

NO. 36751-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

WASHINGTON STATE GAMBLING COMMISSION,

Appellant/Cross Respondent.

v.

ZDI GAMING, INC.,

Respondent/Cross Appellant.

**REPLY BRIEF OF APPELLANT/CROSS RESPONDENT AND
RESPONSE TO CROSS-APPEAL**

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DIVISION II
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STATE OF WASHINGTON

PM 4-24-08

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I. INTRODUCTION

On November 7, 1972, Washington's electorate amended article II, section 24 of the state constitution, to provide, for the first time, the means of establishing legal gambling in Washington State. Prior to this amendment, article II, section 24 unequivocally prohibited all gambling.¹ With this amendment, the gambling prohibition remained in place, but certain gambling activities could be legalized if authorized by a supermajority of the Legislature or the electorate.

In 1973, the Legislature, exercising its newly granted powers, adopted the Gambling Act, RCW 9.46, which legalized certain types of gambling activities, including pull-tabs. In doing so, the Legislature defined the game of pull-tabs as follows:

“[P]ull tabs,” as used in this chapter, shall be given [its] usual and ordinary meaning as of July 16, 1973, except that such definition may be revised by the commission pursuant to rules and regulations promulgated pursuant to this chapter.

On December 19, 1973, the Commission promulgated new rules and regulations that captured and defined how the game of pull-tabs was

¹ The original text of Const. art. II, § 24 prohibited creation of a “lottery.” The Washington State Supreme Court repeatedly made clear that the term “lottery,” as used in the constitution, encompassed all forms of gambling activities. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 247 P.2d 787 (1952). The Court also made it unmistakably clear that the prohibition contained in the Constitution was absolute: “The language of the constitution is mandatory, and the provision is self-executing.” *City of Seattle v. Chin Let*, 19 Wash. 38, 40, 52 P. 324 (1898) (holding that even lotteries conducted for charitable purposes are forbidden).

played. Among other things, these rules specifically provided that pull-tab licensees “shall award all prizes in cash or in merchandise.” WAC 230-30-070(1) (1973) (Attached Appendix A); *see also* RCW 9.46.110(d). For the past 35 years, the Legislature’s and the Commission’s definition of pull-tabs has remained unchanged in this regard.

The Commission functions under a legislative directive to strictly control and regulate state-sanctioned gambling activities within the state of Washington. Cash card technology had not been developed at the time the Legislature defined “pull-tabs” and the Commission adopted the WAC 230-30-070(1). Automatically crediting winnings to a cash card does not comply with the regulatory definitions of “cash” or “merchandise.” For all of these reasons, the Commission’s Final Order, holding that Respondent/Cross Appellant ZDI Gaming, Inc.’s (ZDI’s) VIP Machine does not comply with Washington’s gambling laws and regulations should be upheld and the superior court order reversed.

II. RE-STATEMENT OF ISSUES ON CROSS-APPEAL

A. Did the Commission’s determination that VIP Machine’s cash card technology did not constitute a cash equivalent because it was not universally accepted violate ZDI’s substantive due process rights under federal and state constitutional rights to due process?

B. Should this Court consider arguments regarding whether the VIP Machine is a gambling device under RCW 9.46.0241(1) when ZDI failed to appeal this issue before the superior court?

C. Assuming for the sake of argument that ZDI is entitled to recover attorney fees and costs under the Equal Access to Justice Act (EAJA), RCW 4.84.350, did the superior court's award of \$18,185 in attorney's fees and costs to ZDI constitute an abuse of discretion?

III. RESTATEMENT OF PROCEDURAL HISTORY AND FACTS

ZDI commenced the administrative proceedings in this matter by filing a Petition for Declaratory Relief with the Commission on or about September 21, 2005. AR 1. In the Petition, ZDI asserted that its cash card technology constituted a "cash equivalent for purposes of RCW 9.46 *et seq.*, specifically RCW 9.46.0241(1), and [former] WAC 230.12.050 [sic] and [former] WAC 230-30-070(1)." *Id.* The Commission determined that the record presented by ZDI in its Petition was "factually and legally inadequate to enable the Commission" to reach a meaningful determination, and, pursuant to WAC 230-50-850(3)(b), referred the matter for an administrative hearing before an Administrative Law Judge (ALJ) to be held on or before December 19, 2005. AR 79-80, 144. ZDI's contention that cash card technology constituted a "cash equivalent" was

the sole basis upon which it sought declaratory relief during the administrative hearing before the ALJ. AR 1-3, 275-76, 356-61, 419-22, 686, 706-707, 795, 904-905.

During the hearing, Dallas Burnett, the head of the Commission's Gambling Electronics Team (GET), testified about the reasons underlying the Commission Staff's denial of ZDI's application. Burnett testified that the VIP Machine changed the way pull-tabs was traditionally played by allowing players to "operate the device without . . . any kind of involvement from the operator" thereby converting the game into "a very focused type of activity."² AR 842, lns. 2-4, lns. 11-12.

² Deposition testimony by GET member Sonya Dolson reiterated this concern:

Q. So is there something in your mind that's different between a human being and a mechanical piece of equipment and the application of the rules?

A. Yes.

Q. Why?

A. Because with a human being you're not – there's interaction. It's not the device doing everything. So if I purchase a pull-tab and go to you and redeem the pull-tab, there's no device involved there.

Q. Is there something wrong with having a device involved?

A. Well, when I think it becomes a gambling device. If I'm purchasing a pull-tab and it's a game of chance and I'm putting the pull-tab back into the machine and the machine's redeeming my pull-tab, that's different than me going up to the bar and cashing in my pull-tab with the bartender.

Q. And what's the difference?

A. The device is doing the crediting onto the gift card.

Q. Rather than a human being?

A. Right.

Burnett also expressed concern that the VIP Machine's cash card system did not comply with state gambling regulations governing consideration for gambling activities and the awarding of pull-tab prizes. He testified that "cash cards" were not one of the approved forms of consideration for gambling activities under WAC 230-12-050(2). AR 842, ln.25, AR 843, ln.3. He also testified that "crediting [winnings] back on the card" did not comply with WAC 230-30-070(1), which requires that winnings be paid in cash or merchandise. AR 840, lns. 3-6. Deposition testimony by the other GET members corroborated these concerns. AR 198 (p. 13, ln. 3), AR 199 (p.16, ln. 24); AR 200 (p. 18, lns. 17-22).

When cross-examined about the meaning of the term "cash," Burnett testified that "cash" to him meant currency. AR 855, lns. 4-7. When asked if ZDI's cash card technology was a "cash equivalent," he testified that ZDI's cash card technology was distinguishable from a cash equivalent because it was not universally accepted. AR 873, lns. 11-12. Deposition testimony by the other GET members established that they shared these concerns. AR 201 (p.23, lns.19-20); AR 228 (p.43, lns.4-6); AR 238 (p.76, ln.7), (p.77, ln.23).

AR 206 (p.43, lns. 3-22).

In an effort to establish that cash cards had already been approved as cash equivalents, ZDI asserted that the Commission had approved the use of "Donovan" cards in casinos. AR 293. A Donovan card is a payroll system which allows employers to pay their employees on a pre-paid debit card. AR 215 (p.80, ln.23), (p.81, ln.9); AR 850, lns.15-25. Evidence presented at the hearing, however, established the proponents of the Donovan card payroll system made assurances that the cards would not be accepted or used for gambling purposes. AR 215 (p.81, lns.11-24); AR 851, lns.1-11. Based on these assurances, the Commission Staff concluded that regulation of the cards was outside the Commission's jurisdiction. AR 215-16 (p.81, ln. 2), (p.82, ln. 25).

During the hearing, ZDI also presented testimony from William Tackitt, the owner of the Buzz Inn Restaurant chain, regarding his utilization of "a point of purchase card" that could be used to purchase "everything in the restaurant." AR 413, ¶ 15. Tackitt testified that he had received informal approval from a Commission field agent to allow patrons to purchase pull-tabs with cash cards, but that he had never received formal approval from the Commission. *Id.* Tackitt also testified that he was not aware of any Commission rule or statute which would authorize his use of cash cards. AR 414, ¶ 16. Tackitt further testified that he had never received authorization to use a pull-tab dispenser like the

VIP Machine, which accepted cash card credits as consideration.³ AR 441, ¶16. The ALJ and ultimately the Commission both concluded that informal approval of cash card technology at the Buzz Inn, along “with a handful of other exceptions” should not take precedence over the plain language of Commission regulations, as there is “no evidence in the record that the Commission has ever officially authorized the use of a cash card for pull-tab purchases.” AR 421, ¶ 18.

IV. REPLY ARGUMENT

A. **The Commission’s Final Order Does Not Conflict With Article II, Section 24 Of The State Constitution.**

Neither the Legislature nor the Commission has ever authorized pull-tab prizes to be awarded using the type of cash card technology incorporated into ZDI’s VIP Machine.⁴ Indeed, cash card technology did not even exist at the time the Commission initially adopted its regulations governing pull-tab prizes in 1973. AR 411, ¶ 5; AR 724, lns.3-4; AR 728, lns.3-7. Consequently, the Commission’s determination that ZDI’s cash

³ The findings of fact in the Commission’s Final Order describe Tackitt’s informal arrangement with Commission’s staff. AR 413-14 at ¶¶ 14-16. Neither party has assigned error to these findings, accordingly, they are verities on appeal.

⁴ Subsequent to the December 1, 2005 administrative hearing in this case, the Commission did adopt a regulation that allowed patrons to purchase pull-tabs using a cash card. This was accomplished by amending the list of acceptable consideration to include “gift cards.” See former WAC 230-12-050(2) (2006). This amendment also added “gift certificates” as a valid form of consideration to an exclusive list that already included “cash,” “checks,” and “electronic point-of-sale bank transfers.” Compare former WAC 230-12-050(2) (2005) and former WAC 230-12-050(2) (2006).

card technology does not comply with Washington's gambling laws and regulations does nothing more than maintain the status quo. This is an appropriate exercise of the Commission's regulatory powers as granted by the Gambling Act.

ZDI contends, for the first time on appeal, that the Commission's refusal to approve cash card technology constitutes a violation of separation of powers. Resp. Br. at 10-11. Const. art. II, § 24 provides that all gambling activities are prohibited, unless they receive the approval of a supermajority of the legislature or the electorate.⁵ There is nothing within this constitutional provision that prohibits the Legislature from delegating enforcement and regulatory authority over gambling activities to an administrative agency like the Commission. Nor is there any evidence in this case establishing that the Commission has usurped legislative authority by authorizing otherwise illegal gambling activities. The Commission's determination that the VIP Machine does not comply with Washington's gambling laws does not conflict with Const. art. II, § 24.

ZDI argues that, if Const. art. II, § 24 grants the Legislature exclusive authority to legalize particular gambling activities, then it must

⁵ Const. art. II, § 24 provides in pertinent part:

Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.

also grant the Legislature exclusive authority to “prohibit” gambling activities. ZDI’s logic is flawed on several grounds. First, Const. art. II, § 24 clearly states that all gambling activities are prohibited, unless approved by a supermajority of the Legislature or the electorate. Accordingly, unapproved gambling activities are, by default, illegal gambling activities. The Legislature is not constitutionally obliged to “prohibit” gambling. Accordingly, its delegation of regulatory and enforcement power to the Commission does not conflict with Const. art. II, § 24.

Second, ZDI’s argument hinges upon this Court finding that the VIP Machine and its cash card technology, standing alone, somehow constitute a gambling activity – like black jack, poker, or roulette – that must be approved by a constitutionally mandated supermajority. Pull-tab vending machines, like the VIP Machine, however, are a means by which pull-tabs is played. Pull-tabs is the gambling activity. The Commission’s Final Order regulates how pull-tabs is played, it does not prohibit the game of pull-tabs. Indeed, pull-tabs has been, and continues to be, an authorized gambling activity since the adoption of the Gambling Act in 1973.⁶ See RCW 9.46.010 and .0273; AR 727, ln.12.

⁶ Since the passage of the Gambling Act, the Commission has approved many technological advancements in pull-tab vending devices. If ZDI’s argument has merit, pull-tab dispensers would revert back to the Legislative definition set forth in

ZDI's reliance on *Sackett v. Santilli*, 146 Wn.2d 498, 504-05, 47 P.3d 948 (2002), quoting *Diversified Inv. P'ship v. DSHS*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989), is also misplaced. ZDI cites to *Sackett* for the proposition that, "the Legislature is without authority to delegate to an agency the ability to prohibit gambling activities." See Resp. Br. at 11. *Sackett*, however, does not interpret, or even reference, the Gambling Act.

Through the Act, the Legislature has granted the Commission plenary power to regulate gambling activities in the State of Washington. See RCW 9.46.010 and .070. The Legislature's delegation of authority to the Commission does not threaten or otherwise invade the Legislature's constitutionally reserved authority to enlarge the scope of state-sanctioned gambling. For all these reasons, ZDI's separation of powers arguments should be rejected.

B. Neither The Gambling Act Nor Its Associated Regulations Require The Commission To Approve New Technology That Changes The Nature Of The Gambling Activity Because The New Technology May Also Enhance Regulatory Control.

Const. art. II, § 24, the Gambling Act and the associated regulations governing gambling are animated by one underlying principle: all gambling activities are prohibited, except to the extent they have been authorized by a supermajority of the Legislature or the electorate and

RCW 9.46.0273, which provides that the term "pull-tabs" "shall be given [its] usual and ordinary meaning as of July 16, 1973." Pull-tab dispensing devices circa 1973 resembled manually operated postage stamp vending machines. AR 701, 762.

comply with state law and regulations governing gambling. To this end, the Act expressly states that “limiting the nature and scope of gambling activities and strict regulation and control”, “promote the social welfare” and directs that the Act be “liberally construed” in favor of close control of gambling. RCW 9.46.010. In short, gambling in the State of Washington is disfavored and subject to stringent regulatory control.

The Act delegates to the Commission broad authority to regulate, control and limit gambling activities. *See* RCW 9.46.070. This plenary delegation of authority includes RCW 9.46.070(11), which authorizes the Commission to “regulate and establish the type and scope of and manner of conducting the gambling activities authorized by [the Act], including but not limited to, the extent of wager, money, or any other thing of value which may be wagered or contributed or won by a player in any of such activities.” Pull-tabs is an authorized gambling activity under the Act. RCW 9.46.0325. Accordingly, the Commission has authority to regulate and establish the type and scope and manner of conducting the game of pull-tabs, including, but not limited to, “the extent of wager, money, or any other thing of value which may be wagered or contributed or won” by a pull-tab player. Although ZDI contends that the Commission lacks authority to prohibit automation of the cashier function, RCW 9.46.0325 and RCW 9.46.070(11) belie that assertion.

ZDI's strained reading of the phrase "regulate and establish" as it appears in RCW 9.46.070(11) should also be rejected. ZDI argues that the Commission has "prohibited" cash card technology, rather than "regulate and establish . . . the manner of conducting" the game of pull-tabs, as provided in RCW 9.46.070(11).⁷ Common sense dictates, however, that regulating and establishing the manner of conducting an activity necessarily requires the prohibition of certain types of behaviors, conduct or actions. To hold otherwise would make RCW 9.46.070(11) a nullity. In this case, the Commission has determined that use of a cash card technology to award prizes does not conform to regulations governing the manner in which pull-tabs is to be played. The Commission's Final Order in this matter fully complies with the legislative delegation of authority under RCW 9.46.070.

C. The Cash Card Technology Incorporated Into the VIP Machine Does Not Comply With WAC 230-30-070(1), Which Requires That Pull-Tab Prizes Be Awarded In Cash Or In Merchandise.

1. ZDI's cash card technology is not a "cash equivalent."

ZDI raised one issue in its Petition for Declaratory Order: Is ZDI's cash card a "cash equivalent" that satisfies the regulatory definition of

⁷ It is noteworthy that the Commission subsequently amended WAC 230-12-050(2) to expressly allow cash cards to be used as consideration for gambling activities. Although the Commission still prohibits pull-tab winnings to be automatically credited to a cash card, it is not accurate to say that the Commission has prohibited all use of cash cards for gambling activities.

“cash”? AR 1. In support of its position, ZDI offered the following definitions of “cash:”

Black’s Law Dictionary defines the term cash as follows:
“**Cash.** Money or its equivalent; usually ready money.” . .
. . The Merriam Webster Dictionary (1998) defines “cash”
as follows: “**cash 1** : ready money **2**: money or its
equivalent paid at the time of purchase or delivery.” Cash
cards are not credit. *Cash cards are a cash equivalent.*

AR 3 (emphasis added).

ZDI contends that the definition of “cash” is unambiguous and, therefore, the Court should apply its plain and ordinary meaning. Resp. Br. at 18. The problem with this analysis is that the meaning of “cash” was never in dispute. Rather, the focus has always been on what constitutes a “cash equivalent.” The Commission reasonably concluded that universal acceptance was one defining attribute of a “cash equivalent.” ZDI’s cash card can only be used in the establishment that issued it. Accordingly, the Commission found that the VIP Machine did not comply with the requirement that pull-tab winnings be paid in cash.

ZDI attempts to obscure this issue by recounting instances in which Commission staff have informally approved the award of gift certificates, gift cards, pull-tabs and poker chips as pull-tab prizes. These informal authorizations, however, are distinguishable from the VIP Machine’s cash card technology on several grounds. First, the pull-tab

prizes cited above never received formal approval from the Commission. Consequently, ZDI's challenge regarding the definition of "cash" as that term was used in former WAC 230-12-050(2) (2005) and former WAC 230-30-070(1) (2005) was one of first impression for the Commission.⁸

Second, unlike the VIP Machine, there is no evidence that these informally approved prizes speed up the rate of play or alter the means by which pull-tab prizes are redeemed. If a pull-tab player wins a poker chip, a gift certificate or even a pre-loaded cash card, the player still has to redeem the prize with a human cashier. None of the informally approved prizes identified by ZDI is automatically awarded by the pull-tab dispensing machine.

ZDI's attempts to analogize cash card technology to checks or money orders are also unpersuasive. Checks and money orders are, by definition, negotiable instruments that have universal application (although some entities may still insist upon payment in currency). In contrast, the electronic credits that the VIP Machine loads on to a cash card have absolutely no value unless they are redeemed at the

⁸ Equitable estoppel arguments against the state are disfavored and a party asserting such a claim is subject to a heightened burden of proof which requires them to prove each element by clear cogent and convincing evidence. *Kramarevsky v. DSHS*, 122 Wn.2d 738, 743-44, 863 P.2d 535 (1993). That Commission Staff, rather than the Commission itself, made these informal decisions is the most obvious flaw in ZDI's argument. As a consequence, the Commission has never made a formal decision on these issues to which it can be bound.

establishment that controls the machine. In short, you cannot pay your electric bill or buy a cup of coffee from Starbucks with the cash card issued used by the VIP Machine. The Commission properly held that ZDI's cash card technology is not a "cash equivalent."

2. ZDI's cash card technology does not award "merchandise."

As discussed above and in more detail in Appellant's Brief at Section VI(3)(b), ZDI sought and received a hearing on the narrow issue of whether its cash card technology was a "cash equivalent" that satisfies the regulatory definition of the term "cash." The issue of whether the technology satisfied the definition of "merchandise" was never presented or argued during the administrative hearing. While the Administrative Record contains some passing references to merchandise and "gift certificates," ZDI consistently argued throughout the administrative hearing that the VIP Machine's cash card technology was a "cash equivalent." As a consequence, the scope of the ALJ's Initial Order is limited to the question of what constitutes a "cash equivalent." Having failed to properly raise this issue below, ZDI has failed to exhaust its administrative remedies as required under RCW 34.05.534, and this court should disregard argument on this issue on appeal.

See Northwest Ecosystem Alliance v. Washington Forest Practices Bd.,
149 Wn.2d 67, 75, 66 P.3d 614 (2003).

In any event, the electronic credit that ZDI's machine applies to the cash card does not qualify as merchandise for many of the same reasons it does not qualify as a cash equivalent. Extending the definition of merchandise to cash cards is inconsistent with other gambling regulations that clearly contemplate that merchandise is capable of having a wholesale value. While the Commission staff have informally stated that gift certificates may be an exception to this rule, ZDI has not offered any legal authority supporting the notion that the Commission is bound to adopt the informal interpretation issued by Commission staff. ZDI's reliance on RCW 19.240.010(5) for the proposition that a "gift card" is a type of "gift certificate" is also misplaced, as recent amendments to WAC 230-12-050(2) demonstrate that the Commission considers "gift certificates" and "gift cards" to be two separate and distinct forms of consideration for regulatory purposes.

Nor does the manual award of gift certificates approved by Commission Staff implicate the regulatory concerns posed by ZDI's cash card technology. The gift certificates that ZDI contends are analogous to its cash card technology must still be awarded in a face to face transaction with a cashier, while ZDI's cash card technology allows winnings to be

automatically credited to the cash card without human intervention. Accordingly, manually awarding gift certificates, unlike automatic crediting of winnings by the VIP Machine, does not speed up the game of pull-tabs or remove a human element from the game.

D. The Commission's Adherence To The Long-Standing Legislative Definition Of Pull-Tabs Was Not Arbitrary And Capricious.

The superior court's determination that the Commission acted arbitrarily and capriciously does not withstand close scrutiny. Despite ZDI's assertions to the contrary, the Commission's Final Order contains an adequate rationale for the Commission's actions;⁹ the superior court and ZDI's own expert acknowledged that the regulations governing tribal gambling are inapplicable to non-tribal gambling. Moreover, the incorporation of cash card technology into a pull-tab dispensing machine changes the manner in which pull-tabs is played and has never received approval from the Legislature or the Commission. For all of these reasons, the Commission's Final Order holding that the VIP Machine does not comply with Washington's gambling laws and regulations is reasonable and should be upheld by this Court.

⁹ As authorized under RCW 34.05.464(8), the Commission's Final Order incorporates specific portions of the ALJ's Initial Order by reference.

1. The Commission's Final Order sets forth the rationale for its ruling.

ZDI's contention that the Commission failed to provide an adequate rationale for its actions is contravened by the Final Order's citation to the public policies underlying the Act, which include close regulation, control and limitation of gambling activities, as well as the directive that the Act be liberally interpreted in favor of close control of these activities.¹⁰ AR 415, ¶ 2. It is further belied by RCW 9.46.0237, which defines pull-tabs as the game as it existed in 1973, and WAC 230-30-070(2), which the Commission adopted immediately following adoption of the Act in 1973. That the VIP Machine changes how pull-tabs is played by speeding up the rate of play and by removing a human element from the award of prizes provides further support for the Commission's action.

As the agency responsible for regulating gambling, and pull-tabs in particular, the Commission must necessarily make determinations regarding what types of technological innovations are permissible. In this case, the Commission was asked to determine whether cash card technology satisfied a definition of "cash" in regulations the Commission adopted shortly after passage of the Gambling Act in 1973 and decades

¹⁰ Neither the superior court's letter opinion nor its Findings of Facts and Conclusions of Law reference, let alone interpret, the public policies set forth in RCW 9.46.010. See CP 1031-34, 1064-66.

before ZDI's cash card technology became generally available. *See* AR AR 421, ¶ 20. Under these circumstances, the Commission appropriately concluded that "the cited rule could not have directly contemplated the use of cash cards" and that the only way cash card technology could be approved would be through an amendment to the regulations. AR 421-22, ¶ 21. This ruling was consistent not only with the definition of pull-tabs as it existed in 1973, but also adhered to the legislative directive that the Commission closely regulate and control gambling in the State of Washington and that the Act be liberally interpreted in favor of close control. *See* RCW 9.46.010 and 9.46.0237.

The Commission's decision to adhere to this long-standing regulation was reasonable under the circumstances. The Commission's Final Order was not arbitrary and capricious.

a. ZDI's attempts to refute the testimony of its own expert witness should be rejected.

In its Response Brief, ZDI attempts to refute the testimony of its own expert regarding how the VIP Machine changes how the game of pull-tabs is traditionally played. Resp. Br. at 34-36. At the hearing, ZDI offered expert testimony from attorney Frank Miller about how the VIP Machine functions and whether, in his opinion, it complied with Washington's gambling laws and regulations. AR 698-707. Miller

resigned as director of the Commission in 1997 to open a law practice that specializes in the representation of gambling industry clients. AR 708, ln.19 - AR 709, ln.7.

During the administrative hearing, Miller testified that the VIP Machine permits wins from the [sic] certain lower tier winners (less than \$20.00) to be “credited” to a cash card. AR 704. He also acknowledged that this crediting function “removes a cashier from paying low tier winners[.]” AR 705.

Regarding the speed of play, Miller compared and contrasted the VIP Machine to a traditional slot machine. He explained that the reason slot machines were “so lucrative is because they play so fast. You’re playing against the device. And it’s that speed of play, that’s what generates the revenue.” AR 716. In contrast, Miller testified that the problem with traditional pull-tabs is that “[t]hey’re slow” and cannot effectively compete “against completely electronic formats of gambling.” AR 714. Continuing, Miller explained that the VIP Machine increased the speed of pull-tab play, but that the increase in speed was not comparable to “a traditional slot where it’s fast, fast, fast.” AR 715. Miller also acknowledged that cash card technology was fast developing and that it had only become prevalent in the last seven years since his resignation as director of the Commission. AR 724. This is consistent with the

Commission's conclusion in the Final Order that the Commission (and the Legislature) "could not have directly contemplated the use of cash cards" at the time the regulations were adopted. *See* AR 421-22, ¶ 21.

ZDI's Response Brief offers several pages of analysis attempting to refute its own expert's analysis. Few if any of the factual assertions ZDI offers to refute Miller's testimony, however, are supported by citation to the record as required under RAP 10.3(5) and 10.4(f). *See* Resp. Br. 31-32, 34-36. In sum, ZDI's attempts to impeach its own expert witness are not supported by the evidence, are unconvincing, and should be disregarded.

b. The Final Order is consistent with the legislative directive to closely regulate, control and limit gambling activities.

RCW 9.46.010 expressly states that limiting the scope and nature of state-sanctioned gambling through strict regulation and control promotes the social welfare. While the Legislature recognized that fundraising for non-profits and charities is laudable, RCW 9.46.010 makes clear that gambling activities conducted by these entities are authorized upon the condition that they, like all other licensees, comply with state laws and regulations. Indeed, RCW 9.46.010 provides that pull-tabs, along with other state-sanctioned gambling activities, are allowed only

“when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto.”

The Commission’s mission is to regulate and control gambling activities and enforce Washington’s gambling laws and regulations. RCW 9.46.010. Despite ZDI’s unsupported assertions to the contrary, the Commission is not bound by any legislative or regulatory directive to ensure that the game of pull-tabs remains profitable for its licensees. Nor has ZDI offered any legal citation that supports the notion that the Legislature’s reference to non-profits and charities in RCW 9.46.010 obligates the Commission to unquestioningly adopt any technology that might increase pull-tab sales.

2. **Tribal gambling activities are regulated by the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710 *et seq.* and tribal/state compacts and, therefore, are not analogous to the non-tribal gambling activities at issue here.**

Tribal gaming is subject to a separate and distinct regulatory scheme established through operation of the IGRA and tribal/state compacts. As a consequence, the regulations governing tribal gambling activities are fundamentally different from the Act and its associated regulations, which govern non-tribal gaming in Washington. *See* AR 868-76, Robert A. Medved, *Entering Into & Enforcing Tribal Gaming Contracts: An Overview*, Washington State Bar News (August 2007). At

the hearing, all parties agreed that tribal gambling was governed by a separate and distinct regulatory system. AR 221, p. 16, lns. 3-18; AR 223, (p. 22, ln.21) (p.23, ln. 3); AR 276; AR 421, ¶ 19; CP 1030-31, ¶ 25. Indeed, ZDI's own expert, Frank Miller, testified that "[t]he tribal system's regulatory controls are set forth in compact, while the non-tribal entities are subject to the agencies' administrative provisions." AR 276.¹¹

Tribes are authorized to use "cashless transaction systems" in their Tribal Lottery Systems (TLS). AR 276. The TLS is a "hybrid" game based on games originally offered by the Washington State Lottery Commission.¹² IGRA requires that any type of gambling allowed by the state is subject to compact negotiations between a state and a qualified tribe. 25 U.S.C. § 2710(d)(1)(B). In Washington State, the tribes and the State negotiated compact provisions that allow tribes to offer a lottery system that couples an electronic facsimile of a "scratch ticket" with the electronic delivery system used in "Lotto."

¹¹ Under the Indian Gaming Regulatory Act, (IGRA), tribal pull-tab gaming is a Class II activity subject to exclusive regulation by the tribes. 25 U.S.C. § 2703(7)(A).

¹² The Lottery Commission operates independently from the Gambling Commission and is not subject to regulation under the Gambling Act. RCW 9.46.291.

See Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), *amended*, 64 F.3d 1250 (9th Cir. 1994), and 99 F.3d 321 (9th Cir. 1996), *cert. denied, sub nom. Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997). This system is unique to tribal gaming in Washington and is not available for use by non-tribal licensees, whose gambling activities are regulated by the Gambling Act and its associated regulations.

ZDI's contention that state regulations governing non-tribal pull-tabs operations are analogous to the regulatory system governing tribal gaming is factually and legally incorrect, and is refuted by the testimony of ZDI's own expert witness. Under these circumstances, the disparities between tribal and non-tribal regulations of cash card technology do not support a determination that the Commission's Final Order was arbitrary and capricious.

3. Approval of ZDI's VIP Machine will expand gambling.

The VIP Machine changes how pull-tabs is traditionally played by speeding up the rate of play and by removing an element of human interaction from the game. Both of these changes are attributable to the incorporation of cash card technology into the VIP Machine. To date, the Commission has not approved cash card technology for this purpose.

Cash card technology did not exist in 1973 when the Legislature for the first time authorized pull-tabs and the Commission adopted its first regulations governing pull-tab play. Consequently, neither the Legislature nor the Commission in 1973 could have intended that cash card technology complied with the terms “cash” and “merchandise.” Under these circumstances, the Commission properly concluded that approval of this technology without a corresponding amendment to the law or regulations would constitute an expansion of gambling.¹³ See AR 421-22, ¶ 21.

E. Pierce County Superior Court Lacked Jurisdiction To Hear ZDI’s Case and, Therefore, ZDI’s Case Should Have Been Dismissed For Lack Of Jurisdiction.

1. RCW 9.46.095 does not conflict with the APA.

The Gambling Act provides that “[e]xcept as otherwise provided in this chapter, all proceedings under this chapter shall be in accordance with the Administrative Procedure Act, chapter 34.05 RCW.” RCW 9.46.140(5). It further provides that, with the limited exception of “adjudicative proceedings involving a final decision of the commission to

¹³ ZDI repeatedly misquotes the testimony of Dallas Burnett, the head of the Commission’s Gambling Electronics Team (GET), asserting that he testified that the VIP Machine’s use of cash card technology “would not be an expansion of gambling.” Resp. Br.at 6, 29. In fact, when asked whether cash card technology constituted a “huge exponential expansion of gambling,” Burnett replied: “No, I don’t think it’s a huge expansion of gambling.” AR 879, lns. 6-10. Based on this answer, one can reasonably infer that Burnett believed that the VIP Machine still constituted an expansion of gambling, just not a “huge” one.

deny, suspend, or revoke a license,” no court but Thurston County Superior Court shall have “jurisdiction” to hear any action against the Commission. RCW 9.46.095. ZDI’s Petition for Judicial Review from the Commission’s Final Declaratory Order was an adjudicative proceeding involving a final decision of the Commission. It did not, however, involve a final decision by the Commission to “deny, suspend, or revoke a license.”¹⁴ Accordingly, the only court with subject matter jurisdiction to hear this case was Thurston County Superior Court. *See Lathrop v. State En’gy Facility Site Evaluation Council (EFSEC)*, 130 Wn. App. 47, 151, 121 P.3d 774 (2005) (upholding Kittitas County Superior Court’s dismissal of petition for judicial review based on RCW 80.50.140(1) which grants Thurston County Superior Court sole authority to review EFSEC administrative decisions).

¹⁴ ZDI contends that the Commission “licenses” gambling equipment. The Commission, however, only grants licenses to individuals and entities, not equipment. *See* RCW 9.46.070(1)-(5), (7), (17) (authorizing Commission to license a variety of individuals and entities engaged in the gambling industry); RCW 9.46.310 (authorizing the licensure of individuals who manufacture, sell, distribute or supply gambling devices). Gambling devices and equipment, like the VIP Machine, on the other hand, are subject to regulation by the Commission and must be reviewed to verify that they comply with state law before they can be used in the State. WAC 230-12-316. If the Commission denies approval, the person submitting the equipment for review is entitled to appeal that determination by petitioning for a declaratory order as provided under RCW 34.05.240 and WAC 230-50-850. These proceedings are separate and distinct from licensing proceedings in which the Commission seeks to revoke, suspend or uphold the denial of a gambling license. *See* RCW 9.46.075 (setting forth bases for denying, revoking, or suspending gambling licenses).

The APA provision that is applicable to the Gambling Act and the Commission is RCW 34.05.020, which provides in pertinent part:

Nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. . . . No subsequent legislation shall be held to supersede or modify the provisions of this chapter or its applicability to any agency except to the extent that such legislation shall do so expressly.

In other words, subsequent legislation that expressly states that it supersedes or modifies the APA's application to a particular agency is enforceable.

When the Legislature adopted the Gambling Act in 1973, it expressly stated that “[e]xcept as otherwise provided in this chapter, all proceedings under this chapter shall be in accordance with the Administrative Procedure Act, chapter 34.05 RCW.” Eight years later, the Legislature expressly directed that the Thurston County Superior Court shall have exclusive jurisdiction over all causes of action or proceedings brought against the Commission. In a proviso to RCW 9.46.095, the Legislature affirmatively excluded “adjudicative proceedings involving a final decision of the commission to deny, suspend, or revoke a license” from its scope. RCW 9.46.095. “Provisos operate as limitations upon or exceptions to the general terms of the statute to which they are appended

and as such, generally, should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions.” *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974). When strict construction is applied to the proviso excluding final decisions relating to licensing actions, the only possible conclusion is that other final decisions, like the Final Declaratory Order at issue here, are included.

If any doubt remains as to the Legislature’s intent, one need look no further than the entry for RCW 9.46.095 that appears in Final Bill Report on Substitute S.B. 3307, 47th Leg., Reg. Sess. (Wash. 1981) (Final Bill Report). The Supreme Court has held that the final legislative report on a bill conveys the “express legislative intent” underlying a statute. *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992). The Final Bill Report provides:

In the future, the Superior Court of Thurston County shall have jurisdiction over any action or proceeding against the Commission or any member thereof arising under the scope of his or her employment. Contested cases of a final decision of the Commission denying, suspending, or revoking a license shall be governed by Chapter 34.04 [now Chapter 34.05].

(Emphasis added). ZDI contends that RCW 34.05.030(5) voids RCW 9.46.095’s jurisdictional requirements. Resp. Br. at 41. RCW 34.05.030(5), however, only applies to legislation that existed prior to the adoption of the APA that might have served to exclude an agency from the

APA's scope. Adopted in 1967, it provides that "[a]ll other agencies, **whether or not formerly specifically excluded** from the provisions of all or any part of the Administrative Procedure Act, shall be subject to the entire act."¹⁵ The Gambling Act, which was adopted in 1973, post-dates the adoption of this provision of the APA. Accordingly, RCW 34.05.030(5) does not apply and this Court should disregard ZDI's arguments to the contrary.

RCW 9.46.095 expressly exempts Petitions for Judicial Review from a Final Declaratory Order from the APA's jurisdictional requirements. Accordingly, it complies with RCW 34.05.020 and effectively excludes this action from the jurisdictional requirements set forth in RCW 34.05.514(1).¹⁶

2. RCW 9.46.095 is not structured, and does not function, as a venue statute.

The Legislature's determination that Thurston County should have exclusive jurisdiction over actions against the Commission is consistent

¹⁵ The Legislature amended the APA to include this language in 1967. *See* Laws of 1967, ch. 237, § 7.

¹⁶ RCW 34.05.514(1) provides:

Except as provided in subsections (2) and (3) of this section, proceedings for review under this chapter shall be instituted by paying the fee required under RCW 36.18.020 and filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located.

with the Legislature's desire to have the Act uniformly interpreted by a single superior court and to avoid the uncertainty that results from inconsistent opinions in different jurisdictions. This jurisdictional requirement differs significantly from the cases cited by ZDI in support of its position that RCW 9.46.095 only controls venue.

Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 76 P.3d 1183 (2003), is illustrative. In *Dougherty*, the Supreme Court was asked to determine whether a statute that designated where workers could file industrial insurance claims controlled venue or subject matter jurisdiction. The statute, without using the terms "venue" or "jurisdiction," provided that a worker can file an appeal from a ruling by the Board of Industrial Insurance Appeals in the county where the worker resides, the county where the injury occurred, or, if neither are within Washington State, then in Thurston County. *Id.* at 313. In its analysis, the Supreme Court held that the "type of controversy" is the "critical concept" regarding subject matter jurisdiction, while the critical issue regarding venue was "location." *Id.* at 316. Since the statute allowed the worker to file in virtually any superior court in Washington, depending upon the circumstances of the injury, the court found that it conferred subject matter jurisdiction over industry insurance appeals on all superior courts, and that the

specifications regarding where the case must be filed controlled only venue. *Id.* at 316-17.

Both of the cases ZDI cites in support of the proposition that “jurisdiction” actually means “venue” involve statutes structured similarly to the statute at issue in *Dougherty*. See *Myuskovich v. State*, 59 Wyo. 406, 141 P.2d 540 (1943) (bastardy statute that confers “jurisdiction” on district court in which alleged father resides or in which mother or child resides controls venue rather than subject matter jurisdiction); *Bailiff v. Storm Drilling Co.*, 356 F. Supp. 309, 311 (E.D. Tex. 1972) (interpreting Jones Act venue provision, which provides that actions may be brought in the district court where the defendant employer resides or in which the employer’s principal office is located). Both cases involve laws that generally grant jurisdiction to a particular type of court but then restrict the location where the case may be heard to specific venues.

RCW 9.46.095, on the other hand, clearly and unequivocally provides that no court other than the Thurston County Superior Court shall have jurisdiction over actions brought against the Commission. Unlike *Dougherty*, *Myuskovich*, and *Bailiff*, RCW 9.46.095 specifies that one and only one superior court shall have jurisdiction over these actions. This result is buttressed by RCW 9.46.095’s plain language which uses the word “jurisdiction,” leaving no doubt regarding the Commission’s intent.

See Dougherty, 150 Wn.2d at 317 (procedural requirements regarding location of filing may be interpreted as jurisdictional when “mandated by the clear language of the statute”). Accordingly, this court should reject ZDI’s contention that the Legislature meant “venue,” when the plain language of the statute, as well as the statute’s legislative history, clearly indicate that the Legislature meant “jurisdiction” to mean “jurisdiction.”

3. ZDI’s appeal is subject to the specific jurisdictional requirements set forth in RCW 9.46.095, as opposed to RCW 4.92.010’s general venue requirements applicable to “claims against the state.”

ZDI’s administrative declaratory judgment action against the Commission, which arises under the APA, RCW 34.05, is fundamentally different from “claims against the state” that are governed by RCW 4.92.010. The test for whether a case involves a “claim against the state,” for purposes of RCW 4.92.010, as opposed to merely seeking relief from a state agency, is “whether the judgment or decree necessarily affects some right or interest in a material sense valuable to the state as an entity, so that the decree or judgment effectively operates against the State, rather than the officers sued.” *Say v. Smith*, 5 Wn. App. 677, 682, 491 P.2d 687 (1971) quoting *State ex rel. Fleming v. Cohn*, 12 Wn.2d 415, 425, 121 P.2d 954 (1942).

In this case, the relief sought is a declaratory judgment from the Commission authorizing ZDI to distribute its VIP Machine. ZDI is not seeking a money judgment or any other relief that would generally impact the material interests of the state. Accordingly, RCW 4.92.010 is inapplicable.

In any event, even if RCW 4.92.010 was applicable, the specific legislation set forth in RCW 9.46.095, which applies to “any action or proceeding” against the Commission, trumps RCW 4.92.010’s general provisions regarding “claims against the State.” *See State v. Danforth*, 97 Wn.2d 255, 257, 643 P.2d 882 (1982) (when two statutes appear to cover concurrent issues, the specific statute prevails over the general statute).

Should this court find that RCW 9.46.095 and RCW 4.92.010 do conflict, RCW 9.46.095 controls as it is the more specific of the two statutes. For all the reasons set forth above, this Court should hold that RCW 4.92.010 has no application here.

V. RESPONSE TO CROSS APPEAL ARGUMENT

A. The Commission’s Ruling Comports With Principles Of Substantive Due Process.

ZDI has failed to identify any of the elements necessary to prove a *prima facie* violation of substantive due process. Substantive due process limits a state’s ability to pass unreasonable or irrational laws which deprive

individuals of property rights or interfere with the exercise of recognized liberty interests. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21, 829 P.2d 765 (1992). Modern substantive due process jurisprudence requires a “careful description’ of the asserted fundamental liberty interest.” *Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)); *Doe v. City of LaFayette*, 377 F.3d 757, 768 (7th Cir. 2004). Fundamental interests are those that have “a powerful historical and precedential pedigree that supports the conclusion that they are ‘objectively, deeply rooted in this Nation’s history.’” *LaFayette*, 377 F.3d at 768, (quoting, *Glucksberg*, 521 U.S. at 720-21).

Without any analysis or citation to relevant legal authority, ZDI contends that it has a fundamental right to distribute pull-tab vending machines with cash card technology in Washington State. One need look no further than the Article II, section 24 of Washington State Constitution to realize that no such fundamental right exists. Throughout the history of Washington State, the state constitution has expressly prohibited all gambling activities. The right to offer pull-tab vending machines with cash card technology does not infringe upon a “fundamental interest” that is “objectively, deeply rooted in this Nation’s history.” *Id.* This alone provides sufficient basis to reject ZDI’s substantive due process argument.

Continuing, ZDI, without citation to any legal authority or the record, appears to assert that the Commission's Final Order violates substantive due process for the same reasons that the superior court concluded that the Commission had acted arbitrarily and capriciously. Resp. Br. at 39. This argument should be rejected. The Commission's Final Order was reasonable under the circumstances and did not constitute arbitrary and capricious action. Moreover, even if this court were to find that the Commission's Final Order was arbitrary and capricious, a violation of substantive due process only arises when such action infringes upon a fundamental right, which ZDI has failed to prove.

B. ZDI Did Not Raise The Issue Of Whether the VIP Machine Was An Illegal Gambling Device In Its Petition For Review Or During Its Argument Before the Court.

In its Final Order, the Commission disavowed and vacated the ALJ's ruling regarding whether the VIP Machine was an illegal gambling device as defined in RCW 9.46.241(1). ZDI did not object to this ruling in its Petition for Judicial Review or in its briefing or argument before the superior court. As a result, this issue was not addressed by the superior court in its letter opinion or Findings of Fact and Conclusions of Law.¹⁷

¹⁷ The issue of whether the VIP Machine constitutes an "expansion of gambling" refers to a philosophical debate regarding limits on the Commission's power to authorize new gambling activities. As noted earlier, Const. art. II, § 24 requires new gambling activities to be approved by a supermajority of the Legislature or the electorate. The Commission is granted authority to regulate and limit gambling activities. Presumably, any

Having failed to raise this issue before the superior court, ZDI has effectively waived it, and this court should refrain from considering this issue for the first time on appeal. *See* RAP 2.5(a) (prohibiting argument on issues raised for the first time on appeal).

ZDI's Petition for Judicial Review filed with the superior court makes only passing reference to the Commission's vacation and disavowal of the ALJ's gambling device determination. Argument in the remainder of the Petition focused exclusively on issues related to whether ZDI's technology complied with the definition of "cash" as set forth in WAC 230-12-050 and WAC 230-30-070. The Petition concluded with the following "Request for Relief:"

Petitioner requests the Court allow ZDI customers to buy pull-tabs and redeem winnings of twenty dollars or less from its approved pull-tab verifier and dispensing equipment. The Court should approve the technology because it **complies with the rules.**

CP 359 (emphasis added). ZDI's Trial Brief and Reply Brief before the superior court also focus exclusively on the issue of whether the VIP Machine complies with WAC 230-12-050(2) and WAC 230-30-070(1).

unauthorized gambling activity – i.e., an activity that violates the Gambling Act or Commission regulations constitutes an expansion of gambling and the Commission is authorized to take actions necessary to ensure that the laws and regulations are being enforced. ZDI incorrectly claims that Commission witnesses did not view the VIP Machine as an expansion of gambling. In fact, Burnett testified that he did not perceive the machine to be "a huge expansion of gambling." AR 879, lns. 6-10. Implied in this response is his assessment that the cash card technology will result in some degree of expansion.

CP 459-84, 703-13. Nor did ZDI raise this issue during oral argument. 5/1/07 RP 37-89. Consequently, the superior court did not address this issue in its June 27, 2007 letter opinion, or in its Findings of Fact and Conclusions of Law. *See* CP 1053-63, 1064-66.

On August 3, 2007, over a month after the court issued its letter opinion, ZDI, for the first time, raised this issue in a pleading entitled “ZDI Gaming, Inc’s Supplemental Authority And Citations to the Record RE: ‘Gambling Device Issue.’” CP 824-30. The Commission filed a Response on August 15, 2007, and ZDI filed a Reply Brief the following day. CP 897-903, 1001-1005. Although no motion was pending, the parties argued this issue before the superior court during the presentment hearing on August 17, 2007. RP 12-15, 24-26. During the hearing, the superior court made it clear that the scope of her ruling was limited to whether ZDI’s VIP Machine complied with WAC 230-12-050(2) and WAC 230-30-070(1) and nothing else. 8/17/07 RP 26, Ins. 7-10.

A review of the record before the superior court establishes supports the superior court’s determination that ZDI only sought relief on the issues of whether the Commission correctly interpreted WAC 230-12-050(2) and WAC 230-30-070(1). Having failed to raise this issue below, this Court should decline to address it for the first time on appeal.

C. The Superior Court's Award Of Attorney's Fees and Costs Was Consistent with the Equal Access to Justice Act (EAJA).

For the reasons set forth in the Commission's opening brief, an award of attorney's fees and costs was not warranted under the EAJA. The Commission has asked this Court to reverse and vacate the trial court's order in this regard. *See* Commission's Opening Br. at 44-46. ZDI offers no argument or citation to authority in response to the Commission's arguments. Accordingly, the Commission will refrain from repeating its position again here. In the event this Court determines that an award of attorney's fees and costs is warranted, the Commission would ask that it affirm the trial court's ruling below as opposed to ZDI's request. *See* Resp. Br. at 48-50. ZDI, on cross appeal, contends that the trial court erred by failing to award ZDI the full amount of fees available under the Uniform Declaratory Judgment Act (UDJA). The remainder of this brief is devoted to this issue.

Washington follows the American rule concerning attorney fees under which such fees are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). A statute awarding attorney fees against the state must be strictly construed because it constitutes both a waiver of sovereign immunity and an abrogation of the

American rule on attorney fees. *Rettkowski v. Department of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part* 128 Wn.2d 508, 910 P.2d 462 (1996). A fee award under the EAJA is reviewed for abuse of discretion, *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999), and should not be disturbed absent a clear showing of abuse of discretion, *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987).

RCW 4.84.350 provides that certain “qualified parties” are entitled to recover attorney fees and costs, not to exceed \$25,000,¹⁸ incurred during a Petition for Judicial Review, provided an agency’s actions are found not to be “substantially justified.” RCW 4.84.350 limits the recovery of reasonable attorney’s fees and expenses to those incurred during judicial review of the agency’s Final Order. *Alpine Lakes*, 102 Wn. App. at 19.

¹⁸ In its argument heading on attorney fees, ZDI appears to assert that the EAJA’s \$25,000 cap on attorney’s fees is unconstitutional. *See* Resp. Br. at 48. ZDI has not offered any argument or citation to legal authority supporting this position, accordingly, it has waived argument on this issue. Appellate courts need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

1. **ZDI's counsel does not possess the specialized knowledge, skill or technical education that warrants recovery of more than the statutory rate of \$150 per hour.**

RCW 4.84.340(3) provides that “attorney’s fees shall not be awarded in excess of one hundred and fifty dollars (\$150) per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher rate.” Federal courts,¹⁹ when determining whether “special factors” justify an upward departure from the statutorily set hourly rate, have found that:

Expertise, where the case did not require any specialized knowledge, skill or technical education, will not justify a higher rate. Indeed, specialized knowledge is insufficient to justify an enhanced fee award where attorneys have acquired such knowledge through practice in the field of administrative law or where their expertise is derived from experience as opposed to specialized training. **Rather, the statutory cap may be exceeded only in the unusual situation where the legal services rendered require specialized training and expertise unattainable by a competent attorney through a diligent study of the governing legal principles.** Merely because some scholarly effort and professional experience is required to attain proficiency in a particular practice area does not automatically require enhancement of the EAJA rates. Although an area of law may involve a complex statutory and regulatory framework, the field may not be beyond the

¹⁹ Federal decisions ruling on controversies presented by the same (or similar) language as contained in the Washington EAJA can be cited as persuasive authority. See *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm’n*, 112 Wn.2d 278, 283, 770 P.2d 624 (1989) (holding federal decisions construing federal acts provide persuasive authority in construing similar state acts, although such decisions are not controlling).

grasp of a competent practicing attorney with access to a law library and the other accoutrements of modern legal practice.

32 Am. Jur. 2d *Federal Courts* § 293 (1994) (footnotes excluded) (emphasis added). Examples of special expertise include practice in a specialty area of law, like patent law, or knowledge of a foreign law or language. *Pierce v. Underwood*, 487 U.S. 552, 572, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988). To qualify for an upward departure, an attorney's expertise must be truly exceptional and beyond the knowledge and ability of an otherwise capable litigator; if not, the exception would swallow the whole and every qualified attorney could seek and receive an upward modification of the hourly fee limit. *Id.* at 571-72.

Attorney Joan Mell represented ZDI throughout the administrative proceedings and the Petition for Judicial Review. In its Motion for Award of Attorney's Fees and Costs, ZDI urged the superior court to increase the statutory hourly fee of \$150 to \$250 an hour because "[t]he limited availability of a qualified attorney for the proceeding involved justifies the higher rates." CP 766. As support, ZDI offered the declaration of attorney Paul Nordsletten, who opined that he did not know of any attorneys who shared the same credentials as Mell who would have agreed to handle the case at \$150 per hour and that prevailing rates for this type of work frequently exceed the \$250 per hour rate charged by Mell. CP

805-07. ZDI also offered Mell's declaration and resume into evidence. CP 811-14, 817-18. None of these documents, however, established that Mell possessed an expertise that is truly exceptional and beyond the knowledge and ability of an otherwise capable litigator. Moreover, the *Underwood* court specifically rejected arguments that the limited availability of qualified attorneys for a particular proceeding was sufficient to qualify as "special factor" under the federal statute. *Underwood* at 571-72. Under these circumstances, the superior court did not abuse its discretion when it calculated the fee award using the statutory rate.

ZDI further contends that an upward departure is warranted because its counsel was subject to hardships during the administrative proceedings before the ALJ and the Commission. Resp. Br. at 49. Fees awarded under the EAJA, however, are limited to those incurred during the judicial review proceedings. *Alpine Lakes*, 102 Wn. App. at 19. Accordingly, arguments focusing on alleged hardships suffered during the administrative proceedings are irrelevant and should be disregarded.

2. ZDI is not entitled to recover fees and costs for actions that unreasonably or unduly delayed final resolution of the matter.

Under RCW 4.84.350(1), a court has discretion to deny or reduce requested fees to the extent the qualified party "during the course of the

proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy.” Accordingly, when calculating ZDI’s fee award, the superior court properly excluded fees and costs incurred due to ZDI’s (1) decision to remain in Pierce County Superior Court with knowledge it had filed in the wrong jurisdiction, (2) unsuccessful motion to supplement the record, and (3) unsuccessful opposition to the Commission’s Motion for Partial Dismissal. *See* 8/17/07 RP 33-35; CP 937-38; 943-97.

ZDI contends that the superior court “penalized” ZDI by deducting attorney’s fees and costs incurred during its prosecution of the case in Pierce County. Resp. Br. at 49. The record below, however, establishes that the Commission attempted to resolve this jurisdictional dispute amicably by notifying ZDI that Pierce County lacked jurisdiction and urging ZDI to correct its error by voluntarily dismissing the Pierce County action and filing in Thurston County as required under RCW 9.46.095. CP 9, 995 at ¶ 5. ZDI failed to do this, forcing the Commission to move to dismiss that action. Rather than dismiss, the Pierce County Superior Court issued an order transferring the venue instead. CP 4-5.

Regardless of whether this court ultimately concludes that RCW 9.46.095 controls venue or jurisdiction, ZDI should have filed this case in Thurston County Superior Court. The superior court did not abuse its

discretion when it excluded fees incurred during prosecution of the case in Pierce County, as ZDI's decision to proceed in Pierce County unduly and unreasonably protracted the resolution of the dispute.

The superior court also properly excluded fees related to ZDI's unsuccessful attempt to supplement the record²⁰ and its unsuccessful opposition to the Commission's Motion for Partial Dismissal. These two motions both arise from ZDI's attempts to expand the scope of its Petition for Judicial Review to include review of a Petition for Rule Change ZDI filed the Commission over the summer of 2006. CP 134-43. The Commission opposed ZDI's motion to supplement and filed its motion for

²⁰ ZDI has assigned error to the superior court's denial of its Motion to Supplement the Record. See Resp. Br. at 2. Its only argument on this issue appears as part of ZDI's attorney fees argument: "ZDI objects to [the superior court's refusal to supplement the record] because the complete record further supports ZDI's position. ZDI had the right to make the request pursuant to the terms of the APA. RCW 34.05.566(7)." Resp. Br. at 50. RCW 34.05.566(7) provides "[t]he court may require or permit subsequent corrections or additions to the record." ZDI's argument and citation to legal authority is not sufficient to support ZDI's assignment of error and, therefore, this Court should find that ZDI has waived this issue on appeal as appellate courts need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

In any event, RCW 34.05.562(1) governs when a reviewing court may "receive new evidence" like the evidence ZDI offered with its Motion to Supplement. It provides that a court may "receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues" regarding improper administrative procedures or proceedings that were not otherwise required to be determined on the agency record. The vast majority of the materials ZDI sought to introduce as evidence before the trial court post-dated the December 1, 2005 administrative hearing and relate to a Petition for a Rule Change that ZDI subsequently abandoned. See CP 966-1225. Moreover, ZDI's bald assertion that the supplemental evidence should have been admitted because it "further supports ZDI's position" is not one of the bases for admitting new evidence under RCW 34.05.561(1). Accordingly, even if ZDI had offered sufficient legal argument and authority to properly raise this issue, its argument is still fatally flawed.

partial dismissal because ZDI abandoned its pursuit of the rule change petition before the Commission had an opportunity to rule upon it and, therefore, failed to exhaust its administrative remedies. CP 389, 397, 995 at ¶ 3; *see* CP 426. The superior court granted both motions, thereby limiting the scope of review to the Commission's Final Order. CP 667-68, 1079-80. Both motions arose from ZDI's unsuccessful attempt to force the superior court to review an administrative action that ZDI had affirmatively withdrawn from agency consideration. Both motions unduly and unreasonably protracted resolution of the parties' dispute. The trial court did not abuse its discretion when it deducted the fees ZDI expended on these efforts from the EAJA attorney's fees award.

3. ZDI failed to properly document its fees.

The superior court's award of fees should also be upheld because ZDI failed to offer a sufficient documentary record supporting its fee request. The record supporting an attorney's fees petition must clearly disclose the total number of hours worked and specify the type of work performed. *State, ex rel. T.A.W. v. Weston*, 66 Wn. App. 140, 148, 831 P.2d 771 (1992). "The burden of demonstrating that a fee is reasonable always remains with the fee applicant." *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995).

Many of the entries in ZDI's billing records were vague and unclear, making it impossible to determine what work was performed and whether that work was reasonably related to ZDI's Petition for Judicial Review. *See* CP 943-93. For instance, a June 1, 2006 entry claims five hours of attorney time attributable to "Travel to and from ZDI and Tull's office; Tull statement." CP 955. This charge post-dates issuance of the ALJ's Initial Order by a month and pre-dates issuance of the Commission's Final Order by nearly two months and appears to have been incurred as part of ZDI's aborted rule petition, rather than the declaratory judgment action. This is only one of numerous instances where ZDI sought recovery of attorney's fees that were clearly not recoverable under the EAJA. *See* CP 943-97.

ZDI failed to meet its burden of proving that its fee was reasonable and necessary to the litigation. The superior court did not abuse its discretion when it limited ZDI's award to \$18,000, rather than awarding \$25,000, the maximum amount recoverable under the EAJA.

VI. CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the superior court's ruling and award of attorney's fees and costs be reversed, that the Commission's Final Declaratory Order be

affirmed and reinstated in full, and that ZDI's Cross-motion be denied in its entirety.

RESPECTFULLY SUBMITTED this 24th day of April, 2008.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'H. Bruce Marvin', written over a horizontal line.

H. BRUCE MARVIN, WSBA # 25152
Assistant Attorney General
Attorneys for Appellant Washington
State Gambling Commission

APPENDIX A

Every licensee shall keep the record of all prizes awarded in excess of five dollars, containing all of the information required in subsection (5) above, for a period of one year and shall display the same to any member of the public, representative of the commission or law enforcement officials upon demand. [Order 5, §230-30-070, filed 12/19/73.]

WAC 230-30-080 LIMITATION ON PULL TAB DISPENSING DEVICES.

No pull tabs shall be placed out for play unless the device by which they are dispensed to the consumer allows the consumer to either:

(1) See all of the pull tabs remaining on or within the series of pull tabs; or

(2) The device contains a mechanism on its face which sets out clearly and precisely the number of pull tabs which remain within the series of pull tabs at any given time so that a consumer is able to compare the number of chances remaining with the number and quality of prizes remaining with respect to each set of pull tabs or portion thereof.

No pull tabs shall be added to a series originally placed before the public for play. [Order 9, §230-30-080, filed 12/19/73, 1:26 P.M. Prior: Order 5, §230-30-080, filed 12/19/73, 1:25 P.M.]

WAC 230-30-200 PUNCH BOARD AND PULL TAB OPERATOR BUSINESS RESTRICTIONS.

(1) No operator shall buy, receive or otherwise obtain, or shall any distributor or distributor's representative deliver, any punch board, pull tab or related equipment or merchandise from any distributor except upon the basis of a cash transaction nor shall he permit any distributor to have or acquire any interest, including a security interest, in any such equipment or merchandise. A cash transaction shall include payment or payments by check: PROVIDED, That each check is presented for payment into the banking system by the end of the second business day following the day the check is written.

(2) No operator shall accept a loan of money or any thing of value from any distributor or from anyone connected in any way with such distributing business. [Order 5, §230-30-070, filed 12/19/73.]

WAC 230-30-210 BUYING FROM AND SELLING TO ONLY LICENSEES

REQUIRED. No manufacturer, distributor or distributor's representative, shall sell or otherwise make available to any person any punch boards, pull tabs, pull tab dispensing devices or related equipment in this state unless it has first determined that such person has a valid license issued by the commission to sell or otherwise distribute such equipment within this state, or to operate such activity on a particular premise within this 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. [Order 5, §230-30-210, filed 12/19/73.]

marked, defaced, tampered with or otherwise placed in a condition, or operated in a manner, which may deceive the public or which affects the chances of winning or losing upon the taking of any chance thereon. [Order 5, §230-30-050, filed 12/19/73.]

WAC 230-30-060 PUNCH BOARD RESTRICTIONS. No operator shall display, and no manufacturer shall sell or furnish to any person, any punch board:

(1) To which any key to any winning number, or symbol, exists other than a key which is furnished to the operator, which key designates the color codes for all chances on that board without regard to whether or not such chances are designated winners.

(2) Which has taped sides, corners, or edges. [Order 5, §230-30-060, filed 12/19/73.]

WAC 230-30-070 CONTROL OF PRIZES. (1) Punch boards and pull tabs licenses shall award all prizes in cash or in merchandise. Prizes may not involve the opportunity of taking an additional chance or chances on the punch board or another punch board or of obtaining another pull tab or pull tabs.

(2) The licensee shall display all prizes in the immediate vicinity of the punch board or pull tab device and such prizes shall be in full view of any person prior to that person purchasing the opportunity to play. When a prize is cash, then the money itself shall not be displayed, but a coupon designating the cash amount represented thereby available to be won shall be substituted therefor in the display. The licensee shall display prizes so arranged that a customer can easily determine which prizes are available from any particular punch board or pull tab device located upon the premises.

(3) Upon a determination of a winner, the licensee shall remove the prize won immediately from display and it shall be presented to the winner. Upon presenting such prize, the licensee shall immediately conspicuously delete all references to any cash prize of five dollars or more or merchandise prize with a retail value of five dollars or more as being available to future players from any punch board or pull tab device upon which such reference may appear and from any other list, sign, or notice which may be posted in such a manner that all future customers will know the prize is no longer available.

(4) No licensee shall offer to pay cash in lieu of merchandise prizes which may be won.

(5) When any person shall win over five dollars in cash or merchandise with a retail value of more than five dollars from the operation of any punch board or pull tab device, a record shall be made by the licensee of the win. The record shall contain:

- (a) The full name of the winner
- (b) The current address of the winner
- (c) The date of the win
- (d) A description of the prize won
- (e) If the prize is in merchandise, its retail value.

It shall be the responsibility of the licensee to determine the identity of the winner and the licensee shall require such proof of identification as is necessary to properly establish the winner's identity.

The licensee shall post all of the above information, except the address of the winner, for display to the public in the immediate vicinity of the punch board or pull tab device upon which it was won and it shall be removed only after the punch board or pull tab device is removed from operation.

TITLE 230 GAMBLING COMMISSION, WA. ST.

licensed activity is being conducted then no one under the age of eighteen years shall be admitted to that portion of the premises used to conduct the licensed activity. [Order 5, §230-12-030, filed 12/19/73.]

WAC 230-12-050 NO CREDIT TO BE ALLOWED. No licensee, or any of its members or employees, or any operator, conducting, or in any way participating in the conduct of any of the activities which may be authorized by the commission under these rules, shall allow a person to play that activity on credit, or shall grant a loan or gift of any kind at any time to a person playing the activity. When a person is charged consideration for the privilege of playing the activity that consideration shall be collected in full, by cash or check, in advance: PROVIDED, That the consideration paid for the opportunity to play a punch board or pull tab series may be collected immediately after the play is completed only when such consideration is five dollars or less. [Order 5, §230-12-050, filed 12/19/73.]

WAC 230-12-070 CONDUCT OF GAMBLING ACTIVITY. No licensee operating any activity shall directly or indirectly in the course of such operation:

- (1) Employ any device, scheme or artifice to defraud;
- (2) Make any untrue statement of a fact, or omit to state a fact necessary in order to make a statement not misleading, in consideration of the circumstance under which such statement was made;
- (3) Engage in any act, practice, or course of operation as would operate as a fraud or deceit upon any person. [Order 5, §230-12-070, filed 12/19/73.]

WAC 230-12-200 PROHIBITED PRACTICES CONTRACTS GIFTS REBATES, ETC. (1) No contract shall be made or entered into whereby any operator or distributor agrees to deal in, purchase or operate any particular brand or brands of gambling device or equipment to the exclusion of any other brand of gambling device or equipment.

(2) No manufacturer or distributor, or his employee, shall directly or indirectly, solicit, give or offer to, or receive from any other licensee or any employee thereof, any gifts, discounts, loans of money, premiums, rebates, free merchandise of any kind, treats or services of any nature whatsoever; nor shall any licensee or employee thereof, directly or indirectly, solicit, receive from, or give or offer to any manufacturer or distributor, or his employee, any gifts, discounts, loans of money, premiums, rebates, free merchandise of any kind, treats or services of any nature whatsoever: PROVIDED, That nondiscriminatory discounts offered to all parties on the same conditions shall be permitted.

(3) No manufacturer or distributor, or distributor's representative, shall sell to any person, or solicit from any person, any order for any device, equipment, merchandise, property or service, contingent upon that person or another purchasing or ordering some other device, equipment, merchandise, property or service. The price of any such device,

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
GAMBLING COMMISSION,

Appellant and Cross-Respondent,

v.

ZDI GAMING, INC.,

Respondent and Cross-Appellant.

CERTIFICATE OF
SERVICE

I certify that on April 24, 2008, I caused a true and correct copy of the State's Reply Brief of Appellant/Cross Respondent and Response to Cross-Appeal, Motion to Strike Portions of Respondent's Brief and Cross Appeal and Appendices Thereto, and Declaration of H. Bruce Marvin in Support of Motion to Strike Portions of Respondent's Brief and Cross Appeal and Appendices Thereto, in the above-referenced matter to be served upon the parties herein, as indicated below:

COURT OF APPEALS, DIVISION II
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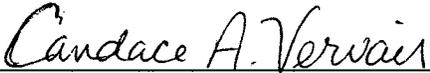
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of April 2008.



CANDACE A. VERVAIR
Legal Assistant