

NO. 44283-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

JAY GEROW AND ZDI GAMING, INC.,

Appellants,

v.

WASHINGTON STATE GAMBLING COMMISSION,

Respondent.

**MR. GEROW AND ZDI GAMING, INC.'S AMENDED OPENING BRIEF**

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## **I. INTRODUCTION**

This court is asked to void two rules adopted by the Washington State Gambling Commission (WSGC.) Neither rule improves the regulatory control of gambling. The rules serve no legitimate purpose other than to confuse licensees and delay a final outcome in the ongoing litigation among Mr. Gerow, his company, and the WSGC and its commissioners. The rules defy logic and are a strained effort to uphold an unlawful market advantage for tribal vendors without legislative approval. This court should declare them void and unenforceable.

## **II. ASSIGNMENTS OF ERROR**

- A. Did the trial court err when it denied supplementation of the record?
- B. Did the WSGC err in adopting WAC 230-14-047 and WAC 230-06-003?
- C. Was Mr. Gerow and his company the prevailing party for purposes of awarding fees and costs under the Equal Access to Justice Act at the trial level and on appeal?

## **ISSUE STATEMENTS**

- 1. Should the trial court have considered the WSGC's past practices of requiring three votes when adopting rules and its procedures for approval of gambling equipment by its licensing division in a rule challenge where the Gambling Act requires three votes for action relating to the regulation of gambling?
- 2. Did the WSGC fail to get the requisite votes?
- 3. Did the WSGC fail to prepare the necessary SBEIS?

4. Did the WSGC act outside the scope of its authority?
5. Did the WSGC act arbitrarily and capriciously?
6. Is Mr. Gerow entitled to attorney's fees and costs at the trial level and on appeal?

### **III. STATEMENT OF THE CASE**

After Mr. Gerow and his company proved the ZDI cash card VIP electronic video pull-tab dispenser complied with the law, the Washington State Gambling Commission (WSGC) changed its rules. AR 118.<sup>1</sup> The WSGC implemented two new regulations, WAC 230-14-047: "Standards for electronic video pull-tab dispensers" and WAC 230-06-003: "Defining "cash." The WSGC refuses to approve ZDI's VIP, relying in part upon these rules. AR 514.

ZDI challenges the validity of these rules by way of a declaratory judgment action brought under the Administrative Procedure Act, RCW 34.05.570 (2)(b)(i). CP 907. The rules are void for many reasons. First, only two gambling commissioners voted in favor of the rules. AR 230-231, CP 66. Second, they voted without a small business economic

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<sup>1</sup> The trial court entered formal Findings of Fact and Conclusions of Law on August 17, 2007 on its letter opinion ruling in favor of ZDI from June 27, 2007 in ZDI's action to approve its VIP. See, *ZDI Gaming Inc., v. State*, 173 Wn.2d 608, 268 P.3d 929 (2012) decided January 12, 2012 upholding trial court's decision. CP 18, 65, 160 - 162, AR 525 - 535. On July 23rd, 2007, WSGC staff filed a Pre-Proposal Statement of Inquiry (CR-101) "Repealing Electronic Video Pull-Tab Dispensers." The WSGC adopted its final proposal referred to as "Alternative #1" on January 11th, 2008, which approved the ZDI VIP in part and rejected "Alternative #2" that specifically authorized the automated recording of a prize of twenty dollars or less on the cash card used to purchase a paper pull-tab. AR 117.

impact statement (SBEIS) or compliance with the rule making requirements related to small businesses. AR 119, CP 70. Finally, the rules lack any regulatory foundation, and are disfavored under the Gambling Act. The WSGC's adoption of these rules is equally arbitrary and capricious as its earlier decision to ban ZDI's cash card VIP. AR 15 - 18 Transcript Jan 11th, 2008 and AR 208 ("The Gambling Commission's order is arbitrary and capricious".)

#### ZDI's Cash Card VIP

ZDI's approved VIP dispenses paper pull-tabs to players in restaurants, bars, bowling alleys, non-profit bingo halls, and other charitable venues. CP 884. In 2005, ZDI upgraded its VIP to accept cash cards in addition to currency. CP 885. ZDI's cash card technology works much like a gift card. CP 885-886. Players like the convenience of cash cards and the ability to play without finding a cashier. CP 887. Operators prefer cash cards because the automated limited cashier feature reduces the overhead needed to staff full-time cashiers to redeem pull-tab winnings. AR 181 (Lt. Gov. Brad Owen's Letter in Support of VIPs with cash cards), AR 184 (Wash. Restaurant Assoc. Ltr. in support of VIPs with cash cards), CP 72. Also, the technology eliminates the exchange of cash with an unregulated cashier, which reduces risk of loss. Id. Cash card technology provides data reports unavailable with cash redemption.

Id. In short, cash cards that automatically record the prize at the dispenser improve the regulatory control of pull-tab gaming. CP 887.

ZDI has established the regulatory benefits of cash card technology as a matter of law. AR 308. ZDI has proven its cash card VIP does not expand gambling. AR 312. ZDI has also shown its cash card VIP is not a gambling device. CP 889 - 892.<sup>2</sup> Similar cash card technology used by tribal vendors has been authorized by the WSGC by compact. AR 308, CP 951, AR 580. Tribal operators have thousands of machines. Video pull-tabs dispensers never exceeded 150 in 55 locations. AR 361.

Historically, the WSGC approved any technological innovation that improved the regulatory control of gambling when the innovation complied with its rules. ZDI's cash card VIP complies with its rules. AR 311, *ZDI Gaming Inc., v. State*, 173 Wn.2d 608, 268 P.3d 929 (2012). When ZDI proved this, the WSGC changed its rules. CP 65-68, AR 234.

ZDI contends the WSGC refuses to approve its upgrade because it has promised a market advantage in machine gaming to tribes without legislative approval and in violation of Mr. Gerow's rights. CP 49, 51, 336. Mr. Gerow and his company are pursuing their claims in Thurston

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<sup>2</sup> On remand of the earlier ZDI case to approve its technology, the WSGC has now after Supreme Court review declared the ZDI cash card VIP a "gambling device" in direct contravention to the findings and conclusions of its ALJ, formerly a staff attorney to the WSGC. ZDI is amending its petition for judicial review in that matter to invalidate its sham decision that lacks any factual or legal foundation and is pure harassment and retaliation. See in part, CP 903.

County Superior court in a separate damages case. Thurston County Superior Court Cause No. 08-2-02518-4. Commissioner Ellis and Commissioner Rojecki are named individually in that suit. Id. These officials are the same officials responsible for the rules at issue in this case.

#### Alternative # 1

These officials first deployed a scorched earth strategy in retaliation for ZDI proving their past actions were arbitrary and capricious and outside the scope of their authority. CP 161-163, AR 483, 486. First, they threatened ZDI's customers that they would take away all the technology that had been in play for over a decade, not just ZDI's upgrade. AR 515, 561, 576. Staff proposed under the misnomer "Rules Simplification Project Rules" a ban on all video dispensers at the WSGC meeting in Yakima. AR 576. The stakeholders were outraged. AR 496 - 513. The WSGC received seventeen letters and comments upon initial filing of the rule proposal. Id. Eight stakeholders testified in opposition at the hearing to file the rule proposal, to include the Recreational Gaming Association, and the Washington Charitable and Civic Gaming Association. AR 577 - 587. The proposal was continued to the October commission meeting.

In October in Spokane, even more stakeholders voiced their concerns. AR 465 (26 written statements). The commission's antics

garnered the attention of concerned public officials. AR 465 (Senator Mark Schoesler of the Ninth Legislative District AR 262, Congresswoman Cathy McMorris Rodgers AR 292-293). When a stakeholder asked the commissioners why they were proposing the ban, Senator Prentice, an ex-officio commissioner at the time responded: “That was the danger when someone over-reaches; they end up lucky to escape with their hides. That is the reality of it.” AR 470. The commissioners voted to file the petition for rule change, banning all video dispensers.

In November in Seattle, the commissioners held a hearing on their rule proposal. AR 237. (Now 30 written statements in opposition) AR 354. For the first time, staff presented the commissioners with “Alternative #1”, the proposal the commissioners ultimately adopted. This proposal was not a ban on all video dispensers. AR 354. Nor was it a ban on video dispensers with cash cards. AR 354 (Expressly authorizing the purchase of pull-tabs automatically at a dispenser with a cash card, but silent as to recording a prize on the cash card).

Staff claimed to have worked with stakeholders in development of these rules when they did not. AR 355, 137-138. Further, staff misrepresented the new rules as maintaining the “status quo” when the rules did not maintain the status quo; the rules were entirely new. AR 355.

Jay Gerow offered “Alternative #2”, a variation on WAC 230-314-

047. His proposal did reflect stakeholder input and was supported without opposition. AR 354, Jan. 11, 2008 Hearing at 8 - 15. Alternative #2 expressly authorized a limited cashier feature for winning tickets of twenty dollars or less. AR 123. The commissioners failed to provide any regulatory reason to oppose Alternative # 2. Commissioner Rojecki simply said that it would compromise their legal standing on appeal in ZDI's action for approval of its upgrade. AR Jan. 11th, 2008 at 17. Commissioner Ellis thought, "that the addition of having the machine credit wins under \$20 to the gift card is a step that we are not authorized to take." He referenced an attorney general opinion that advised video pull-tabs were not the same as paper pull-tabs. He did not recognize in his reasoning that ZDI's cash card VIP is a paper-pull-tab dispenser, and not a video pull-tab machine. AR Jan. 11th, 2008 transcript at 16. Neither commissioner provided any rationale for deciding a player could purchase a paper-pull-tab from a dispenser with a cash card, but could not collect the prize back on the card. Staff cautioned that "Approving Alternative #2 will impact current litigation." AR 120. Thus, the only reason for omitting an express authorization for the automated limited cashier feature from Alternative #1 was the lawsuit.

Alternative #1 proposed two new rules: WAC 230-14-047 and WAC 230-06-003. AR 238.

*A. WAC 230-14-047 - Standards for Electronic Video Pull-tab Dispensers*

When ZDI developed its cash card VIP, there was a rule for pull-tab dispensers. WAC 230-14-045. See also, AR 15 (without underlined text at subsection 5). ZDI's cash card VIP complied with this rule and all the other rules. AR 422. However, the WSGC could not simply approve the upgrade. They wanted to stop ZDI from prevailing, so they made up a new rule that expressly banned all innovation in video pull-tab dispensers:

**“Electronic video pull-tab dispensers must be approved by us prior to use, meet the requirements below, and **may incorporate only the features below and not perform additional functions.**”**

WAC 230-14-047 (emphasis added).

This new rule prohibits any innovation in the technology. Before this limitation was adopted, ZDI could incorporate new and novel features so long as the features did not violate any rule and did not impede regulatory control of the activity. WAC 230-06-050.

The new rule expressly permits the use of a cash card in part. Previously, there was no rule that expressly permitted the use of cash cards to purchase pull-tabs at the dispenser. Contrary to the representations of staff to the commission, this rule did not “explicitly authorize dispensers currently in play” because ZDI's cash card VIP was the first to be developed and the commission had still not approved it.

Thus, the rule did not preserve the status quo as represented by staff. In fact, on the issue of innovative changes, the rule reversed the status quo.

**B. WAC 230-06-003 - Defining "Cash"**

The commission's new definition of "cash" was also novel:

"Cash," when used as a noun in this title, means currency in the form of coins or bills issued by the government of the United States or Canada only and does not include electronic, digital or other representations of money or other methods of payment.

WAC 230-06-003.

The commission adopted a rule whereby its meaning of "cash" applies only where the term is used as a "noun." The rule making file offers little to explain the purpose of this new definition. Staff merely mentioned it in passing when introducing Alternative #1: "Lastly it creates a definition for cash which we have not had before." AR Jan. 11th, 2008 transcript at 8. In its rule proposal paperwork staff reported: "A new rule would define cash." AR 117. The apparent purpose for the new definition of "cash" was to undermine ZDI's success in proving that "cash" includes cash equivalents like cash cards, which then could be used to purchase paper pull-tabs from its dispenser and to record the prize automatically without a cash exchange with a cashier. See, *ZDI Gaming Inc., v. State*, 173 Wn.2d 608, 268 P.3d 929 (2012). The WSGC assigns its own novel definition to distinguish its meaning from the meaning assigned to it by the Supreme

Court.

The logic of these rules was not universally accepted by the commissioners. The vote count was not unanimous. Only three of the five commissioners were present at the vote on final adoption.

Rule Making: The Adoption of Alternative #1

***C. Only Two Votes - Ellis and Rojecki***

The two votes in favor of Alternative # 1 were Commissioners Ellis and Rojecki.

***D. Neither Offered Legitimate Regulatory Rationale***

Commissioner Ellis spoke the most. He said he did not “disagree with anything that the proponents of alternative 2 have offered.” AR Jan. 11th, 2008 transcript at 15. He mentioned the record did not have information that he thought important to electronic video pull-tab dispensers generally, such as the “speed of play” and “social impacts.” Id. at 16. He basically indicated he favored a ban on all video dispensers, but did not think a ban would be fair. Id. He could not offer any reason why allowing a limited automated cashier feature would be problematic.

Commissioner Rojecki voted for Alternative #1 because the Attorney General defending in ZDI’s lawsuit against him and the agency told him to vote for it:

“And basically my concern revolves around the legal process.

And I've told others within the industry that, you know our AAG, our Attorney General, they have advised us on specific aspects that alternative 2 does not address. Not necessarily specifically, but there's similar provisions. And I just don't think it's in our best interest at this current time as this Commission has made a decision to appeal some legal proceedings that have happened in lower courts. And for us to defy the orders of our AAG and AG, I just think it is not in our best interest as a Commission." AR Jan. 11, 2008 transcript at 17.

The Chair, Commissioner Niemi, voted against Alternative #1. AR Jan. 11th, 2008 transcript at 18. She recognized the public interest in protecting gambling revenues that were rapidly decreasing with the tribes' market advantage:

"We are the only state in this whole country that does not have revenue sharing with tribal gambling....This year any community that has gambling may tax for that gambling. This is all non-tribal, and they do....Well that revenue is going away. And it seems to me if there's any little thing we could do to help the local communities gain somewhat, we should do that."

Id.

The commission and its staff did nothing to evaluate the impact on the industry or any of the small businesses affected.

***E. No Small Business Economic Impact Statement***

Staff provided a disingenuous excuse for failing to prepare a small business economic impact statement (SBEIS) required for all rule making that will impose more than minor costs of businesses in an industry, RCW

19.85.030:

“Alternative #1 does not require a Small Business Economic Impact Statement (SBEIS) because it provides clarification without changing current requirements. If the Commission were to move forward with the original rule proposal, we would need to determine whether an exemption not requiring an SBEIS applies. If an exemption does not apply, an SBEIS would need to be completed.” AR 119.

The rule making file lacks analytical data regarding the regulatory impacts of these new rules. No one took the time to assess the devastating financial losses to ZDI from a new rule that would essentially ameliorate its entire research and development team. No one took the time to assess the market advantages to Alternative #2, and the losses the industry would continue to suffer if unable to compete due to antiquated technology and high staffing overhead in a down market. No one reported the costs associated with substituting new programming on the ZDI cash card VIP dispensers to make cash cards partially work. The commission’s interpretation of Alternative #1 required ZDI to reprogram the software to accept a purchase transaction, but not a redemption transaction. No one reported the costs associated with resubmitting the reprogrammed dispensers to the lab for approval, from the agency side or the industry side.

In short, the WSGC did not act within the scope of its authority, it acted irrationally and it adopted two new rules that are void because they

are arbitrary and capricious.

#### Trial Court Error on Record for Review

Before the trial court ruled on the validity of the rules, the court rejected ZDI's request to supplement the rule making file. AR 657, 719-720. The Legislature set forth a very specific voting requirement of three commissioners "for all actions of the commission relating to the regulation of licensing under" the Gambling Act. RCW 9.46.050. The rule making file does not include a record of evidence for deciding what actions of the commission are "actions ... relating to the regulation of licensing." There is no opportunity to develop such a record during the rule making process because the vote is unknown until taken, and then it is too late to add to the record other than on review.

The WSGC commission does not have a rule that provides any clarity to the meaning of what actions relate to the "regulation of licensing." ZDI offered exhibits to assist the court in its construction of the statute to the vote taken. CP 553 - 554. The exhibits included testimony from Commissioner John Ellis stating the licensing division of the WSGC approves or does not approve equipment like the ZDI VIP, CP 567; testimony from the Assistant Director for licensing operations David Trujillo saying the lab at the WSGC within the licensing division looked at the ZDI cash card VIP to "make a decision as to whether or not

he would approve it.” CP 570. He also explains the process for approval of ZDI’s equipment, from the submission of an application, to review by the lab, and the GET team within the licensing division. 571 - 578. The application forms for approval of ZDI’s equipment state “All electronic or mechanical devices and equipment (including software) must be analyzed and approved by the Gambling Commission before they can be sold, rented or otherwise supplied...” AR 585. Robert Tull, a former gambling commissioner, offered his testimony regarding the historical practices of the agency to require a vote of three commissioners when adopting rules. He attaches to his declaration the minutes from meetings where the commission ruled on and required a vote of three to adopt rules, including a rule regarding gambling equipment: “regulation of disposable bingo cards.” AR 626, 645-648, 652, 655. He also testifies that Alternative # 1 required three affirmative votes because the rules impact the rights of licensees.

Agency briefing materials and references to the mandate for small business assessments was also offered. AR 631 - 642. The WSGC had been briefed on the subject two meetings before voting on Alternative # 1 that did not include an SBEIS. CP 636, 665. In their briefing materials on the subject, the staff concedes most of its licensees qualify as small businesses under the act. CP 631.

### Trial Court Error on Petition for Judicial Review

On November 8th, 2012, the trial court published a written opinion denying any declaratory relief to Mr. Gerow and his business. CP 960-962. Later, the court formalized its decision and entered an “Order On Judicial Review” on December 7th, 2012. CP 965-966. The court denied reconsideration on November 30th, 2012. CP 963.

The trial court disregarded the plain language of the Administrative Procedure Act (APA) to reach its result. The court decided the Gambling Act provisions were more specific than the APA, even though the only authority for the gambling commission to adopt rules is under the APA, and the APA has a definition of “licensing,” where the Gambling Act does not. RCW 9.46.070(14) (“All rules and regulations shall be adopted pursuant to the administrative procedure act, chapter 34.05 RCW.”).

The trial court illogically concluded the rules regarding the type of gambling equipment ZDI, a licensed manufacture may lease or sell to its customers, who are also licensees, “does not affect the license of a business or individual.” CP 961. The court said the rules “determined the functions of pull-tab machines that were permissible.” *Id.* Under the APA, “licensing” means “the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.” RCW 34.05.010(9)(b). A “license” is an approval or similar form of

authorization required by law. RCW 34.05.010(9)(a). Thus, Mr. Gerow and ZDI contend the trial court erred in applying basic principals of statutory construction.

Also in error, the trial court decided an SBEIS was not needed because ZDI's need to compete was not a "cost." AR 961. The court did not mention the "costs" to ZDI of reprogramming its ZDI cash card VIP to meet the requirements of the new rules, or the lab fees to review the reprogrammed equipment, or the staffing costs to review the equipment again. The trial court did not mention the costs to ZDI, it's customers, and other product developers who could no longer support any research and development since the new rule prohibited all innovation.

Finally and again in error, the trial court said that Alternative #1, "was necessary to distinguish pull-tab machines from other gambling machines to provide clear and consistent regulation of different gambling equipment." AR 962. The trial court reached this conclusion without any reference to the express reasoning of the commissioners who voted in favor of the proposal. The trial court relied upon a reason never expressed by the WSGC to hold the decision was not arbitrary and capricious. The trial court did not apparently understand that electronic video pull-tab dispensers operated for more than ten years without a rule to distinguish them from other equipment and without any regulatory concerns. AR Oct.

12th, 2007 transcript at 11 - 12. Mr. Gerow and ZDI maintain there was no reason to adopt Alternative # 1 over Alternative #2, other than to protect an unlawful market advantage for tribal vendors and to defending against their lawsuit that names both Ellis and Rojecki for supporting this unlawful market advantage without legislative approval. They ask this court to void the rules because the WSGC acted outside the scope of its authority; the rules did not receive the requisite three votes; a SBEIS was required; and the commission's adoption of the rules was arbitrary and capricious.

#### IV. ARGUMENT

##### **A. *De Novo Review***

An appellate court reviewing agency action, such as rule making, reviews the record de novo without deference to the trial court. *D.W. Close Co., Inc. v. Wash. State Dept. of L&I*, 143 Wn. App. 118, 177 P.3d 143 (2008).

##### **B. *The WSGC Must Protect Pull-Tabs, A Social Pastime That Serves The Public Interest***

Judicial review of the WSGC's rule making requires deference to the Legislature's declaration that pull-tabs are a favored social pastime. RCW 9.46.010. The Legislature has found that the raising of funds for the promotion of bona fide charitable or nonprofit organizations is in the

public interest as is participation in such activities and social pastimes. *Id.* Pull-tabs are specifically authorized as a commercial stimulant and for charities and non-profits. RCW 9.46.0217 and .0325. These games are not to be regulated in a manner that restricts participation by individuals in the play of pull-tabs. RCW 9.46.010. Mr. Gerow and his company contend the WSGC adopted the rules at issue in this case in violation of this policy.

***C. The Trial Court Should Have Admitted The Supplemental Evidence***

On appellate review of an administrative action, the court may consider the testimony of a witness by affidavit when the review concerns the authority with which the agency acted. *Hunter v. Univ. of WA*, 101 Wn. App. 283, 2 P.3d 1022 (2000). A court may take additional evidence where needed to decide disputed issues regarding the unlawfulness of procedure of the decision-making process. *Aviation West Corp. v. Wash. State Dept. of L & I*, 138 Wn.2d 413, 980 P.2d 701 (1999). Review of agency rule making is not limited to consideration of the reasons contained in the agency's concise general statement. *Id.*

There are two procedural grounds for this court to invalidate the rules at issue in this case. RCW 34.05.320 (voting requirements) and RCW 19.85.030 (SBEIS). The supplemental information provides helpful

information regarding agency practice and procedure.

In addition, the supplemental exhibits provide evidence that is typically afforded “great weight” when construing agency statutes and rules. *Ball v. Smith*, 87 Wn.2d 717, 723, 556 P.2d 939 (1976); *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956). Silent acquiescence of the legislative body over a long period of time show official approval or acceptance of a particular construction of a statute. *Id.* Evidence of past practices is properly admitted when considering the propriety of agency action. *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). Past practices of an agency may bind the agency when the duration and scope of the agency practice is lengthy and consistent. *Bowles v. Wash. Dept. Ret. Systems*, 121 Wn.2d 52, 66, 847 P.2d 440 (1993). The WSGC’s historical practice of requiring three votes when adopting agency rules should have been considered. In addition, the agency’s practice and procedure in approving equipment in its “licensing” division shows it took licensing action.

The trial court erred in striking references to these helpful materials.

***D. Two Votes Insufficient***

The Gambling Act requires three votes for actions of the commission relating to the regulation of licensing. RCW 9.46.050. Three members constitute a quorum. *Id.* When only three members are present,

all three members must vote unanimously in favor of any rule proposal. The WSGC has no power to adopt a rule unless it does so pursuant to the APA. RCW 9.46.070(14). Under the APA, not all agency activity amounts to rule making. RCW 34.05.010 (16). A “rule” means any agency order, directive, or regulation of general applicability. *Id.* In particular, any rule that establishes, alters, or revokes any mandatory standards for any product or material, which must be met before distribution or sale. *Id.* at (e). The APA standards for rule making do not apply to statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public. *Id.* at (e)(i). Thus, the WSGC may act with a mere majority (2) of a quorum of three when it is acting on matters internal to the management of the WSGC. However, when adopting rules such as rules that mandate approval of electronic video pull-tab equipment, then it must follow the APA and get three votes.

Under the APA, the “agency head” presides over agency rule making. RCW 34.05.324. The agency head has ultimate rule making authority, even if portions of the proceedings are delegated to a presiding officer. *Id.* The APA defines an “agency head” as the body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. RCW 34.05.010. When the “agency head” is a body of

individuals like it is with the Gambling Commission, a majority of those individuals constitutes the “agency head.” *Id.* The WSGC consists of five members. RCW 9.46.040. Thus, three members constitute a majority for purposes of adopting rules under the APA.

This three vote requirement is entirely consistent with the Gambling Act requirement of three votes for actions of the commission relating to the regulation of licensing. The Gambling Act does not define the term “license,” but the APA provides a definition that necessarily includes the approval of gambling equipment. RCW 34.05.010(9)(a). A “license” means an “approval” or “similar form of authorization required by law.” *Id.* “Licensing” is the agency process respecting the issuance, denial, revocation, suspension, or modification of a license. *Id.* at (9)(b).

WAC 230-14-047 is a rule “related to the regulation of licensing” because it is a rule mandating approval of electronic video pull-tab equipment. The rule identifies the criteria for the WSGC to approve electronic video pull-tab equipment, or deny it.

The WSGC argues its approval process for gambling equipment is not “licensing” because it only issues licenses to people or businesses. CP 849. It contends ZDI’s manufacturer’s license was unaffected by the rules. *Id.* at fnnt 5. Its argument defies the plain language of the APA, and presupposes the agency has unilateral authority to decide arbitrarily what

is and what is not a “license” or “licensing.” It does not have that much power.

The rules directly affect the value of ZDI’s manufacturer’s license and the licenses of the operators with whom he markets technology. With the rule, ZDI cannot get its ZDI cash card VIP approved for use. AR 514. This means no one can legally possess it. RCW 9.46.215.

The trial court made no effort to reconcile RCW 9.46.050 with the provisions of the APA. The trial court simply disregarded the APA when the APA controls rule making, even the rules of the WSGC. The APA should be given effect and not rendered superfluous by ignoring it. *See State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010)(“we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous....it is the State’s interpretation that would result in superfluous statutory language.” Id. at 823.

Unanimity among a simple majority is further supported in the common law. Long ago the Washington State Supreme Court adopted the “American Rule”, which is a legal principle whereby the majority of a body may act and take action so long as the body acts with unanimity. *State ex. rel. King County, v. Tac Com’n of State of Wash.*, 174 Wash. 336, 24 P.2d 1094 (1993). A split vote among the majority of the body results in a failed measure. Here, all three had to vote in favor of the rule

proposal. They did not. The measure failed. This court should declare WAC 230-14-047 and WAC 230-06-003 void.

***E. SBEIS Needed***

When adopting the Regulatory Fairness Act, the Legislature issued findings to the effect that “unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes.” RCW 19.85.020. Findings at (7) “The process by which state rules are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses, to examine the impact of proposed and existing rules on such businesses, and to review the continued need for existing rules.” *Id.* finding (10). The APA mandates public examination of a proposed rule’s impact on small business. RCW 34.05.320(j). The Regulatory Fairness Act requires preparation of an SBEIS if the proposed rules impose more than minor costs on businesses in an industry. RCW 19.85.030. Minor costs are \$100.00. RCW 19.85.020. An SBEIS addresses issues critical to the viability of small businesses such as the number of jobs that will be created or lost as the result of compliance with the proposed rule. RCW 19.85.040. It must report the costs of equipment, supplies, labor, professional services, and increased administrative costs. RCW 19.85.040.

The WSGC did not follow the APA or Regulatory Fairness Act when adopting and implementing Alternative #1. It claims it did not need to because the rules maintained the “status quo.” Commissioner Bierbaum did not believe staff’s representations that the proposed rules maintain the status quo. AR 355, AR Nov. 16th, 2007 transcript at 13.

There is no “status quo” exemption from the Regulatory Fairness Act. Even if there was, the rules were new rules with new requirements that did not maintain the “status quo.” The new rules banned the ZDI cash card VIP when formerly it met the requirements of the all of the rules. The new rules mandated approval of all electronic video pull-tab dispensers and prohibited any new innovation not expressly authorized under the rule. The new definition of “cash” changed the status quo wherein pull-tabs were played back, and where gift certificates were used. WAC 230-14-090(3). It also created inconsistency in rules that explicitly allowed cash equivalents. WAC 230-15-553. Most importantly, the rule changed the plain meaning of the term “cash”, making up a non-sensical version just for pull-tabs in direct contravention to the Supreme Court’s decision in favor of ZDI. *ZDI Gaming Inc., v. State*, 173 Wn.2d 608, 268 P.3d 929 (2012). The WSGC has no power to simply make up the meaning of ordinary terms in direct contravention to the ordinary dictionary meaning. The term “cash” is not a term of art susceptible to

more than one meaning. *See State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002). “Cash” means currency and other cash equivalents. *ZDI Gaming Inc.* at 621-622. The WSGC cannot make “cash” mean something different just to avoid liability. Its new definition restricts regulatory control, which is contrary to its purpose.

The notable costs that should have been analyzed include the costs associated with staffing the redemption of paper pull-tabs with cashiers as opposed to automatically at the dispenser. There were costs associated with reprogramming the ZDI cash card VIP to shut down the limited automated cashier feature. ZDI and its vendors expended resources on equipment, supplies, and labor. There were costs for resubmitting the equipment for approval, to include staffing dedicated and assigned to review the revised technology. There were costs for each and every licensee innovating in pull-tab dispensing who had to lay off staff whose jobs were related to research and development of pull-tab gaming innovations. There simply is no excuse for the WSGC to have refused the preparation of a SBEIS. The WSGC should have prepared an SBEIS and it erred in failing to do so. This court should void its rules.

***F. Adopting Rules that Restrict the Regulatory Control of Pull-tabs To Avoid Liability Is Outside the Scope of Agency Authority and is Arbitrary and Capricious***

Gambling regulation is a subject unique from other government activities because the State Constitution prohibits gambling except when the Legislature approves it. Const. art. II § 24. Given the Legislature's exclusive role in approving gambling, the Legislature may not delegate its approval authority to an executive branch agency. The Legislature's exclusive power is non-delegable. *State ex. rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135, 310 P.2d 261 (1957). Only the Legislature may ban Mr. Gerow's equipment, and it has not done so. The Gambling Commission has no power to do so by rule.

When the Legislature adopted the Gambling Act, the Legislature expressed its constitutional duty to "limiting the nature and scope of gambling activities." RCW 9.46.010. The Legislature did not delegate this duty to the Gambling Commission. *Id.*, see also, RCW 9.46.070 (Gambling Commission powers and duties). The intent section of the statute makes no reference whatsoever to the Gambling Commission. Thus, the Gambling Commission has no power to "limit the nature and scope of gambling activities." The Legislature set forth the limits on the nature and scope of gambling activities in the Gambling Act.

The Legislature expressly authorizes pull-tab gambling and

characterizes the activity as a favored “social pastime” and in the public interest to promote charities and non-profit organizations. RCW 9.46.010. This specific approval includes the Legislature’s understanding that pull-tabs are and always have been dispensed from devices. RCW 9.46.116 (Substitution of fees on pull-tab devices instead of a special tax on coin-operated gambling devices). The Legislature cautioned against “restricting participation of individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.” RCW 9.46.010.

The Legislature in 2003 adopted restrictions on the use of cash cards, but did not prohibit their use for gambling. RCW 19.24.005. Cash cards are authorized for gambling. A cash card may be a merchandise prize. WAC 230-14-090. A customer may purchase pull-tabs from a ZDI dispenser with a cash card. WAC 230-14-047. A cashier may add cash prizes from winning pull-tabs to a gift card manually at the counter. AR 182,184.

The Legislature has never expressed any concern about the use of gift cards with gambling. No one else has expressed any concern either. Not one concerned citizen asked the Gambling Commission to adopt Alternative #1. In fact, there was no community nor stakeholder support

for these rules. AR 496-513. Stakeholders were more concerned that the Gambling Commission would adopt its “draconian” proposal to ban the equipment in its entirety. The version adopted was simply the less restrictive of two undesirable proposals. AR 496-513. The Gambling Commission rejected the proposal supported by stakeholders that would allow the innovation and improve regulatory control without expanding gambling. The Gambling Commission chose to instead to ban ZDI’s innovation by rule without any authority to do so.

The Legislature described its duty of “strict regulation and control” of gambling in the provisions of the Gambling Act. The Legislature did not delegate strict regulation and control to the Gambling Commission. The Gambling Commission’s powers and duties are limited to those enumerated in twenty subsections of RCW 9.46.070. Not one of these provisions allows the Gambling Commission to prohibit an automated cashier function. The Gambling Act does not prohibit automation. The Legislature does not require a human cashier for pull-tabs or for any other gambling activity. Not one of the twenty subsections expresses an intent to regulate the manner in which gambling is paid for or prizes are collected.

Subsection (11) of RCW 9.46.070 may not be interpreted to mean the Gambling Commission can prohibit an automated cashier feature

without inappropriately violating the exclusive power of the Legislature. Administrative agencies are “creatures of the legislature without inherent or common-law powers”, and they may exercise only those powers conferred on them “either expressly or by necessary implication.” *Washington Independent Telephone Ass’n v. Telecommunications Ratepayers Ass’n*, 75 Wn. App. 356, 880 P.2d 50 (1994). An enabling statute that does not expressly or by necessary implication authorize a particular regulation, then the regulation must be declared invalid. *Id.*

Subsection (11) allows the Gambling Commission to “regulate and establish the type and scope of and manner of conducting the gambling activities authorized by the Legislature.” Here, the gambling activity is the pull-tab. “Gambling” is a defined term that encompasses risking something of value. RCW 9.46.0237. With pull-tabs, the player wins the prize when the ticket is opened, the gambling activity is complete. Whether or not or how the player collects the prize does not change the value of the prize or the conditions upon which a prize is awarded. AR 203. The opportunity for chance is preprogrammed into the paper ticket. The use of a gift card does not affect the outcome of the game. AR 203. Thus the “manner of conducting the gambling” does not encompass cashier functions. The cashier function is a universal business activity not unique to gambling.

Legislation may be deemed invalid when it lacks appropriate guidelines by which a court can measure the rules made by the agency. *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960). For those powers that may be properly delegated, the Legislature must prescribe specific standards for the agency to follow. *State v. Gilroy*, 37 Wn.2d 41, 221 P.2d 549 P.2d 549 (1950). Authorizing legislation must define what is to be done, how it is going to be done, and the scope of authority by prescribing reasonable administrative standards. *Keating v. P.U.D. No. 1 of Clallum County*, 49 Wn.2d 761, 306 P.2d 762 (1957). None of that is provided here because the Gambling Commission adopted a rule in response to a judicial decision that was critical of them, rather than in response to legislation about electronic video paper pull-tab dispensers.

The Gambling Commission relies upon its general authority, rather than a specific authorizing measure or bill that it requires. It attempts to ban the use of gift cards in the context of a legislatively authorized and favored gambling activity. Reliance upon an enabling act to promulgate rules is generally disfavored under the Administrative Procedure Act. RCW 34.05.322. The enabling act does not provide specific criteria sufficient to warrant an absolute ban on gift cards to store wins. The courts may not create powers not specifically articulated by the Legislature even if the court believes such power would be beneficial,

useful, or reasonable. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998). Gift cards are acceptable recognized tender under state law. Banning the limited cashier feature is an extraordinary and extreme approach not warranted nor authorized under the circumstances. If the Legislature wanted to ban gift cards for purposes of pull-tab gambling they could do so, they have not done so, nor have they asked the Gambling Commission to do so. The rules should be invalidated as the rules are outside the statutory authority of the agency.

When the Gambling Commission adopted WAC 230-14-047 it expressly authorized players to purchase pull-tabs automatically from a dispenser without human interaction in unlimited quantities with a gift card. At the same time under the same rule, the same player was expressly prohibited from collecting any low tier winning pull-tabs cash prizes from the machine on the gift card. Instead, by rule the player is now required to take the winning paper ticket to the counter and ask the cashier to record the cash prize on the card. The two voting members of the Commission did not identify any regulatory purposes for such a prohibition. In fact, Commissioner Ellis opined that the Commission had no authority to adopt the rule he voted on. He preferred the alternative, which was a complete ban on the equipment.

Arbitrary and capricious action is action lacking in any rationale. The rule lacks any regulatory rationale. *WA Federation of State Employees v. State Dept. of General Admin.*, 152 Wn. App. 368, 216 P.3d 1061 (2009). Rojecki's express concern that he did not want to disregard his lawyer's legal advice does not amount to a reason why the public would be harmed by the automated cashier feature. The Chair who voted in opposition to the rule articulated multiple reasons why the rule was unwarranted, namely survival of the industry. Ellis merely expressed a compromise position without any expression of the correlation between the complete ban on the use of gift cards to record a prize and any public policy expressed by the Legislature.

A complete prohibition is the most extreme regulatory position available and may only occur pursuant the state's police powers. Police powers permit regulatory measures that correlate to the protection of the public.

The attorney's general's legal arguments to justify the rule do not equate to the Gambling Commissions reasons for adopting the rule. After the fact justifications do not cure the existing defect.

Further, the Gambling Commission has never attempted to suggest gift cards to record prizes automatically at a dispenser presents a risk of harm to the public. Any such conclusion must be arbitrary and capricious

because essentially the same automated function is used daily across the state with Gambling Commission approval. All of the technology in tribal venues utilize automated cashier features. The Commissioners have approved this technology. The Gambling Commission cannot approve the technology in one venue and ban it in another without identifying any risk of harm to the public without acting arbitrarily and capriciously. Further it is non-sensical to arbitrarily draw the line between purchasing a paper pull-tab with a cash card and adding the prize back to the card. If it can be done manually at the register with an unlicensed cashier, it should be permissible to allow it automatically at the dispenser where there are better regulatory controls. Here their proposal is totally arbitrary and capricious. Alternative #1 should be invalidated as an arbitrary and capricious abuse of agency power, which is the same abuse of power the courts recognized in the litigation successfully approving of ZDI's technology. Alternative #1 should be voided in its entirety.

***G. Attorney's Fees and Costs Requested Trial Level and On Appeal***

Mr. Gerow and his company request an award of attorney's fees and costs under the Equal Access to Justice Act. RCW 4.84.350. ZDI qualifies for an award of attorney's fees and costs as has been previously recognized in the prior ZDI action. AR 539-540, 544-545. So too does Mr. Gerow. As prevailing parties on judicial review, Mr. Gerow and his

business may recover \$25,000.00 for each level of judicial review. *Costanich v. DSHS*, 164 Wn.2d 925, 194 P.3d 988 (2008). Both parties request \$25,000.00 for the underlying petition and up to another \$25,000.00 for a total cap of \$100,000.00 for attorney's fees and costs of appellate level review at the Court of Appeals. Any further review would trigger an additional award.

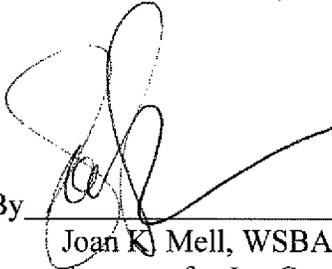
## V. CONCLUSION

Mr. Gerow and his business ask this court to declare WAC 230-14-047 Rules for Electronic Video Pull-Tab Dispensers and WAC 230-06-003 Defining "Cash" void. The WSGC acted outside the scope of its authority when adopting rules that do not authorize use of the ZDI cash card VIP's limited automated cashier feature when the feature improves the regulatory control of pull-tabs, a social pastime deemed to be in the public interest. Maintaining the viability of the pull-tab industry protects the legislative purpose for regulating the activity, specifically to generate revenue for restaurants, bars, pool halls, bowling alleys, and to benefit non-profits and charitable organizations. The rules did not get the requisite votes and the rule making file did not include the requisite SBEIS. Commissioners Ellis and Rojecki's efforts to immunize themselves from liability and to support a market advantage for tribal vendors without legislative approval amounts to arbitrary and capricious

action that is unlawful and unsupportable. An attorney's fees and costs  
award to Mr. Gerow and his company are warranted.

DATED this 12th day of April, 2013.

III BRANCHES LAW, PLLC

By 

Joan K. Mell, WSBA #21319

Attorney for Jay Gerow and ZDI Gaming, Inc.

**Declaration of Service**

I, Jonathan Tretheway, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On April 12, 2013, I caused to be served true and correct copies of the foregoing: Mr. Gerow and ZDI Gaming, Inc.'s Amended Opening Brief, and this Declaration of Service by Electronic mail through the Washington State Court of Appeals Div. II filing system and U.S. Postal Service as follows:

Callie A. Castillo  
Assistant Attorney General  
1125 Washington Street SE  
P.O. Box 40100  
Olympia, WA 98504

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

Dated this 12th day of April 2013 at Fircrest, WA.

  
Jonathan Tretheway, Paralegal

# III BRANCHES LAW

**April 12, 2013 - 3:37 PM**

## Transmittal Letter

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