs on appeal. Accordingly any such request in ZDI's Reply Brief must be denied.

III. CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court disregard the Appendices attached to ZDI's Opening Brief, as well as ZDI's citations to Supplemental Materials and the Trial Brief Appendices. The Commission also requests that the Court deny ZDI's belated request for an award of attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 16th day of June, 2008.

ROBERT M. MCKENNA
Attorney General



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Gambling Commission

Appendix A

APPENDIX A

LOCATION ZDI's Opening Brief	PASSAGE	BASIS OF OBJECTION	RELIEF SOUGHT
Appendix 1		Appendix 1 is not part of the administrative record, the clerk's papers, or the record before the superior court, and has been appended to ZDI's Opening Brief without permission from the Court of Appeals.	Disregard Appendix 1.
Appendix 2		Appendix 2 is not part of the administrative record, the clerk's papers, or the record before the superior court, and has appended to ZDI's Opening Brief without permission from the Court of Appeals.	Disregard Appendix 2.
Appendix 3		Appendix 3 is not part of the administrative record, the clerk's papers, or the record before the superior court, and has been appended to ZDI's Opening Brief without permission from the Court of Appeals. Unfair and prejudicial to include complaint regarding issues that post-date superior court's final order.	Disregard Appendix 3.
Page 3	"Presently there are 135 ZDI VIPs. Declaration of Jay Gerow dated October 7, 2007 ("Gerow Dec.")"	The declaration cited to post-dates the superior court's August 17, 2007 final order.	Disregard passage.

		Unfair and prejudicial to include reference to document that is not in administrative record or the clerk's papers and that post-dates superior court's final order.	
Page 4	"In June of 1998, the Commission approved 18,000 tribal lottery system terminals that rely upon cash card technology. AR 878, 536 and Appendix 1."	Appendix 1 is not part of the clerk's papers or the record before the superior court. Neither AR 536 nor AR 878 support the preceding factual assertion.	Disregard passage.
Page 4	"By March 30, 2007, after denying use of cash card technology to ZDI, the Commission increased the number of terminals available to nearly 30,000. CP 583-609"	CP 583-609 were not admitted as evidence by the superior court and are not part of the administrative record.	Disregard passage.
Page 4	"While machine gaming at tribal venues generates billions, pull-tab gaming revenues are spiraling downward from a market high in 2001. CP 624"	CP 624 was not admitted as evidence by the superior court and is not part of the administrative record. AR 623 does not support the factual proposition.	Disregard passage.
Page 7	"ZDI asked the Commission to agree to a rule change to add the term 'cash card' to its rules. CP 770."	CP 770 is ZDI's own motion for costs. This citation does not support the preceding factual assertion.	Disregard passage.
Page 7	"The Commission refused. CP 295-	CP 295-300 were not admitted into	Disregard passage.

	300."	evidence by the superior court and are not part of the administrative.	
Page 8	"In July, 2006, the Commission changed its rules to allow the use of a cash card to purchase pull-tabs. CP 658, Appendix 2"	CP 658 was not admitted as evidence by the superior court and is not part of the administrative record. Appendix 2 is not part of the administrative record or the record before the superior court, and has been appended to ZDI's Opening Brief without permission from the Court of Appeals.	Disregard passage.
Page 9	"In January 2008, the Commission passed a new rule that it adopted in retaliation for ZDI's challenge of its authority. State's Brief, Appendix C. The new rule purports to prohibit ZDI's upgrade with regard to the redemption of prizes. An action is currently pending in Thurston County to invalidate the new rule on several grounds. State's Brief, Appendix C."	Appendix C post-dates the administrative and superior court proceedings in this case and has been appended to ZDI's Opening Brief without permission from the Court of Appeals.	Disregard paragraph, and Appendix 3.
Page 12	"Cash cards have never been a prohibited prize. In fact, cash cards are prizes for pull tabs just like gift certificates are prizes for pull tabs. A cash card prize may be attached to the flare and removed when the winning ticket is played. When the cash card is a prize it is the same as merchandise. The card has market value. Cash cards are traded over	Facts asserted without citation to record below. CP 183 was not admitted by the superior court as part of the record below and should be disregarded.	Disregard passage.

	the internet and sold in grocery stores. AR 794; CP 183."		
Page 14-15	"Historically the Commission followed the adage that any innovation that improves regulatory control is permitted. AR 728; CP 157-58"	Neither AR 728 nor CP 157-58 support the factual assertion being made. CP 157-58 is from an unsigned and undated declaration that is not part of the Administrative Record and was not considered by the superior court during its deliberations.	Disregard passage.
Page 15	"Computerized innovation such as the limited cashier function available using cash card technology meets the regulatory and policy objectives of the agency. CP 158-59; AR 728."	Neither CP 158-59 nor AR 728 support the factual assertions set forth in this passage. CP 158-59 is from an unsigned and undated declaration that is not part of the administrative record or the record considered by the superior court.	Disregard passage.
Page 17	"After the fact finding hearing and prior to its ruling on the petitions for review, the Commission changed WAC 230-12-050(2) to specifically authorize the purchase of a pull tab with a cash card. CP 318."	CP 318 was not admitted as evidence by the superior court and is not part of the administrative record.	Disregard passage.
Page 21	"The Commission reaffirmed its position that gift certificates are merchandise prizes for pull tabs by field operation memo. CP 658"	CP 658 was not admitted as evidence by the superior court and is not part of the administrative record.	Disregard passage.

Page 21	"The Commission has recently proposed a rule consistent with its Field Operations Memo affirming the use of gift certificates as pull tab prizes. Appendix 2."	Appendix 2 post dates the administrative and superior court proceedings and was appended to ZDI's Opening Brief without permission from the Court of Appeals.	Disregard passage.
Page 21.	Citation to CP 238	CP 238 is supplemental documentation that was not admitted or considered by the superior court.	Disregard citation.
Page 23	"ZDI has asked Thurston County Superior Court to void the new rule on several grounds. Appendix 3 [sic.] The rule was adopted without consideration of the impact on small business in violation of the APA. RCW 34.05.310(2); RCW 19.85.040. The rule was adopted by two votes, rather than the statutorily required three votes. RCW 9.46.050(2). And finally, the rule violates the rights of ZDI and is without statutory authority. ZDI expects the rule will be deemed void."	Appendix C post-dates the administrative and superior court proceedings in this case and has been appended to ZDI's Opening Brief without permission from the Court of Appeals.	Disregard passage and Appendix 3.
Page 28	"Instead the phrase is a shorthand for a parliamentary discussion in the legislature when gambling bills reach floor action. CP 660-62. Legislators have used the term to inquire whether a measure violates the [sic.] art. II, § 24provision of the	CP 660-62 was specifically excluded as evidence by the superior court.	Disregard passage.

	constitution that requires supermajority vote [sic.] of the legislature to authorize any lotteries. *Id* [sic.] The parliamentary rulings have been justified through consideration of whether the measure authorizes gmbling not previously approved – hence the inquiry "Is it an expansion of gambling." [sic.] The parliamentary rulings are not particularly dispositive, but rather political in nature. *Id.*"		
Page 29	"The Commission never articulated any reason why a cash card is permitted to purchase a pull tab, but not to award a prize. CP 229-30. There is no rationale for such a distinction. *Id.*"	CP 229-30 is not part of the administrative record and was not admitted as evidence by the superior court.	Disregard passage.
Page 34	"None of the pull tab licenses are generating five million dollars of revenue in pull tab gambling." CP 487."	CP 487 is not part of the administrative record and was not admitted as evidence by the superior court.	Disregard passage.

NO. 36751-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON GAMBLING COMMISSION, Appellant and Cross-Respondent, v. ZDI GAMING, INC., Respondent and Cross-Appellant.	CERTIFICATE OF SERVICE

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

I certify that on June 16, 2008, I caused a true and correct copy of the State's Supplemental Reply Brief of Appellant/Cross Respondent in the above-referenced matter to be served upon the parties herein, as indicated below:

COURT OF APPEALS, DIVISION II 950 BROADWAY, SUITE 300 TACOMA, WA 98402	☒ U.S. Mail ☐ Hand Delivered ☐ Overnight Express
JOAN K. MELL MILLER QUINLAN & AUTER, P.S., INC. 1019 REGENTS BLVD., SUITE 204 FIRCREST, WA 98466	☒ U.S. Mail ☐ Hand Delivered ☐ Overnight Express

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of June 2008.

MARLENA MULKINS
Legal Assistant

ORIGINAL