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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, by and through the
WASHINGTON STATE GAMBLING COMMISSION,

Appellant,

v.

ZDI GAMING, INC.

Respondent/Cross Appellant.

ZDI GAMING, INC.'S REPLY BRIEF

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ARGUMENT

A. UNDER THE EQUAL ACCESS TO JUSTICE ACT (EAJA) \$25,000.00 MAY BE AWARDED IN ATTORNEY'S FEES AND COSTS ON APPEAL

ZDI asks this Court to increase the trial court's award of attorney's fees and costs under the EAJA to \$50,000.00 to more appropriately reflect its actual fees and costs and to include attorney's fees and costs on appeal incurred after the trial court's award. *ZDI Response Brief at 50*. After submitting its Responsive Brief, counsel for ZDI learned that the Supreme Court was scheduled to hear a case of significance to this matter. The Washington State Supreme Court heard oral argument in May of 2008 on the case of *Costanich v. State of Washington, Dept. of Social and Health Services*, 138 Wn. App. 547, 156 P.3d 232 (Div. 1 Jan 29, 2007) as amended on reconsideration (May 03, 2007). The Supreme Court is expected to rule on Costanich's argument that the \$25,000.00 EAJA limit on fee and cost awards applies on appeal, making the total award available \$50,000.00. The Washington State Trial Lawyers filed an amicus brief to support the contention that the EAJA applies to all levels of review. Costanich and the Trial Lawyers correctly argue that the plain language of the EAJA authorizes up to \$25,000.00 for each level of review. ZDI seeks such an award.

ZDI requests this Court award an additional \$25,000.00 in fees and costs to ZDI to mitigate its expenses in defending against the State on this Appeal. Under the EAJA, RCW 4.84.350(1) provides, "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses." (Emphasis added). Each court reviewing the matter may award the fees and costs. Any decision to the contrary undermines the intent of the EAJA. The State would simply appeal all matters to avoid liability under the EAJA and exhaust all of the resources of its opponent. Thus, equal access is thwarted.

As articulated in *Costanich*, the EAJA does not condition payment of the award on a successful appeal. ZDI pointed out that an award under the EAJA may not be stayed on appeal. *ZDI's Opposition to State's Motion to Stay at 11-12*. It is a statutory entitlement for prevailing before the trial court. The State should have paid ZDI's award already. Pursuant to the plain language of the Act the award was payable within sixty days. RCW 4.84.360. Thus, each level of review is treated separately. ZDI should be awarded \$25,000.00 for prevailing at the trial level, and this Court should consider awarding an additional \$25,000.00 for costs and fees related to this appeal.

The State has filed two motions before this Court, which has caused ZDI to expend considerable resources in attorney time and costs. ZDI should recoup its losses and ZDI should not be deterred from asserting its rights through petition for judicial review.

The State objects to an award of fees on appeal to ZDI on technical grounds that are not valid. ZDI's citation to *Costanich* in its reply is based upon the recent oral argument on the subject. ZDI supplemented its authority prior to closure of the briefing and at a time when the State has had a meaningful opportunity to respond in the additional pages granted to it. ZDI did request the fees on appeal in its initial brief as admitted by the State. *ZDI's Response Brief at 50.* *Costanich* is additional authority to support its argument that it should be awarded in excess of \$25,000.00 in fees and costs. The Court benefits from the additional authority cited as authorized under RAP 10.8 up until the time of a decision on the merits. Certainly citation to additional authority is warranted when both parties have had the opportunity to brief the issue to the Court as has been accomplished in this matter. ZDI respectfully requests an award of fees and costs on appeal.

B. THE STATE'S APPENDIX A TO ITS REPLY BRIEF CONFIRMS ZDI'S POSITION THAT CASH CARD TECHNOLOGY COMPLIES WITH THE RULES

The State's Reply brief Appendix A contains old versions of Gambling Commission administrative code provisions. These old rules were never introduced as evidence; however, the old rules support ZDI's case.

1. Cash Is Acceptible, Credit Is Not

A review of the 1973 version of WAC 230-12-050 confirms ZDI's argument that cash has always been distinguished from credit; credit was prohibited, but cash was permitted. Cash cards are not credit and therefore comply with the policy objectives of the rules designed to restrict accumulated debt.

2. Denial of Equipment is a "Licensing Action"

The old rules demonstrate equipment approval is a "licensing" action, which may be heard in Superior Court in Pierce County. WAC 230-30-210 from 1973 requires individuals to have a license to sell their equipment in the state:

"No operator, distributor or distributor's representative, shall purchase or otherwise obtain from any person any punch board, pull tab, device for the dispensing of pull tabs or related equipment in this state until it has first determined that the person selling or otherwise offering

such equipment has a valid license issued by the commission to sell **the equipment** in this state or has been registered with the commission as required.”

The current version of the rule is similar, a license is required.

WAC 230-30-210. The State’s position that it does not “license” equipment is fiction, its denial of equipment is a licensing action. Pierce County was the proper venue to hear the licensing action. RCW 9.46.095.

The State’s case of *Lathrop v. State En’gy Facility Site Evaluation Council (EFSEC)*, 130 Wn. App. 147, 151, 121 P.3d 774 (2005) does not address the jurisdiction question before this court. In *Lathrop*, agency petitions for review of an application for certification were required to be “filed” in Thurston County. The Gambling Commission’s statute RCW 9.46.095 does not have a requirement to “file” in Thurston County. Further, RCW 9.46.095 is silent with regard to declaratory actions. The statute makes no reference to declaratory actions; declaratory actions are referenced in the Administrative Procedures Act.

Of significance to interpreting RCW 34.05.020, the APA provision referenced by the State, is the fact that the Gambling Act never amended the APA when RCW 9.46.095 was adopted. If the Gambling Commission were to be exempted and allowed to enforce its own exclusive jurisdictional requirements, pursuant to the plain language of RCW

34.05.020, the Legislature had to exempt the Gambling Commission under RCW 34.05.030, or at a minimum amend the APA to authorize exclusive jurisdiction over declaratory actions involving the Gambling Commission to Thurston County. RCW 34.05.030 is not limited to legislation prior to the APA and RCW 9.46.095 is not the more specific statute. ZDI properly pursued its right to relief in Pierce County.

C. GIFT CERTIFICATES ARE VALID PRIZES

At the May 2008 Gambling Commission Hearing, the Gambling Commission formally approved the use of gift certificates as pull tab prizes. WAC 230-14-085. The rule formalizes Commission Staff's Field Operations Memo. AR 572. Nothing in the rule requires a paper gift certificate. Gift certificates may be electronic and there is no rule prohibiting the use of a cash card as a gift certificate. Despite ZDI's arguments for the past five years that cash cards are gift certificates as a matter of law by statutory definition, RCW 19.240.010 (4) & (5), the Gambling Commission did not in its new rule attempt to distinguish a gift certificate from a cash card. In fact, it has no authority to do so. The state statute is controlling.

WAC 230-12-050(12) was also amended adding the term cash card and gift certificate, which the State argues means the Gambling

Commission views the two as distinct. However, ZDI contends the Gambling Commission added those two terms because it equates a cash card to merchandise, and merchandise was not specifically referenced in WAC 230-12-050. WAC 230-30-070 already included the use of both terms, cash and merchandise, which eliminated the need for the Gambling Commission to add the terms gift certificate and cash card to authorize their use for pull tab prizes.

The Gambling Commission's new rule on electronic dispensing devices specifically authorizes the purchase of pull tabs with a cash card and gift certificates. WAC 230-14-047. It also defines "cash" to mean currency. Thus, the Gambling Commission must consider a cash card merchandise, which is consistent with statute and its new rule on gift certificates. This ameliorates the State's argument with regard to "universal application" of cash equivalents. Prizes do not need to be "universally accepted" because prizes may be merchandise and cash cards may be used to purchase pull tabs.

Nothing in the new rule on electronic dispensing devices affirmatively prohibits the redemption of the prize at the terminal, and nothing in the new rule requires human interaction. In fact, there are no rules or statutes anywhere prohibiting automation. Automation improves

regulatory control. Thus, the State argues for broader powers than permissibly delegated to the Commission when it contends the Commission can prohibit automation that improves the regulatory control of an authorized gambling activity. ZDI should be allowed to use the cash card prize function on its approved electronic pull tab dispenser that customers already use to buy pull tabs with cash cards without human interaction, and to buy electronic scratch tickets and bingo in tribal venues.

D. THE STATE'S SUPPLEMENTAL BRIEF SHOULD BE STRICKEN BECAUSE THE GAMBLING COMMISSION IS NOT THE PROPER PARTY AND ITS APPENDIX IS ARGUMENT EXCEEDING THE PAGE LIMIT

From its inception, ZDI's Petition for Review was properly filed against the State of Washington. The proper caption and proper party is the State of Washington, not the Washington State Gambling Commission. The caption appears to have been erroneously transformed, which is significant to ZDI's position under RCW 9.46.095 that this is an action against the State, not against the Commission. The State has filed a Supplemental Brief on behalf of the Washington State Gambling Commission and has altered the caption of this matter without leave of Court. RAP 3.4. ZDI contends the Commission lacks standing and is not

a proper party named in this matter to file a brief. The legal basis in support of this contention is the case of *Foothills Development Co. v. Clark County Board of County Com'rs*, 46 Wn.App. 369, 730 P.2d 1369 (1986). In that matter, the court clarified that the County, not the Commission was the proper party because there was no authority identifying the Commission as a separate entity of government subject to suit. As in *Foothills*, the State can be sued as an entity under RCW 4.92.010. The Gambling Commission is not a separate entity subject to suit. RCW 9.46.095. The Gambling Commission as an agency may only be named in an action under RCW 34.04.570 to challenge the validity of a rule. ZDI named the State of Washington when it petitioned for judicial review. The State is the proper party to this case.

Appendix A to the Supplemental Brief should be stricken because as the State has repeatedly argued in its Supplemental Brief, Appendix A is not a part of the underlying record. The Appendix contains argument which informally extends the States's ten page supplemental briefing limit to fifteen pages. Appendix A unfairly prejudices ZDI, which has not been granted supplemental pages to its Reply Brief. Further the Appendix misstates the facts. Despite ZDI addressing these errors in its response to

the State's motion to strike, the State cut and pasted all the erroneous references previously listed and added more.

Additional grounds to sanction the State is its violation of RAP 10.2. The State did not serve the brief on ZDI. The Certificate of Service verifies that its brief was sent to Miller, Quinlan and Auter, P.S. Inc. on the filing due date of June 16th. Miller, Quinlan and Auter, P.S.Inc. withdrew from this matter as of June 2, 2008. After ZDI had prepared its Reply Brief for filing believing the State elected not to file a supplemental brief, ZDI received the Supplemental Brief from Miller, Quinlan and Auter. This delay caused ZDI to have to reformulate its Reply to respond to the supplemental briefing.

E. THE "GAMBLING COMMISSION'S" MOTION TO STRIKE SHOULD BE DENIED, ZDI'S CITATIONS ARE PROPER

The State lost its motion to strike previously filed and rather than drop its erroneous arguments, it has repeated its motion to strike by incorporating its arguments into a Supplemental Brief. ZDI responds as follows:

1. ZDI's Appendix 1: Chart of the 18,260 Approved Machines Using Cash Cards in 2005.

The document attached is from the Washington State Gambling Commission's website. It is a chart identifying the number and location of

the more than eighteen thousand machines authorized by the State to operate with cash card technology for gambling in this State prior to 2005. At the same time the State denied ZDI the use of a cash card, the state authorized thousands of more machines using cash card technology under Appendix 2X, following negotiation of the Spokane Compact, increasing the number to nearly 27,000. CP 573. That fact is undisputed and relates to ZDI's position that the Gambling Commission has no basis to prohibit cash card technology to ZDI while authorizing it under Compact because clearly the activity does not present any public harm and the Commission could not authorize by Compact an activity prohibited or against the public policy of this State. CP 460-461, 475, 477-478.

ZDI added the chart for ease of reference in its Appendix. The chart does not introduce a fact not already in evidence. The number of machines in operation at the time of the ALJ hearing is in the record in the testimony of Former Gambling Commission Director Frank Miller, and is referenced in the Compacts, which have been admitted for illustrative purposes, for the Court. AR 726, AR 536. Obviously the Gambling Commission had knowledge of these facts when it heard this matter because it approved the thousands of terminals. This Court is entitled to the same background information in its review.

2. ZDI's Appendix 2: Rule Affirming the Use of Gift Certificates as Prizes

The document at Appendix 2 is the Gambling Commission's proposed rule change that formalizes in rule its Field Operations Memo permitting the use of a gift certificate as a pull tab prize. The rule was adopted in May of 2008 and is now legal authority to support ZDI's position that ZDI's cash card complies with the rules because by law cash cards are gift certificates and by rule gift certificates are proper prizes.

3. ZDI's Appendix 3 Petition For Declaratory Order and OPMA Complaint to Void the State's Improper Rule Change

The State offers on appeal the fact that it has adopted a new rule on electronic pull tab equipment. State's Brief, Appendices C and D. The rule was not before the trial court and is not any part of the record in this matter. However, the State deemed it appropriate to append the new rule to its brief and introduce it into argument. That new rule was adopted in violation of the Administrative Procedure Act, state statute, and violates the rights of ZDI. ZDI has petitioned Superior Court to void the rule and sanction the Gambling Commission. ZDI objects to the State's contention that the State can by Appendix introduce a rule change before the Court, but that ZDI cannot complete the record with the Petition to Void the Commission's Rule Change. In a footnote the State refers to an amended

Complaint, which ZDI filed after the State conceded the APA controlled the proceedings. The amended complaint is available upon request.

If the State contends it can introduce discussion of its own rule change under RCW 34.05.562 (2)(d) into the record after the fact, then ZDI is entitled under the same analysis to complete the record. If the Court is inclined to strike Appendix 3, then the State's brief beginning at page 11 and Appendices C and D should be stricken because the Commission's rule change after ZDI prevailed at the Trial Court is not relevant to affirming the Trial Court's ruling. It was not introduced into evidence, and the actions occurred after the Trial Court's ruling.

4. Valid Page References

Page 3: "Presently there are 135 ZDI VIPs."

Jay Gerow's Declaration filed in this Court in Opposition to the State's Motion to Stay is cited because ZDI's brief sets forth the fact that ZDI "presently" has 135 ZDI VIPs. ZDI cites his more recent declaration because at the time of hearing before the Administrative Law Judge he testified to having 130. AR 788. If the Court prefers to rely upon his testimony from December 2005, ZDI has no objection.

Page 4: "In June of 1998, the Commission approved 18,000 tribal lottery system terminals that rely upon cash card technology."

Former Director Frank Miller testified before the Administrative Law Judge that there were 18,000 high speed terminals in operation:

“It’s going to be more entertaining but it’s not going to change the world. It’s competing against 18,000 high-speed devices out there right now in the tribal lottery system. Those – there’s no comparison, to be very candid with you. There’s no comparison in speed of play and things. So of course I would approve this.” [the ZDI VIP upgrade]. AR 726.

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.”

The State objects to the reference to CP 583-609, which was offered into the record for illustrative purposes. The fact of additional authority for new machines in March 2007 is absolutely undisputed and is known now and was known then to the Gambling Commission. This fact was argued before the Trial Court. VRP 69. The Spokane Compact, which is the document initiating the negotiations of Appendix 2X at CP 583-609 is in the record for illustrative purposes as authorized by the Trial Court’s order: “Appendices 1 through 6, 9, and 11 to ZDI’s Trial Brief are offered by ZDI for illustrative purposes only.” CP 723. CP 583-609 is Appendix 3 to ZDI’s Trial Brief.

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, AR 623.

CP 624 as set forth above was properly before the Trial Court as an illustrative exhibit. CP 723. The downward spiral of the pull tab industry is an undisputed fact set forth in the Findings of Fact and Conclusions of Law of the ALJ, and later adopted by the Trial Court:

“The economic vitality of pull-tabs reached its height in the 1980’s, and has since been in decline. The decline is attributed in large part to competing new forms of gambling, including mini casinos and the expansion of tribal gaming.” AR 410.

Former Director Frank Miller testified:

“With the expansion of gaming, particularly in the electronic format permitted via tribal compact, the pull-tab industry has not enjoyed the same growth and in fact has declined...”AR 700.

AR 550 references the decline. The Gambling Commission’s speaking agent testified that machine gaming in tribal venues represents 70% of all gaming revenues in the State. AR 885. The State is objecting to an undisputed fact that was and is well known to the Gambling Commission, and is supported by the record.

Pages 7-8: “ZDI asked the Commission to agree to a rule change to add the term “cash card” to its rules” CP 770.

CP 770 is not a motion as asserted by the State, it is Jay Gerow’s Declaration wherein he states he asked to negotiate a rule change, which supports the brief. The same point is in the record at CP 179.

“The Commission refused.” CP 295-300.

The State objects to this Court's consideration of the verbatim report of proceedings from the Gambling Commission Hearing wherein the Gambling Commission specifically considered and rejected ZDI's proposed amendment to the Gambling Commission's rule change. At the same time, the State incorrectly argues ZDI "abandoned" its proposed rule change. The State cannot be allowed to misrepresent the factual history in this manner through a motion to strike the verbatim report of proceedings.

The APA encourages deference to the parties to have "full opportunity to submit and respond to all pleadings, motions, objections, ..." RCW 4.05.437 "The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record..." RCW 34.05.566(1). The agency record is broader than "evidence received or considered." RCW 34.05.476. The record includes the hearing transcript, which the State is asking the Court to strike. RCW 34.05.476 (2)(h). The record also includes "data submitted to the presiding officer". RCW 34.05.476. ZDI has cited to portions of the record that were in fact before the Gambling Commission and include the

verbatim report of proceedings. The references should remain intact as should ZDI's arguments.

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 is properly before the Court as Appendix 9 to its Trial Brief. The Court permitted reference to this correspondence for illustrative purposes. CP 723. The same letter is also at CP 369 attached to ZDI's initial Petition for Judicial Review. Having reviewed this reference further, the more appropriate references for Page 8 are CP 366-368 as that is the Gambling Commission's Petition for rule change to add the term "cash card" to its rule on pull tab purchases. The rule can be read in its amended form at WAC 230-12-050.

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.

It is unclear what the State's objection is with this reference other than the State argues its own Appendix on its own brief at Appendix C is not part of the record. If the State concedes its Appendix C is not part of the record and wishes to strike it, ZDI has no objection.

Page 12: "Cash cards have never been a prohibited prize..."

CP 183 provides the same supporting documentation as AR 37-55. Further, the trial court examined an illustrative exhibit demonstrating the

cash card as a merchandise prize. VRP 13-14. See also AR 740-742. The record clearly supports the briefing.

Page 14-15: “Historically the Commission followed the adage that any innovation that improves regulatory control is permitted.” AR 728; CP 157-158.

This proposition can be supported not only by the signed and dated Declaration of Former Gambling Commissioner Robert Tull at CP 157-158, but by his October 5th, 2007, Declaration filed in Opposition to the State’s Motion to Stay at page 3. The Commissioners clearly received Tull’s testimony as documented by AR 955-957, which are cover letters to the Commissioners enclosing his testimony on DVD. The statement is also supported by the testimony of former Gambling Commissioner Frank Miller as set forth at AR 701.

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 158-159, AR 728.

As stated above, CP 158-159 was received by the Gambling Commission and is both signed and dated June 14, 2006 by former Gambling Commissioner Robert Tull. AR 955-957.

The statement is further supported by the testimony of the speaking agent for the gambling commission Dallas Burnett AR 456-460:

Q: And you don’t see any problem with the use of the cash card?

A: Like I said, just because the WACs prohibit it.

Q: But other than – I mean, assuming cash card was in there, you don't have a problem with it? You don't see any problem with it in terms of –

A: If – if the WACs were interpreted, you know, or changed or, you know, made it so that it's clearer-cut, I don't have a problem. I just follow the rules.

Q: You recognize that there's some beneficial security advantages, I think we talked about the cash card, but even the technology itself, having the equipment?

A: Any advancements in technology happen to make – or either expands the activity or increases the ability to investigate the activity. Log files. ...any kind of advancements that you make in any type of activity is going to create opportunity to regulate the activity higher or better.

Q: And that's your purpose; right?

A: That's one of my purposes, yes, it is.

Q: And that is what this upgrade by ZDI could do?

A: You know what, it's a battle within myself over the activity. If it wasn't – like I said, if the statute had read something differently, I would have looked at it differently and recommended differently.

Q: Because you don't have any fundamental inherent problem, you actually see some advantages to it?

A: Sure. ...

Greg Thomas from the Gambling Commission AR 461-466:

A: As far as...I don't have a regulatory issue with the way they're doing it. Whether it meets the definition of a gambling device to me is another issue for the legal – our legal people to interpret and decide. But as far as putting the cash on the card or being able to buy them, I don't have a regulatory issue.

A: I don't recall the specifics of our conversation. But in general, I probably said something similar to what I said today as far as that I don't have a regulatory concern with it.

Q: And tell me again what you mean when you say "I don't have a regulatory concern with it."

A: I don't think it – I don't think it's going to create a problem as far as in defrauding the public or accounting for pull tabs or just the general operation of them.

Q: Do you see some benefits to it?

A: Possibly.

Q: What would those be?

A: I suppose that you could have – maybe from the operators' perspective, they might have tighter control over their cash.

The State's motion to strike should be denied as the statement is well supported by the record.

Page 21: "The Commission reaffirmed its position that gift certificates are merchandise prizes for pull tabs by field operation memo." CP 658.

Again CP 658 was admitted for illustrative purposes. CP 723. It is also in the record attached to the Petition for Judicial review at CP 369. It is a part of the administrative record and is properly referenced.

Page 21: "The "merchandise" issue was before the ALJ, the Commission, and the trial court. AR 890, 891, 893, 9905, CP 238, 472-474.

The State contends "none of these citations support ZDI's factual contention regarding the ALJ."

AR 890 - 893 is the transcript from the ALJ hearing. The Assistant Attorney General is examining the Gambling Commission's speaking agent before the ALJ:

Q: And isn't it true from what's in the memo that they interpreted the gift certificate to qualify as merchandise?

A: That is true. That is their interpretation.

Q: So technically whether – well, technically then if a gift certificate is interpreted as merchandise, then that would comply with the rule that prizes are to be awarded in cash or merchandise?

A: True.

By Judge Gorrell:

Q: We have this memo that treats a gift certificate as merchandise.

A: Yes.

Q: Okay. Is there anything in your mind that distinguishes a gift certificate from this cash card that makes the gift certificate merchandise and the cash card not merchandise?

A: Well, there's a lot on my mind. There is a distinct difference. The liability issue is no longer there. See, with a gift certificate or with a cash card, there's still a liability. The transaction has not concluded. There's a liability that the establishment has. So an outstanding, they're liable to pay that – pay the thing. With cash or merchandise, when it's been handed over, the transaction is concluded. There's no other liability left. ...

CP 238 is the verbatim report of proceedings from ZDI's argument before the Gambling Commission on its Petition for Review wherein counsel stated:

“It's also merchandise. It can certainly be deemed merchandise. Under the testimony that was presented in court; the testimony is that a gift certificate is equal to a cash card. There is no difference between a cash card and a gift certificate. Gift certificates are authorized to use. If gift certificates are authorized to be used there is no distinction or policy basis to treat cash cards any different than a gift certificate. Gift certificate as defined under law and the RCW means something that can be used to buy products or merchandise. Something that can be sold. Gift certificates are sold everywhere all across the state. So it

certainly meets the requirements that um a prize be awarded on a gift card as merchandise.”

CP 472-472 is ZDI’s trial brief to the Trial Court, the caption of which states: “A Cash Card Must Be Either Cash or Merchandise.”

The State’s request to strike has absolutely zero merit.

Page 23: This is another objection to ZDI’s reference to its petition to void the Gambling Commission’s retaliatory rule change. The reference is proper, particularly given the State’s Appendix C wherein it adds its rule change into the record.

Page 28: The State misquotes ZDI’s trial brief. The typographical errors attributed to ZDI are not there. ZDI’s trial brief at Page 28 discusses the concept of “expansion of gambling.” The reference cites provided of CP 660-662 are pages from the Legislative record reflecting the floor debate on a gambling measure and a summary list of all gambling measures and the parliamentary ruling. The Trial Court granted the State’s motion to strike the documents, but authorized ZDI to reference legislative action in its brief: “the parties are free to cite to and attach relevant legislative history to their briefs.” CP 724. CP 660-661 is a copy of verbatim floor activity on a gambling bill. CP 662 is a summary of all gambling bills and the parliamentary ruling. The floor action support

ZDI's position that the parliamentary rulings are political, rather than legal precedence.

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 299-300.

The State incorrectly argues the cite was "229-30". CP 299-300 is the cite in the brief and it is the verbatim report of proceedings on the Gambling Commission's rule change to allow cash cards to purchase pull tabs and rejecting ZDI proposal to also add cash cards to its rule on prizes.

Additional authority supports ZDI's statement in its brief, in particular, the verbatim report of proceedings from ZDI's argument before the Gambling Commission on its petition for review. CP 232-241. Also, see the Commission's final order. AR 961-963.

Page 34: "None of the pull tab licenses are generating five million dollars of revenue in pull tab gambling." CP 487.

The trial court considered CP 487 an illustrative exhibit, and thus it is properly a part of the record. The limited income levels are also evidenced at AR 570. This fact is undisputed and does not warrant a motion to strike.

5. The State Asks to Strike Legal Argument.

RAP 10.3 does not support striking the legal argument of ZDI.

RAP 10.3 directs the parties to prepare a fair statement of the facts. The State in many instances is challenging ZDI's presentation of the status of the law, in particular the wording of rules and the history of those rule changes. RAP 10.3 does not provide a basis for striking references to rule changes. Further, the record related to a rule change may be properly considered an appropriate reference to legal authority much the same as reference to bill reports, floor debate, and hearing files may be properly integrated into legal argument. *State v. Law*, 154 Wn. 2d 85, 110 P.3d 717 (2005).

6. The Trial Court Rejected the State's Arguments on the Record and the State Did Not Challenge the Trial Court's Order. Thus its Arguments have been waived.

When ZDI prevailed in this matter, the State moved for reconsideration and included its argument that the trial court considered matters outside the administrative record. The Trial Court rejected the State's position denying its motion for reconsideration. CP 1035-1036. The State did not appeal the Trial Court's order. As a result, the State has waived any argument regarding the Trial Court's consideration of matters

the State considers outside the agency record. The State's motions should be denied.

DATED this 19th day of June, 2008.

III BRANCHES LAW, PLLC

By  _____
Joan K. Mell, WSBA #21319
Attorney for ZDI Gaming, Inc.

CERTIFICATE OF SERVICE

On said day below I sent via U.S. Mail a true and accurate copy of the following document: **ZDI Gaming, Inc.'s Reply Brief** in Court of Appeals No. 36751-3 to the following:

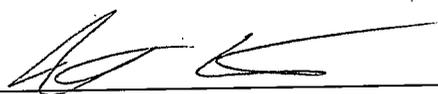
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DEPUTY

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 19th day of June, 2008, at Fircrest, Washington.



Jonathan Trethewey, Paralegal
III Branches Law, PLLC