

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 REPLY BRIEF

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I. RESTATEMENT OF RELEVANT FACTS

The Commission states, “it does not license gambling equipment.” Respondent’s Br. 4. When making this factual assertion, the Commission is actually reaching an erroneous legal conclusion. To do so, the Commission ignores the plain language of the Administrative Procedure Act that defines the term “license.” A “license” is an “approval”, or “similar form of authorization required by law.” RCW 34.05.010(9)(a). The Commission admits that the ZDI VIP is gambling equipment that the Commission must approve for use. Respondent’s Br. 5, AR 35, 145. It verifies its approval from the identification stamps it provides to licensees to affix to the equipment. *Id.* Whether the Commission has the power to create its own meaning for a defined statutory term is the issue ZDI asks this court to decide. ZDI contends the term “license” must be interpreted under the APA definition because all rules adopted by the Commission must be promulgated under the authority of and in compliance with the APA. RCW 9.46.070(14) “All rules and regulations shall be adopted pursuant to the administrative procedure act, chapter 34.05 RCW.” Thus, the Commission errs when stating its approval process is not a licensing action. The Commission does by the APA definition license gambling equipment.

In its summary of the facts, the Commission incorrectly attributes to the Supreme Court a quote from a footnote in the ZDI Supreme Court decision. The Supreme Court quoted the ALJ's reasoning on ZDI's declaratory action to approve its upgraded VIP. Respondent's Br. 7. The ALJ commented that the Commission can revise its rules to comport with the modern realities of the industry if it so chooses. The Supreme Court did not make this statement. The Supreme Court cited to the ALJ decision noting the ALJ appeared to have knowledge that the Commission would change its rules before the Commission changed them. *ZDI Gaming, Inc. v. State*, 173 Wn.2d 608, 621 n.1 "presciently", 268 P.3d 929 (2012). The ALJ was formerly the Commission's assigned assistant attorney general. Thus, the Supreme Court's reference does not provide any legal authority to support the rules challenged here.

The Commission tells this court that the reason it started its rulemaking process to adopt the rules at issue here was because of a "new concern" that the upgrade was a gambling device. Respondent's Br. 8. The Commission started its rulemaking as soon as Judge Pomeroy ruled against it in July of 2007. AR 23. Two years earlier the Commission refused approval of the ZDI VIP upgrade stating the upgrade was a "gambling device." ZDI proved the Commission was not correct. The VIP upgrade is not a gambling device. *ZDI Gaming, Inc.*, 173 Wn. 2d at

932 “An administrative law judge (ALJ) agreed with ZDI Gaming that the VIP machines did not violate gambling statutes;” and *ZDI Gaming, Inc. v. State*, 151 Wn. App. 788, 798, n.1, 214 P.3d 938 (2009). Thus, the Commission’s factual assertion that the “gambling device” issue first arose in 2007 is not true. The Commission already knew the upgrade was not a gambling device because its ALJ had said it was not on May 1st, 2006.

The Commission relies upon an attorney general opinion to argue the Commission has regulatory discretion to decide whether to authorize ZDI’s upgrade and may apply its own limitations. Respondent’s Br. 5. However, this court has previously chosen to disregard that specific reference when ruling against the Commission on ZDI’s petition for declaratory relief to approve the upgrade. *ZDI Gaming, Inc. v. State*, 151 Wn. App. 788, 801 n. 4, 214 P.3d 938 (2009).

II. LEGAL ARGUMENT

A. ZDI’s Argument Relies Upon Principles of Statutory Construction

The Commission complains that ZDI has “conflated the legal requirements for promulgation of administrative rules with the legal requirements for the regulation of licensing.” Respondent’s Br. 16. ZDI does not understand what the Commission means. ZDI replies that

principles of statutory construction direct the court to give plain meaning to statutory terms. Principles of statutory construction that require the court to harmonize provisions is not “conflation.” *Prince v. Savage*, 29 Wn. App. 201, 627 P.2d 996 (1981). Rules of statutory construction can be used only to ascertain meaning of the statutes, not to modify it. *State v. Spino*, 61 Wn.2d 246, 377 P.2d 868 (1963). ZDI’s analysis comports with the law regarding statutory construction. The Commission’s analysis does not because the Commission asks this Court to allow it to define terms different from the meaning given to the term by the Legislature. “License” is one such term. The Commission does “license” gambling equipment, and it has no discretion to argue it does not. Its argument is not well founded.

The Commission cites to the definition of “agency head” in support of its statement that rulemaking requires a majority vote. Respondent’s Br. 17. ZDI agrees that rulemaking requires a majority vote. ZDI points out that under the APA the majority means the majority of the individuals who comprise the “agency head.” RCW 34.05.010(4). In this case, the Commission has five members, thus a majority is three, not two. RCW 9.46.040. The Commission argues that the Gambling Act’s quorum requirements at RCW 9.46.050(3) override the APA’s rulemaking requirements, allowing it to adopt rules with two out of three members.

The Gambling Act does not override the APA on rulemaking. RCW 9.46.070(14). The two statutes are easily reconciled, giving full effect to the APA and the Gambling Act. A quorum is the necessary number of Commissioners needed to hold a meeting and conduct agency business that is not rulemaking under the APA. The APA definition of “rule” indicates not all agency business is rulemaking. RCW 34.05.010 (16) & (18). However, when an agency “establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale, the agency is engaged in rulemaking. Id. at (16)(e). When an agency establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession the agency is engaged in rulemaking. Id at (16)(d). If an agency is a commission, then a majority of the Commission members must vote in favor of the rule. RCW 34.05.010(4). A majority did not vote in favor of the rules at issue here and the rules are void and unenforceable.

The exception under RCW 9.46.050(2) for “all actions of the commission relating to the regulation of licensing” does not consume the general quorum requirements under ZDI’s analysis because “all action” includes action other than rulemaking. Rulemaking is a subset of action specifically controlled under the APA. ZDI is not arguing that “virtually

every action” by the Commission relates in some way to the regulation of licensing requiring three votes. ZDI is arguing “every action” that qualifies, as “rulemaking” under the APA that relates to the regulation of licensing requires three votes. Thus, there are many actions the Commission may take with a quorum present that does not require three affirmative votes: approving minutes, setting the budget, taking personnel action, negotiating tribal compacts, etc. Making rules like those at issue here is not one of them. The rules are void because the Commission did not have three votes in favor of the rules as required under the APA and the Gambling Act.

The Commission argues that ZDI still has a valid license even though it cannot distribute its upgraded VIP without agency approval when the agency is refusing approval under its newer rules. To argue ZDI’s license is unaffected has no substantive basis. It is like saying a person still has a driver’s license, but may not drive a car because cars are prohibited. Certainly a rule banning cars affects the licensee’s driver’s license. The rule ameliorates the benefits of having a license.

This Court should not adopt the Commission’s argument regarding the rulemaking vote requirements because the Commission’s position ignores principles of statutory construction. It does not attempt to harmonize the APA with the Gambling Act and it disregards the actual

statutory language of “relating to the regulation of licensing.” ZDI’s interpretation harmonizes both statutes and gives full effect to the terms used by the Legislature. The rules are void, because three votes were needed

B. The Commission Cites No Authority To Support Its Narrow Interpretation of Costs

The Commission asks this Court to so narrowly construe the Regulatory Fairness Act’s definition of “costs” that the Commission may escape compliance under most circumstances. It may never have to comply with the Act. Yet the Regulatory Fairness Act was specifically adopted to help small businesses like ZDI survive in a highly regulated environment. RCW 19.85.011. The Commission fails to cite any authority to support its contention that development costs are not costs under the Act. The Commission simply summarily decides that research and development costs are not costs associated with regulatory compliance. This makes no sense where in this case ZDI proved its upgrade complied with the rules, and then the Commission changed the rules. ZDI necessarily incurred actual expenditures downgrading its upgrade that complied with the rules. ZDI customers have suffered from the lack of innovative competitive technology. ZDI necessarily incurred a market disadvantage from the complete policy shift reflected in the rules.

The new rules prohibit all innovation not specifically authorized when the old rules permitted all innovation that improves the regulatory control of an approved activity so long as the innovation complied with the rules. The rule changes did not maintain the status quo as represented. The rules created a market advantage for tribal vendors who are allowed to innovate and market competitive and innovative technologies. The rules should be void because the Commission did not follow the rule making laws.

III. CONCLUSION

The Commission needed three votes to adopt its rules. It only had two. The rules are void. The Commission disingenuously represented the rules as status quo changes, when the rules added new requirements and limitations. Thus, the rules changed the status quo. The Commission should have required an EIS. The Commission has again acted outside the scope of its authority and has acted arbitrarily and capriciously. This court should void the rules.

DATED this 10th day of July, 2013.

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By 

Joan K. Mell, WSBA #21319

Attorney for Jay Gerow and ZDI Gaming, Inc.

Declaration of Service

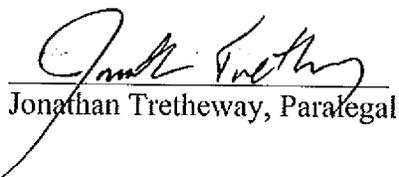
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I am over the age of 18, a resident of Pierce County, and not a party to the above action. On July 10, 2013, I caused to be served true and correct copies of the foregoing: Mr. Gerow and ZDI Gaming, Inc.'s Reply Brief, and this Declaration of Service by Electronic mail through the Washington State Court of Appeals Div. II filing system and U.S. Postal Service as follows:

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

Dated this 10th day of July 2013 at Fircrest, WA.


Jonathan Tretheway, Paralegal

III BRANCHES LAW

July 10, 2013 - 2:39 PM

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