Proposed Amendatory Section:
WAC 230-10-375 Failing to maintain a positive cash flow.

Proposed Repealed Sections:
WAC 230-10-370 Adjusted cash flow limits for bingo.
WAC 230-10-380 Relief reduction for minimum annual adjusted cash flow.

November 2014 – Final Action
October 2014 – Study Session
September 2014 – Up for Discussion and Possible Filing
August 2014 – Study Session

ITEM 8: November 2014 Commission Meeting Agenda	Statutory Authority 9.46.070, RCW 9.46.0209

Who proposed the rule change?

Ric Newgard, licensed primary bingo manager for Seattle Junior Hockey Association, and Clyde Bock, licensed primary bingo manager for Leon Sullivan Health Care Center.

Proposed Change

With these rule changes, bingo licensees with annual gross gambling receipts over $1.5 million dollars would no longer have to meet quarterly and yearly "cash flow" requirements, which is calculated based on the quarterly activity reports they submit. Instead, licensees would have to show a positive cash flow when they submit their annual financial statements to the Commission. These financial statements would continue to be prepared in accordance with WAC 230-07-150.

In addition, associated rules allowing a reduction for taxes paid and an automatic 25% reduction of the cash flow requirements would also be repealed.

There are currently only 8 licensees who would be impacted by this petition because they have annual gross gambling receipts from bingo and punch board/pull-tab (PB/PT) activities over $1.5 million.

Attachments:
- Revisions to WAC 230-10-375 and repealed sections WAC 230-10-370 and WAC 230-10-380.
- Petition for Rule Changed dated July 18, 2014, with proposed new subsection(2) to WAC 230-10-175.
- Stakeholder notification letter e-mailed to Group III, IV, and V bingo licensees on August 7, 2014.
- Responses supporting the petition (see below for details).
- History of Net Income, Net Return, and Adjusted Cash Flow Regulations.
- RCW 9.46.0209

History of Rule

All charitable and nonprofit organizations must demonstrate they have made "significant progress" toward the accomplishment of the organization's stated purposes each year (RCW 9.46.0209). In the last 31 years, we have had numerous rules that outline how charitable and nonprofit licensees can demonstrate they have made significant progress and are not operating primarily for gambling purposes (RCW 9.46.0209(1)(i)). The rules outlined specific "net income," "net return," or "adjusted cash flow" levels charitable and nonprofit licensees had to attain to demonstrate compliance with the RCW.

Prior to the mid-1990's, bingo was one of the primary gambling activities and a major source of income for charitable and nonprofit organizations. In the mid-90's, there were so many large bingo licensees that the Commission had a "Top 40" list. Since 1994, bingo has experienced a significant decline. As an example, the number of bingo licensees has declined 69% since 1987 from 571 licensees to 179 as of July 31, 2014. Bingo "net income" (defined as gross receipts minus prizes and expenses) peaked in 1991 at $19.9 million. As of June 30, 2013, bingo net receipts were $2.5 million, an 87% decline from 1991.

As competition in a declining industry increased, growth in gross receipts did not always result in growth in the amount of net income or money going back to the organization's purposes. This was due in part to the bingo operators offering higher prize payouts and nicer amenities to sustain or grow their market share from their competitors, which in turn increased their expenses.

Since 1983, we have had eleven rule changes to reduce the required income/cash charitable and nonprofit organizations must meet to demonstrate they have made significant progress. The rule changes between 1983 and 1990 reduced the required income/cash for the stated purpose by 58%. The history of the net income, net return, and adjusted cash flow compliance rules is on the attached chart. In addition, the rules addressed expenses that impact cash back to programs in various ways. Some of those expenses included prizes, taxes paid to local jurisdictions, amortization and depreciation. The rules also included various types of variances and petitions for relief from the Director or from the five-person Commission.

The following is a summary of the current adjusted cash flow rules:

2004 Rule Changes

The net return requirements were replaced with quarterly and annual "adjusted cash flow" requirements. Adjusted cash flow from bingo operations means the combined gross receipts from bingo and PB/PT activities minus all prizes and expenses, whether paid or accrued to operate these gambling activities excluding depreciation and amortization. These rules are still in place today.

Quarterly requirement - Licensees have to report positive cash flow from their bingo and PB/PT operations, at least $1, on their quarterly gambling reports. By rule, if a licensee reports a loss on their quarterly gambling activity reports ("a negative cash flow") for two consecutive quarters, their license is summarily suspended, which means they must stop operating immediately.

Annual requirement - By rule, bingo licensees must achieve the following annual minimum "adjusted cash flow" levels based on their overall gross receipt levels:

Gross Receipts*	Adjusted Cash Flow
(1) Above $1,500,000 up to $2,500,000	Three percent of gross receipts over $1,500,000
(2) Above $2,500,000 up to $3,500,000	$30,000 plus four percent of gross receipts over $2,500,000
(3) Above $3,500,000 up to $4,500,000	$70,000 plus five percent of gross receipts over $3,500,000
(4) Above $4,500,000	$120,000 plus six percent of gross receipts over $4,500,000

Commission staff calculates licensee compliance based on information reported on their quarterly gambling activity reports. If a licensee does not meet the minimum annual cash flow requirement, the licensee faces revocation of their licenses. The rules offers automatic relief to licensees who fail to meet the annual minimum adjusted cash flow requirement by allowing up to a 25% reduction to the annual dollar amount of required adjusted cash flow for the year. This relief is only available to each licensee once every five years.

2006 Rule Change – Additional Waiver to the Annual Adjusted Cash Flow Requirement
A 50% waiver or reduction in the annual adjusted cash flow requirement was available to those licensees that failed to reach their required cash flow levels. Only three licensees requested this relief and all three requests were granted. This option was only available during 2006.

2009 Rule Change – Additional Relief to the Annual Adjusted Cash Flow Requirement
Licensees who fail to meet the minimum annual adjusted cash flow requirements, but who have maintained a positive quarterly cash flow may apply for a credit of up to 49% of the local gambling taxes paid. This relief is applied first. If the licensee is still out of compliance, then, by rule, commission staff automatically grants relief by allowing up to a 25% reduction of the annual dollar amount of the required adjusted cash flow for the year. The credit for local taxes paid is available every year.

Impact of the Proposed Change

There are currently only 8 licensees who would be impacted by this petition because they have annual gross gambling receipts from bingo and PB/PT activities over $1.5 million. The petition would repeal all quarterly cash flow requirements. Licensees would still have to meet significant progress annually; these requirements are outlined in other rules.

This petition would require all bingo licensees, regardless of their annual gross receipts, to report gross income from bingo and PB/PT activities less prizes and expenses, paid or accrued, excluding depreciation and amortization, of at least $1 annually. Currently, bingo licensees with annual gross receipts under $1.5 million dollars need to report gross income from bingo and PB/PT activities of only $1.

Staff now spends considerable time calculating and monitoring both the quarterly and annual adjusted cash flow requirements for these licensees. Staff will continue to monitor positive cash flow for these licensees annually.

Summary of Actions With Licensees For Noncompliance with Quarterly and Annual Adjusted Cash Flow Requirements
The following summary of actions with licensees over the past 10 years for quarterly and annual cash flow compliance issues. The first column shows the first five years from 2004 to 2008, and the second column shows the past five years, from 2009 through 2013.

Action Taken	From 2004 to 2008	From 2009 to 2013
One Quarter of Negative Cash Flow – Advisory Letter	32	6
Two Consecutive Quarters of Negative Cash Flow – Advisory Letter	0	1
Insufficient Projected Annual Cash Flow – Advisory Letter	18	1
25% Annual Reduction Relief Granted (started in 2004)	3	0
50% Annual Relief Granted (2006 only)	3	0
49% Annual Local Gambling Tax Credit (started in 2009)	n/a	0
Total	**56**	**8**

Of the 64 total actions taken by staff over the last ten years (from 2004 to 2013), only eight have occurred in the past five years. During the last five years, no licensees have requested the 25% reduction relief available

or the 49% tax credit. There have been only seven instances of licensees showing negative cash flow during a single quarter and only one has shown two consecutive negative quarters. This licensee eventually discontinued business. A Small Business Economic Impact Statement was not prepared because the rule change would not impose additional costs.
Regulatory Concerns
Minimal.
Resource Impacts
This change would save staff time monitoring and sending out notification letters.
Policy Consideration
This is a change in policy by measuring adjusted cash flow on an annual basis, rather than a quarterly basis. If adjusted cash flow requirements are not met, it is no longer a mandatory summary suspension, but instead, an administrative action to revoke the license.
Statements Supporting the Proposed Rule Change
Attached e-mails from: • Jay Gerow, ZDI Gaming Inc. • Jeff Barlow, Licensed Bingo Manager at Spokane Youth Sports Association. • Bonnie Dykstra, American Legion Post 176.
Statements Opposing the Proposed Rule Change
None.
Licensees/Stakeholders Directly Impacted By the Change
Eight bingo licensees with gross bingo and PB/PT receipts of over $1.5 million.
Staff Recommendation
Final Action.
Proposed Effective Date for Rule Change
Petitioner has requested an effective date of 31 days from filing the adopted rule.

Amendatory Section:

WAC 230-10-375 Failing to maintain a positive cash flow.

(1) Bingo licensees must measure adjusted cash flow ((~~quarterly~~)) to ensure that they maintain a positive cash flow and are not operating primarily for gambling purposes.

(2) If a licensee does not maintain a positive cash flow from the bingo operation ((~~during any two consecutive license year quarters, measured independently,~~)) as reflected in their annual financial statement as prepared in accordance with WAC 230-07-150 the director will take administrative action to revoke~~summarily suspends~~ the organization's bingo license.

((~~(3) If a licensee fails to meet the adjusted cash flow requirements for any calendar year, we take administrative action to revoke the organization's bingo license.~~))

Repealed Sections:

~~WAC 230-10-370 Adjusted cash flow limits for bingo.~~

~~For the purpose of this subsection, "gross receipts" means the combined gross gambling receipts from bingo, pull-tab, and punch board activities. Bingo licensees must ensure that the adjusted cash flow from the bingo operation available for its charitable or nonprofit programs during each license year is, at least:~~

~~Gross Receipts*~~	~~Adjusted Cash Flow~~
~~(1) Above $1,500,000 up to $2,500,000~~	~~Three percent of gross receipts over $1,500,000~~
~~(2) Above $2,500,000 up to $3,500,000~~	~~$30,000 plus four percent of gross receipts over $2,500,000~~
~~(3) Above $3,500,000 up to $4,500,000~~	~~$70,000 plus five percent of gross receipts over $3,500,000~~
~~(4) Above $4,500,000~~	~~$120,000 plus six percent of gross receipts over $4,500,000~~

~~*If the licensee does not operate for a full license year, we may pro rate the requirements based on full quarters operated.~~

WAC 230-10-380 Relief reduction for minimum annual adjusted cash flow.

~~(1) If a bingo licensee fails to meet the minimum annual adjusted cash flow requirements for any calendar year and has maintained a positive cash flow, the licensee may apply as a credit against the required adjusted cash flow up to forty-nine percent of gambling taxes paid to local governments.~~

~~(2) If the licensee is still out of compliance, the director automatically grants relief, allowing up to twenty-five percent reduction to the annual dollar amount of required adjusted cash flow for the year, excluding the relief available in subsection (1) of this section, in which the licensee is out of compliance.~~

~~(3) No licensee granted relief is eligible to receive relief for any of the four years following the calendar year for which the director granted the relief, pursuant to subsection (2) of this section.~~

PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

In accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at http://apps.leg.wa.gov/wac/default.aspx?cite=82-05.

CONTACT INFORMATION *(please type or print)*

Petitioner's Name Ric Newgard / Clyde Bock
Name of Organization WCCGA
Mailing Address 7012 220th ST SW
City MLT State WA Zip Code 98043
Telephone 425-327-3841 Email BUMPIARIC@AOL.COM

COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: http://www.leg.wa.gov/CodeReviser/Documents/RClist.htm.

INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: WSGC

☐ 1. NEW RULE. I am requesting the agency to adopt a new rule.

☐ The subject (or purpose) of this rule is: _____

☐ The rule is needed because: _____

☐ The new rule would affect the following people or groups: _____

Received
JUL 18 2014
Gambling Commission
Comm. & Legal Division

☒ **2. AMEND RULE - I am requesting the agency to change an existing rule.**

List rule number (WAC), if known: 230-10-375

☒ I am requesting the following change: SEE ATTACHED

☐ This change is needed because: _____

☐ The effect of this rule change will be: _____

☐ The rule is not clearly or simply stated: _____

☒ **3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.**

List rule number (WAC), if known: 230-10-370, 230-10-380

(Check one or more boxes)

☐ It does not do what it was intended to do.

☒ It is no longer needed because: CHANGES TO WAC 230-10-375

☐ It imposes unreasonable costs: _____

☐ The agency has no authority to make this rule: _____

☐ It is applied differently to public and private parties: _____

☐ It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

☐ It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

☐ Other (please explain): _____

WAC 230-10-175

(2) If a licensee does not maintain a positive cash flow from the bingo operation as reflected in their annual financial statement prepared in accordance with WAC 230-07-150 the director will take administrative action to revoke the organization's bingo license.

STATE OF WASHINGTON
GAMBLING COMMISSION

P.O. Box 42400 • Olympia, Washington 98504-2400 • (360) 486-3440 • TDD (360) 486-3637 • FAX (360) 486-3632

August 7, 2014

Dear Nonprofit Licensee:

NOTICE OF RULE MAKING

The Washington State Gambling Commission is starting the first stage of rule making to revise **WAC 230-10-375 Failing to maintain a positive cash flow** and to repeal **WAC 230-10-370 Adjusted cash flow limits for bingo** and **WAC 230-10-380 Relief reduction for minimum annual cash flow**.

The proposed change would no longer require bingo licensees to meet quarterly and yearly cash flow requirements from bingo and punch board/pull-tab (pb/pt) activities. Instead, licensees would have to show a positive cash flow from bingo and pb/pt activities when they submitted their annual financial statements to the Commission, which are prepared by an independent certified public accountant.

The Gambling Commission encourages you to give input. Do you support or oppose the proposed rule change?

By mail:
Tina Griffin
Gambling Commission
P.O. Box 42400
Olympia, WA 98504-2400

By e-mail:
Tina.Griffin@wsgc.wa.gov

By fax:
(360) 486-3632

The proposed rule change will be discussed at the Study Session of the August 2014 Commission meeting. The meeting will be held at the August 14, 2014 at the Comfort Inn Conference Center, 1620 74th Avenue SW, Tumwater, WA 98501. Commission meetings are open to the public and you are invited to attend. Please check our website (www.wsgc.wa.gov) a week in advance to confirm the date, time and location.

From: Jay Gerow [jayg@zdigaming.com]
Sent: Monday, August 11, 2014 4:42 PM
To: Griffin, Tina (GMB)
Subject: rule changes

Tina,

This email is to show ZDI Gaming's support for the rule changes pertaining to Bingos cash flow. It is unfortunate this action was not taken some time ago by the previous leadership at the agency, as it would have potentially saved some valuable community charities that have been lost.

We are in favor of the proposed changes and revisions to WAC's 230-10-375, 230-10-370, and 230-10-380. I will not be attending the meeting this month however would like this email of support to go on the record in the minutes.

Sincerely,

Jay Gerow
ZDI Gaming Inc.
2124 196th St. SW
Lynnwood, Wa 98036

(425)775-7991 office
(425)775-8433 fax

From: Jeff Barlow [jeff@sysa.com]
Sent: Tuesday, August 12, 2014 2:23 PM
To: Griffin, Tina (GMB)
Subject: Revision of Cash Flow Requirements

Dear Commissioners and Staff:
Thank you for taking the time to consider the rule change that is being proposed. My name is Jeff Barlow, and I am the primary manager at SYSA Bingo in Spokane.
I have been in the bingo industry since 1986 and have seen the best of times and the worst. I remember the day when being in the top 40 was a really big deal. I remember the "moratorium days". In all the years since, i have watched licensees continue to fail to meet the requirements that were in place to protect everyone. Unfortunately many charities, and the groups that they so diligently supported, have been the ones that have suffered as a result of games going under.

I am writing today to show my support for the "Revision of Cash Flow Requirements". When I talk to other operators in the state we all seem to be in the same boat. Are you going to make your number this year?
Are you going to have to use your 5 year exemption? For us in Spokane, it has been extremely difficult to survive, We have had to use our exemption, as had many others that i have talked to.

I feel that the proposal has value in a couple of ways. First, it gives operators a chance to get a financial breath. We still have our own budgeted numbers that must be met, but at least the pressure of making the GC number will be gone. Secondly, I'm sure that this will give the "Budget Staff" at the commission some room as well, so as not to have to track each licensees progress each quarter and do all the paperwork that is involved. I can only imagine the man hours and money that can be saved by not having to track every hall.

I am very sorry that I will not be able to be there this month for the study session and meetings. I feel very strongly that this is a great thing for the industry, and i applaud the commission and staff for considering these changes. I am looking forward to attending next months meetings, and see if we can get this passed as soon as possible.

Jeff Barlow
Bingo Director
SYSA Bingo

From: Bonnie [gmscal@pacifier.com]
Sent: Wednesday, August 13, 2014 11:23 AM
To: Griffin, Tina (GMB)
Cc: scalcashier@gmail.com
Subject: RE: Proposed Rule Change - WAC230-10-375, WAC230-10-370 & WAC230-10-380

Ms. Griffin:

This is to let you know that Salmon Creek Heights Post 176 The American Legion, in Vancouver, is in support of WAC230-10-375, WAC230-10-370 & WAC230-10-380 rule change, to show a positive cash flow from Bingo & Pull Tabs on the annual financial statement prepared by a CPA, instead of the current quarterly reports.

Thank you for your consideration.

Bonnie Dykstra
Bookkeeper
Salmon Creek Heights Post 176
The American Legion
PH# 360-573-2331
E-mail gmscal@pacifier.com

History of prize payout and net income/return and adjusted cash flow regulation

DATE	REGULATION STATUS
Prior to 1983	No regulation.
1983	Declining profit from Bingo and prize "wars" prompts emergency temporary prize payout limit rule: ▪ Beginning at $125,000 per quarter = 80%, down to 68% for over $750,000 ▪ Required monthly reports Licensee and staff Study Committee formed.
1984	Permanent rule: ▪ Restructured gross receipts and limited to $3.5 million. ▪ Modified prize payout limits to begin at $500,000 = 80% with 2 percentage point decrease for every license class increase. Added minimum net income requirement. Required annual review of rule ("sunset" provision).
1985	Gross receipts limited to $3.5 million (continued). Prize payouts: ▪ Both quarterly and annual limits ▪ Annual = variable rates beginning at 83% for $500,000, decreasing to 70% for $3.5 million. Net income: ▪ Annual limits only ▪ Annual = 4% @ $500,000 up to 14% for $3.5 million.
1988	Larger games started to reach $3.5 million gross receipts limit. Committee formed to discuss increasing gross receipts limit. Temporary increase in gross receipts limits if 14% of the excess beyond $3.5 million was donated to any charitable cause.
1989	Added two new license classes (L, M) over $4.0 million. Classes D and E now covered by limits. Removed requirement for annual review of rule.
1990	Added PB/PT and Snack Bar to the net return mix (net income). Net income increases 1 to 2.5 percentage points for Bingo/PB/PT licensees. Allowed local tax as a credit (reduces expenses). Increased prize payout limits by 1 to 2.5 percentage points. Reduction in net income limits by one percentage point if no PB/PT. Required small games (up to $100,000) to have positive cash flow if rent or wages paid. Added requirement for minimum net income from PB/PT for non-profits without a bingo license.
1993	Legislature changed RCW 9.46.070 (10) and (16) to make them discretionary. Decreased net income requirement by 1 percentage point for bingo only and PB/PT. Allowed variances (Director approved) for local conditions. ▪ Added enforcement guidelines and procedures (mandatory downgrade). Added penalties for bingo managers for prize payout violations. Codified staff procedures.
1994	Significant progress rule passed.

DATE	REGULATION STATUS
1995	Licensees were having a hard time meeting net income requirements. October 1995 emergency moratorium—no mandatory downgrade if within 2.5% of the net income requirements for the licensee's license class (modified to 4.5% in permanent rules). Formed Bingo Task Force.
1996	Bingo Task Force Recommendations: ▪ Change to net return from net income. ▪ Split the net return rule into three separate rules: requirements, variances, and sanctions ▪ Added four new license classes (over $4.0 million) ▪ Class D and E GR ranges change, Class D removed from regulation ▪ Reduced net return requirement (new def.) across the board by 0.5 to 1 percentage point. ▪ Deleted the prize payout limits (became guidelines only) ▪ Deleted penalties for bingo managers ▪ Codified difference between bingo for "fund-raising" or "social" purposes ▪ Allowed electronic POS transactions ▪ Liberalized promotions (coupons, promotional gifts, birthday gifts, frequent player points, drawings, creativity and originality contests, birthday bonus, free games as prizes and good neighbor prizes) ▪ Liberalized Raffles—discount sales, prizes for selling tickets, and credit cards for phone sales. Other significant changes to Bingo: ▪ Liberalized promotions; free food, etc. ▪ Pre-sale of games and gift certificates ▪ Authorized electronic daubers ▪ New games authorized (keno bingo, satellite bingo, 3# speed bingo and hidden face bingo) ▪ Authorized "second element of chance" schemes ▪ Mandatory throw-away cards for large games ▪ Make it a violation to have a loss from a snack bar, if not in compliance with net return.
1998	Licensees seeing another decline in activity; changing market conditions.
1999	Temporary moratorium on bingo net return requirements instituted in January. Bingo Net Return Task Force established.

DATE	REGULATION STATUS
2000	Changes streamlined bingo rules. Gambling proceeds, net return and the qualification to be considered an active member were redefined; the retention period of some bingo records was reduced; political contributions were no longer required to be reported to the commission, as they are reported to the Public Disclosure Commission; electronically generated formats for inventory control were allowed as an inventory control format; bingo operators were allowed to offer free and discounted food and non-alcoholic beverages to their players; language was added to clarify that a maximum of 66 electronic bingo cards could be played at one time; and language that was redundant with other rules was removed for streamlining purposes. New rules allowing free food and beverages. Minimum net return rules proposed, carried forward into 2001. Positive cash flow required. Significant progress rule updated. Minimum net return modified to blended rate calculation; to "band" groups of license classes, to set base amounts and % of net income over base amounts; prize payout limitations and other penalties in certain circumstances where minimum net return is not met.
2001	Minimum cash flow requirements set; adjusted cash flow defined as all income from the bingo operation less all prizes and expenses, with depreciation/amortization not counted as an expense of the bingo operation. Added profit from Amusement Games and Raffles (income side) Adjusted cash flow applied to four different levels of gross receipts per quarter, applied to Class D and above. Summary license suspension for failure to maintain a positive cash flow for two consecutive calendar quarters.
2002	Statutory authorization for bingo operators to share a facility and operate seven days a week.
2003	Request from licensees to modify the minimum cash flow rules (due to continuing problems with meeting the minimum cash flow requirements). Petition for variance portion of the minimum cash flow requirements removed due to complexities in administering it.
2004	The gross receipts amounts were set to calendar year (instead of quarters), and there was a 25% reduction permitted to the required adjusted cash flow every four years at the request of the licensee. One-time reduction in lieu of automatic revocation of bingo license. Summary license suspension for failure to maintain a positive cash flow for two consecutive calendar quarters continued.

DATE	REGULATION STATUS
2006	Since the smoking ban went into effect, 7 of the top 20 bingos closed. The industry petitioned for a rule change, which was approved. For calendar year 2006, the director could grant automatic relief allowing up to a 50% reduction to the annual dollar amount of the required adjusted cash flow.
2009	The industry petitioned for a rule change, which was approved, to allow licensees to apply for a credit against the required adjusted cash flow up to 49% of gambling taxes paid to local governments. This relief is to be applied before the automatic relief of up to 25% reduction that is available only once every 5 years.

RCW 9.46.0209

"Bona fide charitable or nonprofit organization."

(1)(a) "Bona fide charitable or nonprofit organization," as used in this chapter, means:

(i) Any organization duly existing under the provisions of chapter 24.12, 24.20, or 24.28 RCW, any agricultural fair authorized under the provisions of chapters 15.76 or 36.37 RCW, or any nonprofit corporation duly existing under the provisions of chapter 24.03 RCW for charitable, benevolent, eleemosynary, educational, civic, patriotic, political, social, fraternal, athletic or agricultural purposes only, or any nonprofit organization, whether incorporated or otherwise, when found by the commission to be organized and operating for one or more of the aforesaid purposes only, all of which in the opinion of the commission have been organized and are operated primarily for purposes other than the operation of gambling activities authorized under this chapter; or

(ii) Any corporation which has been incorporated under Title 36 U.S.C. and whose principal purposes are to furnish volunteer aid to members of the armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same.

(b) An organization defined under (a) of this subsection must:

(i) Have been organized and continuously operating for at least twelve calendar months immediately preceding making application for any license to operate a gambling activity, or the operation of any gambling activity authorized by this chapter for which no license is required;

(ii) Have not less than fifteen bona fide active members each with the right to an equal vote in the election of the officers, or board members, if any, who determine the policies of the organization in order to receive a gambling license; and

(iii) Demonstrate to the commission that it has made significant progress toward the accomplishment of the purposes of the organization during the twelve consecutive month period preceding the date of application for a license or license renewal. The fact that contributions to an organization do not qualify for charitable contribution deduction purposes or that the organization is not otherwise exempt from payment of federal income taxes pursuant to the internal revenue code of 1954, as amended, shall constitute prima facie evidence that the organization is not a bona fide charitable or nonprofit organization for the purposes of this section.

(c) Any person, association or organization which pays its employees, including members, compensation other than is reasonable therefor under the local prevailing wage scale shall be deemed paying compensation based in part or whole upon receipts relating to gambling activities authorized under this chapter and shall not be a bona fide charitable or nonprofit organization for the purposes of this chapter.

(2) For the purposes of RCW 9.46.0315 and 9.46.110, a bona fide nonprofit organization also includes:

(a) A credit union organized and operating under state or federal law. All revenue less prizes and expenses received from raffles conducted by credit unions must be devoted to purposes authorized under this section for charitable and nonprofit organizations; and

(b) A group of executive branch state employees that:

(i) Has requested and received revocable approval from the agency's chief executive official, or such official's designee, to conduct one or more raffles in compliance with this section;

(ii) Conducts a raffle solely to raise funds for either the state combined fund drive, created under RCW 41.04.033; an entity approved to receive funds from the state combined fund drive; or a charitable or benevolent entity, including but not limited to a person or family in need, as determined by a majority vote of the approved group of employees. No person or other entity may receive compensation in any form from the group for services rendered in support of this purpose;

(iii) Promptly provides such information about the group's receipts, expenditures, and other activities as the agency's chief executive official or designee may periodically require, and otherwise complies with this section and RCW 9.46.0315; and

(iv) Limits the participation in the raffle such that raffle tickets are sold only to, and winners are determined only from, the employees of the agency.

(3) For the purposes of RCW 9.46.0277, a bona fide nonprofit organization also includes a county, city, or town, provided that all revenue less prizes and expenses from raffles conducted by the county, city, or town must be used for community activities or tourism promotion activities.

Proposed Re-Codification of:
WAC 230-14-047 Standards for electronic video pull-tab dispensers.

November 2014 – Final Action
October 2014 – Study Session
September 2014 – Up for Discussion and Possible Filing
August 2014 – Study Session

ITEM 9: November 2014 Commission Meeting.	Statutory Authority 9.46.070 & 9.46.110
Who proposed the rule change?	
Staff.	
Proposed Change	
This rule proposal is to re-codify the current version of WAC 230-14-047. Because this rule relates to the regulation of licensing, it requires an affirmative vote of at least three Commission members for final approval (RCW 9.46.050(2)). A May 2014 Court of Appeals decision held that in 2008, WAC 230-14-047 was "adopted without compliance with statutory rule making procedures" per RCW 34.05.570(2)(c). The Court of Appeals found that the rule relates to the regulation of licensing, and thus under RCW 9.46.050(2) required the affirmative vote of at least three Commission members for final approval. The rule was improperly promulgated in 2008 because only two of the three Commission members present voted to approve the rules. Attachments: • RCW 9.46.050 • Court of Appeals Opinion dated May 13, 2014.	
History of Rule	
In 2008, the Commission adopted WAC 230-14-047, which sets out standards for electronic video pull-tab dispensers. In April 2014, the Commission adopted an amendment to add language to WAC 230-14-047 to allow pull-tab prizes of $20 or less to be added to cash cards used in electronic video pull-tab dispensers. This amendment became effective May 12, 2014.	
Impact of the Proposed Change	
None. A Small Business Economic Impact Statement was not prepared because the rule would not impose additional costs.	
Resource Impacts	
None.	
Policy Considerations	
None.	
Stakeholder Statements Supporting the Proposed Rule	
None.	
Stakeholder Statements Opposing the Proposed Rule	
None.	

Stakeholder Statements Regarding the Proposed Rule
None.
Licensees Directly Impacted By the Rule
Licensed manufacturers, distributors, and pull-tab operators.
Staff Recommendation
Adoption.
Effective Date
31 days from filing the adopted rule.

Current Section to be Re-Codified:

WAC 230-14-047 Standards for electronic video pull-tab dispensers.

Electronic video pull-tab dispensers must be approved by us prior to use.

(1) Electronic video pull-tab dispensers must dispense a paper pull-tab as defined in WAC 230-14-010 and follow the rules for:

(a) Pull-tabs; and

(b) Flares; and

(c) Authorized pull-tab dispensers.

(2) Electronic video pull-tab dispensers that use a reading and displaying function must:

(a) Use a video monitor for entertainment purposes only; and

(b) Open all, or a portion of, the pull-tab in order to read encoded data that indicates the win or loss of the pull-tab if the dispenser is equipped to automatically open pull-tabs; and

(c) Dispense the pull-tab to the player and not retain any portion of the pull-tab; and

(d) Read the correct cash award from the pull-tab either when it is dispensed or when the pull-tab is reinserted into the dispenser; and

(e) Display the cash award from the pull-tab, one pull-tab at a time; and

(f) Provide:

(i) An electronic accounting of the number of pull-tabs dispensed; and

(ii) A way to identify the software version and name; and

(iii) A way to access and verify approved components; and

(iv) Security on the dispenser to prevent unauthorized access to graphic and prize amount displays.

(3) Cash cards used in electronic video pull-tab dispensers must:

(a) Be purchased with cash, check, gift certificates, or electronic point-of-sale bank transfer before use in the dispenser; and

(b) Be convertible to cash at any time during business hours; and

(c) Subtract the purchase price of the pull-tab one pull-tab at a time.

(4) Electronic video pull-tab dispensers that accept cash cards may award any pull-tab cash prize of twenty dollars or less onto the cash card.

RCW 9.46.050

Gambling commission — Chair — Quorum — Meetings — Compensation and travel expenses — Bond — Removal.

(1) Upon appointment of the initial membership the commission shall meet at a time and place designated by the governor and proceed to organize, electing one of such members as chair of the commission who shall serve until July 1, 1974; thereafter a chair shall be elected annually.

(2) A majority of the members shall constitute a quorum of the commission: PROVIDED, That all actions of the commission relating to the regulation of licensing under this chapter shall require an affirmative vote by three or more members of the commission.

(3) The principal office of the commission shall be at the state capitol, and meetings shall be held at least quarterly and at such other times as may be called by the chair or upon written request to the chair of a majority of the commission.

(4) Members shall be compensated in accordance with RCW 43.03.250 and shall receive reimbursement for travel expenses incurred in the performance of their duties as provided in RCW 43.03.050 and 43.03.060.

(5) Before entering upon the duties of his or her office, each of the members of the commission shall enter into a surety bond executed by a surety company authorized to do business in this state, payable to the state of Washington, to be approved by the governor, in the penal sum of fifty thousand dollars, conditioned upon the faithful performance of his or her duties, and shall take and subscribe to the oath of office prescribed for elective state officers, which oath and bond shall be filed with the secretary of state. The premium for said bond shall be paid by the commission.

(6) Any member of the commission may be removed for inefficiency, malfeasance, or misfeasance in office, upon specific written charges filed by the governor, who shall transmit such written charges to the member accused and to the chief justice of the supreme court. The chief justice shall thereupon designate a tribunal composed of three judges of the superior court to hear and adjudicate the charges. Such tribunal shall fix the time of the hearing, which shall be public, and the procedure for the hearing, and the decision of such tribunal shall be final. Removal of any member of the commission by the tribunal shall disqualify such member for reappointment.

JAY GEROW, an individual, AND ZDI GAMING, INC., a Washington corporation, Appellants,

v.

WASHINGTON STATE GAMBLING COMMISSION, Respondent.

No. 44283-3-II

Court of Appeals of Washington, Division 2

May 13, 2014

Lee, J.

Jay Gerow and ZDI Gaming, Inc. (ZDI) appeal the superior court's dismissal of their petition to invalidate two Washington State Gambling Commission (the Commission) regulations under the Administrative Procedure Act (APA), RCW 34.05.570(2)(c). ZDI argues that WAC 230-14-047 ("Standards for electronic video pull-tap dispensers") and WAC 230-06-003 ("Defining 'cash'") are invalid because, inter alia, the Commission adopted them without a three-vote majority as required by the "Gambling Act, " ch. 9.46 RCW. We agree.

Any rules adopted by the Commission relating to the regulation of licensing statutorily require at least three of five votes by Commission members. WACs 230-14-047 and 230-06-003 both relate to the regulation of licensing and the Commission promulgated these rules with only two votes. Because these rules were "adopted without compliance with statutory rule-making procedures, " we reverse the superior court's ruling that WACs 230-14-047 and 230-06-003 are valid and invalidate both rules. RCW 34.05.570(2)(c). Additionally, we award ZDI its attorney fees and costs on appeal and remand to the superior court to award attorney fees below.

FACTS

A. Background

ZDI is a Commission-licensed gaming supply distributorship that manufactures electronic video-pull tab dispensers.[1] In 1994, the legislature specifically included "video pull-tabs, " along with video poker and slot machines, as types of "gambling device[s]" that are illegal in Washington. RCW 9.46.0241. Despite this limitation, two gambling device manufacturers (including ZDI) created "electronic video pull-tab dispensing devices" that the Commission approved in 1997 and 2002. Administration Record (AR) at 119.

ZDI's first electronic pull-tab dispensing machine incorporated a pull-tab dispenser and a pull-tab reader housed in a decorative cabinet designed to emulate a video slot machine. Although the machine did not contain drums or spinning reels, the video display contained rows of "spinning" pictures and simulated the play of a casino-style slot machine. AR at 202. In addition to mimicking a slot machine, these machines emitted "attractor" sounds, also commonly associated with casinos. AR at 202. The Commission approved this equipment in 2002.

ZDI's updated machine, the VIP, is nearly identical to the equipment the Commission approved in 2002; the primary difference is that the VIP machine incorporates cash card technology. As we explained in a previous opinion involving this technology:

The earlier versions of the machine required a player to purchase the pull tab with currency and required that players redeem all winning pull tabs with a cashier. The VIP machine disposes of these steps by allowing a player to purchase pull tabs with a prepaid "cash card" and automatically crediting pull tab winnings of $20 or less back onto the "cash card." For winning pull tabs in excess of $20, the VIP machine directs the player to seek payment from an employee. If a player stops playing the game before depleting the "cash card, " the player can use the remaining credit to purchase food, drink, or merchandise, or the player can simply turn the credit back into cash. The "cash card" operates as a means by which a player can purchase pull tabs and receive winnings of less than $20; the odds of winning for any individual player do not change from use of the "cash card."

ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n, 151 Wn.App. 788, 797, 214 P.3d 938 (2009), *aff'd,* 173 Wn.2d 608, 268 P.3d 929 (2012).

B. Procedural History

In 2005, ZDI submitted an application to the Commission seeking permission to .....distribute its VIP machine with cash, card technology.. The.. Commission denied the permit. request relying heavily on former WAC 230-30-070(1) (2001), which stated that "[a]ll prizes from the operation of punch boards and pull-tabs shall be awarded in cash or in merchandise." AR at 346-47. The Commission also determined that the VIP machine was an illegal "gambling device." Clerk's Papers (CP) at 330. ZDI filed a petition for declaratory relief, and in August 2007, the superior court ruled that the Commission acted arbitrarily and capriciously in denying ZDI's permit to distribute its VIP machine.[2]

In September 2007, concerned about the potential impact of the superior court's ruling, the Commission began discussing:

whether these electronic video pull-tab dispensing devices: 1) Are consistent with the Commission's

legislative authorization to define a pull-tab game; 2) Are consistent with the original authorizing rules [allowing pull-tab gaming under the Gambling Act]; and 3) [whether the VIP machine authorized] by the [superior] court increase[s] the possibility of an unintentional expansion of electronic machine gambling in Washington.

AR at 10; *see also* Commission Meeting Transcription (CMT) (Sept. 14, 2007) at 5-6. This discussion led to three rule proposals related to electronic pull-tab dispensers.

Commission staff presented the first proposed rule, which would have amended WAC 230-14-045 ("Authorized pull-tab dispensers") to specifically ban all electronic pull-tab dispensers—effectively eliminating technology the Commission had approved in 1997. AR at 15; CMT (Sept. 14. 2007) at 6-7. One member of the Commission described this proposal as:

draconian because it was designed to get everybody involved in this process to recognize the need that if we can't get rules that are clear to everybody, then we're just not going to have these machines at all. But we will, because I know that people would be able to get together and make a set of rules that are clear and understandable so we won't be litigating for the rest of our lives..

Commission Public Meeting Transcription (CPMT) (Oct. 12, 2007) at 32.

Commission staff also presented the second proposed rule, designated as "ALTERNATIVE #1, " which stated:

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

(1) Electronic video pull-tab dispensers must dispense a paper pull-tab as defined in WAC 230-14-010 and follow the rules for:

(a) Pull-tabs; and

(b) Flares; and

(c) Authorized pull-tab dispensers.

(2) Electronic video pull-tab dispensers that use a reading and displaying function must:

(a) Use a video monitor for entertainment purposes only; and

(b) Open all, or a portion of, the pull-tab in order to read encoded data that indicates the win or loss of the pull-tab if the dispenser is equipped to automatically open pull-tabs; and

(c) Dispense the pull-tab to the player and not retain any portion of the pull-tab; and

(d) Read the correct cash award from the pull-tab either when it is dispensed or when the pull-tab is reinserted into the dispenser; and

(e) Display the cash award from the pull-tab, one pull-tab at a time; and

(f) Provide:

(i) An electronic accounting of the number of pull-tabs dispensed; and

(ii) A way to identify the software version and name; and

(iii) A way to access and verify approved components; and

(iv) Security on the dispenser to prevent unauthorized access to graphic and prize amount displays.

(3) Gift certificates or gift cards used in electronic video pull-tab dispensers must:

(a); Be purchased with cash, check or electronic point-of-sale bank transfer before use in the dispenser; and

(b) Be convertible to cash at any time during business hours; and

(c) Subtract the cash value for the purchase of the pull-tab one pull-tab at a time.

AR at 8. Alternative #1 also included a proposed rule defining "cash" for all of Title 230 of the Washington Administrative Code:

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

ARat9.

The pull-tab industry presented the third proposed rule, designated as "ALTERNATIVE #2." This proposed rule was substantially similar to Alternative #1, except that it would allow pull-tab dispensers to "add prizes twenty dollars or less to a cash card upon insertion of the winning pull-tab." AR at 18-19.

After gathering extensive information from pull-tab industry stakeholders and holding a number of public meetings addressing the three proposed rules, the Commission voted in January 2008 to adopt Alternative #1, which included the proposed rule defining "cash." CMPT (Jan. 11, 2008) at 16-19. Hence, Alternative #1 became WAC 230-14-047, and the rule defining "cash"

became WAC 230-06-003. Although a quorum of three of five commissioners was present for purposes of holding a meeting, RCW 9.46.050(2), only two of the three commissioners present voted in favor of adopting the new rules.

In February 2008, ZDI commenced this action against the Commission in Thurston County Superior Court, challenging WACs 230-14-047 and 230-06-003 under the APA. In April 2009, the superior court stayed the proceeding pending the outcome of the Commission's appeal of the August 2007 superior court order ruling that the Commission had acted arbitrarily and capriciously in refusing to permit ZDI's VIP machine. After our Supreme Court upheld the August 2007 superior court order, the stay was lifted in June 2012.

ZDI then moved to supplement the agency rulemaking file with depositions of Commission members and staff, purportedly to show that Commission members adopted the new WACs out of loyalty to tribal gaming interests or in response to the pending ZDI lawsuit. ZDI also sought to supplement the rulemaking file with evidence that, in the past, the Commission had adopted new rules only when at least three members voted in support of adoption. The superior court denied ZDI's motion to supplement the rulemaking file.[3]

After hearing oral argument and considering the parties' briefs, the superior court ruled that the Commission did not violate the Gambling Act or the APA in adopting WACs 230-06-.003 and 230-14-047. ZDI appeals.

ANALYSIS

ZDI argues that WACs 230-14-047 and 230-06-003 are invalid because the Commission adopted them without complying with statutory rule-making procedures of the Gambling Act or the APA. The Commission contends that the rules at issue do not relate the Commission's licensing activities; therefore, a majority vote of a quorum of members (here, two votes out of a quorum of three) was sufficient under the Gambling Act and the APA. We agree with ZDI that the Commission adopted the rules in violation of the Gambling Act.

A. Standard of Review

The APA governs our review of agency rulemaking. In reviewing an agency rulemaking action, we sit in the same position as the superior court and our review is, in general, limited to the record before the agency. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). In a proceeding involving review of agency rules, we will declare the rules invalid only if (1) the rules violate constitutional provisions, (2) the agency exceeded its statutory authority in adopting the rules, (3) the agency adopted the rules without complying with statutory rulemaking procedures, or (4) the rules are arbitrary and capricious. RCW 34.05.570(2)(c). As the party asserting the invalidity of the rules, ZDI bears the burden of demonstrating their invalidity. RCW 34.05.570(1)(a).

We review questions of statutory interpretation de novo. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009). When construing a statute, our objective is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n* 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Statutory interpretation begins with the statute's plain meaning. *Lake*, 169 Wn.2d at 526. We discern plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole. *Lake*, 169 Wn.2d at 526. When faced with an unambiguous statute, we derive the legislature's intent from the statute's plain language alone. *Waste Mgmt. of Seattle, Inc. v. Wash. Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d1034 (1994).

When a statute is ambiguous, however, we will '"resort to principles of statutory construction, legislative history, and relevant case law to assist in [its interpretation].'" *Yousoufian v. Office of King County Exec*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004) (quoting *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d *66* (2002)). A statute is ambiguous if it can be reasonably interpreted in more than one way. *Yousoufian*, 152 Wn.2d at 433-34 (quoting *Vashon Island Comm. for Self-Gov 't v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995)).

B. Voting Requirements

ZDI argues that WACs 230-14-047 and 230-06-003 are invalid because the Commission adopted these rules without complying with statutory rule-making procedures of the Gambling Act, which requires an affirmative vote of three of five Commission members to promulgate new rules related "to the regulation of licensing." RCW 9.46.050(2). The Commission contends that "the rules at issue relate to allowable standards for [electronic video pull-tab dispensers], and are not related to the Commission's process for issuing, denying, revoking, etc. the license of persons, associations, or organizations carrying on specific gambling activities;" therefore, a - majority vote of two members of a three-member quorum was sufficient. Br. of Resp't at 18.

Both parties also argue that the APA supports their respective positions on voting requirements. ZDI argues that, under RCW 34.05.010(4), all rulemaking decisions must be approved by a majority of the total membership of an agency or commission's governing body. Citing the same provision, the Commission argues that the APA requires only a majority vote of a sitting quorum for agencies or commissions to promulgate new rules.

1. Voting Requirements under the Gambling Act

The Gambling Act created the five-person Commission. RCW 9.46.040. RCW 9.46.050(2) states, "A majority of the members shall constitute a quorum of the commission: PROVIDED, *That all actions of the commission relating to the regulation of licensing under this chapter shall require an affirmative vote by three or more members of the commission."* (emphasis added). Here, we must decide whether WACs 230-14-047 and 230-06-003 relate to the "regulation of licensing under this chapter." If so, the Commission violated the Gambling Act's affirmative three-vote requirement when promulgating these new rules.

The term "license" is not defined in the Gambling Act or in. Title 230 of the Washington Administrative Code. RCW 9.46.310, however, discusses the type of license needed for the "manufacture, sale, distribution, or supply of gambling devices":

No person shall manufacture, and no person shall sell, distribute, furnish or supply to any other person, any gambling device, including but not limited to punchboards and pull-tabs, in this state, or for use within this state, without first obtaining a license to do so from the commission under the provisions of this chapter.

Such licenses shall not be issued by the commission except respecting devices which are designed and permitted for use in connection with activities authorized under this chapter: PROVIDED, That this requirement for licensure shall apply only insofar as the commission has adopted, or may adopt, rules implementing it as to particular categories of gambling devices and related equipment.

This provision was adopted in 1981 and appears separately from RCW 9.46.070(4), which authorizes the Commission to issue year-long licenses "to any person, association, or organization [engaged] in the selling, distributing, ... [or] in the manufacturing of devices for use within this state."

"Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.'" *State ex rel Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (quoting *State v. O'Neill*, 103 Wn.2d 853, 862, 700 P.2d 711 (1985)). Moreover, "[statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

Here, when read together, RCW 9.46.310 and 9.46.070(4) show that the legislature intended two separate licensing requirements. Under RCW 9.46.070(4), a company that manufactures approved gambling devices must have a license to do so. In addition, RCW 9.46.310 requires that each approved device also be licensed. Accordingly, because WACs 230-14-047 and 230-06-003[4] address requirements that electronic video pull-tab dispensers must meet before receiving approval (i.e., licensure), three affirmative votes were required before the Commission could promulgate the rule.

Additionally, the Gambling Act explicitly states that although the Commission has the power and responsibility to "adopt such rules and regulations as are deemed necessary to carry out the purposes and provisions of [the Gambling Act], " all such rules and regulations must be "adopted pursuant to the administrative procedure act, chapter 34.05 RCW." RCW 9.46.070(14).

The APA includes a definition of "license":

"License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, _ symbols, and similar^property owned or controlled by the agency.

RCW 34.05.010(9)(a). The APA also states that a "[r]ule" is an "agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale." RCW 34.05.010(16)(e).

Here, the new WACs at issue clearly constitute new rules relating to the regulation of licensing under the APA. WACs 230-14-047 and 230-06-003 both impact the licensing (i.e., permitting or approval) of electronic video pull-tab dispensers, like the machine designed by ZDI. Additionally, both regulations fall squarely under the APA's definition of a "rule" because they establish mandatory standards for electronic video pull-tab dispensers: Thus, under the APA, these were rules that relate to "the regulation of licensing, " requiring an affirmative vote of three or more members of the Commission to adopt.[5]

2. Voting Requirements under the APA

The only provisions in the APA explicitly related to voting requirements involve the voting provisions of the joint administrative rule reviews committee—a "bipartisan committee consisting of four senators and four representatives from the state legislature" that reviews proposed agency rules. RCW 34.05.610, .620, .630, .640. Indeed, voting requirements and the term "quorum" do not appear anywhere in the APA. Nevertheless, both ZDI and the Commission argue that the APA itself has a voting requirement provision, citing

to RCW 34.05.010(4).

RCW 34.05.010(4) states, "'Agency head' means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head." ZDI believes this definitional provision supports its view that all agency rulemaking must be approved by a majority vote of the commission's members (i.e., three members). The Commission, on the other hand, contends that the provision supports a majority vote of a quorum requirement. We disagree that RCW 34.05.010(4) incorporates a specific voting requirement.

First, nothing in RCW 34.05.010(4) actually describes agency voting or voting requirements. This is simply a definitional provision intended to differentiate between the agency as a whole including all of its employees, and those particular individuals with vested legal authority in final decisions involving agency operations.[6]

Second, it is a standard maxim of statutory construction that "[a] specific statute will supersede a general one when both apply" in a given situation. *Waste Mgmt. of Seattle*, 123 Wn.2d at 630. Here, RCW 9.46.050(2)'s three-vote requirement is clearly more specific than any potential voting requirement that may be read into the definition of "agency head" in RCW 34.05.010(4). Accordingly, even if we were to read a voting requirement into the APA, which we do not, the more specific provision of RCW 9.46.050(2) would still control in these circumstances.

Finally, the APA specifically states, "Each agency may adopt rules governing the formal and informal procedures prescribed or authorized by this chapter and rules of practice before the agency." RCW 34.05.220(1)(a). There is no provision in the APA that addresses quorum or voting requirements generally applicable to all administrative agencies. Instead, the legislature and the agencies themselves address the question of voting requirements for specific "agencies, boards, and commissions. Throughout the Revised Code of Washington (RCW), the legislature has frequently inserted specific quorum and voting requirements for agency boards and commissions—such as RCW 9.46.050(2)'s three vote requirement.[7] In other circumstances, the legislature has remained silent on voting requirements and, instead, agencies have themselves promulgated such rules under the APA's authority, RCW 34.05.220(1)(a).[8]

Here, the legislature has clearly instructed the Commission that, when adopting new rules related to the regulation of licensing, three affirmative votes are required. The APA does not dictate a different result.

We hold that WACs 230-14-047 and 230-06-003 are invalid because both provisions relate to the regulation of licensing, and RCW 9.46.050(2) requires the affirmative vote of at least three Commission members before promulgating such rules.[9] Accordingly, these rules were adopted "without compliance with statutory rule-making procedures" that bind the Commission. RCW 34.05.570(2)(c).[10]

C. Attorney Fees

ZDI requests attorney fees and costs under the Equal Access to Justice Act (EAJA). RCW 4.84.350. Under the EAJA, a party that prevails in a judicial review of an agency action is entitled to attorney fees and other expenses up to $25, 000 unless "the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). To be entitled to an award of attorney fees under the EAJA, a qualified party is deemed to have prevailed if that party obtained relief on a significant issue. RCW 4.84350(1). The EAJA also states that "[i]f two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars."[11] RCW 4.84.350(2). Because the record does not support the conclusion that the Commission "was substantially justified" in promulgating WACs 230-14-047 and 230-06-003 (especially with only two members voting in support of the new rules) or that awarding ZDI fees would be unjust, ZDI is entitled to an award of attorney fees. Therefore, we grant ZDI's request for attorney fees in an amount to be determined by a commissioner of this court subject to compliance with RAP 18.1(d).

Finally, the Supreme Court has held that the "stated purpose of the EAJA, indicates legislative intent to award fees for each level of judicial review before each court" that a case has proceeded through. *Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 932, 194 P.3d 988 (2008). Accordingly, we remand to the superior court to determine an award of reasonable attorney fees for that level of judicial review. *Devine v. Dep't of Licensing*, 126 Wn.App. 941, 956, 110 P.3d 237 (2005).

We reverse the superior, court's ruling that WACs 230-14-047 and 230-06-003 are valid, invalidate both rules, award ZDI its attorney fees and costs on appeal, and remand to the superior court to award attorney fees below.

We concur: Worswick, C.J., Johanson, J.

Notes:

[1] Pull-tabs predate the 1973 legalization of limited types of gambling in the State of Washington. AR 201. A standard pull-tab is a paper ticket with a series of windows concealing numbers or symbols; certain number or symbol combinations entitle the player to a prize.

WAC 230-14-010. Each pull-tab series has a predetermined number of winning tickets. WAC 23 0-14-03 5.

[2] The Commission appealed this decision. In *ZDI Gaming*, 151 Wn.App. at 809-810, we held:

"Although the ZDI "cash card" is not, in and of itself, cash or a universally . accepted equivalent, a player must tender either cash or a universally accepted equivalent to obtain the card. The cards may not be purchased on credit. . . . The record does not support the Commission's determination that ZDI "cash cards" are not cash equivalents satisfying its regulatory definition."

The Supreme Court affirmed our decision reasoning that "the VIP cash card is functionally equivalent to cash." 173 Wn.2d at 622.

[3] ZDI challenges this ruling on appeal. However, ZDI has failed to articulate how the trial court manifestly abused its discretion in denying ZDI's motion to supplement the rulemaking record and fails to discuss any of the provisions of the APA that allow a reviewing court to supplement an agency record (i.e., RCW 34.05.562). *Lund v. Dep't of Ecology*, 93 Wn.App. 329, 334, 969 P.2d 1072 (1998) (citing *Riss v. Angel*, 80 Wn.App. 553, 562, 912 P.2d 1028 (1996), *aff'd*, 131 Wn.2d 612, 934 P.2d 669 (1997)). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998); *see also* RAP 10.3(a)(6). Accordingly, we do not further address this argument.

[4] The new WAC defining "cash" directly impacts the VIP machine (and its potential to be permitted/licensed) because WAC 230-14-047(3)(a) requires that gift cards used in the machine must be "purchased with cash, check or electronic point-of-sale bank transfer before use in the dispenser." By eliminating the possibility of purchasing more pull-tabs with a "cash equivalent" (specifically, with credit accruing on the gift card for winning prizes under $20), WACs 230-14-047(3)(a) and 230-06-003 (when read together) guarantee that ZDI's new version of the VIP cannot be permitted/licensed.

[5] The Commission argues that "ZDI's expansive reading of the proviso [RCW 9.46.050(2)] and the definition of 'license' under the APA overshadows the majority rule requirement [that a majority of a quorum is sufficient for agency action], as one could argue that virtually every action by the Commission 'relates' in some way to licensing." Br. of Resp'ts at 17-18. While this may be true, it is not unreasonable to assume that the legislature intended nearly every rule adopted by the Commission to be promulgated with at least three votes as this ensures that every new rule impacting gambling—perhaps the most highly regulated industry in the State—has been duly considered and approved by a majority of the Commission.

[6] Washington's APA is largely based on the 1981 Model State Administrative Procedure Act (MSAPA). The comments to the 1981 MSAPA's definitional section state that the term "agency head" is used to "differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular individuals in whom the final legal authority over its operations is vested." MSAPA, § 1-102 cmt, 15 U.L.A. 13 (2000)

[7] For instance, the enabling statute of the Washington State Medical Quality Assurance Commission states,

The affirmative vote of a majority of a quorum of the commission is required to carry any motion or resolution, to adopt any rule, or to pass any measure. The commission may appoint panels consisting of at least three members. A quorum for the transaction of any business by a panel is a minimum of three members. A majority vote of a quorum of the panel is required to transact business delegated to it by the commission.

RCW 18.71.015. To give just a few more examples, code provisions for the Growth Management Hearings Board (RCW 36.70A.270(4)), the Board of Naturopathy (RCW 18.36A.150(5)), the Utilities and Transportation Commission (RCW 80.01.050), the Fish and Wildlife Commission (RCW 77.04.060), and the Public Employment Relations Commission (RCW 41.58.010(3)) all contain specific provisions related to quorum voting requirements.

[8] For example, quorum requirements for the Office of the Secretary of State's Electronic Recording Standards Commission (WAC 434-661-140), the Washington Higher Education Facilities Authority (WAC 253-02-050), the Forest Practices Board (WAC 222-08-040), and the Forensic Investigations Council (WAC 218-04-040) are all addressed in the Washington Administrative Code.

[9] After oral argument, the Commission submitted a statement of additional authorities pursuant to RAP 10.8 informing us that, on April 11, 2014, the Commission adopted amendments to WAC 230-14-047. The amendments, effective May 12, 2014, allow pull-tab prizes of 20 dollars _or less to be added to cash cards (as originally proposed by pull-tab industry members in Alternative #2). It is unclear from the statement of additional authorities whether these amendments were adopted with the affirmative vote of three Commission members, which was the primary issue the parties have asked us to address on appeal. ZDI maintained at oral argument that the Commission's adoption of the amendments would not affect this appeal. Wash. Court of Appeals oral argument, *Jay Gerow & ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, No. 44283-3-II (Feb. 27, 2014) (on file with the court). Accordingly, we do not

assume the adoption of these amendments moots ZDI's arguments as to the improper promulgation of WAC 230-14-047.

[10] ZDI also argues that WACs 230-14-047 and 230-06-003 should be invalidated because the Commission adopted these rules without preparing a Small Business Economic Impact Statement as required by the Regulatory Fairness Act, RCW 19.85.040 or, alternatively, that the Commission acted arbitrarily and capriciously in adopting these rules. Because we invalidate the rules on the grounds that they were adopted without adherence to statutory rule-making procedures, we do not address these remaining contentions.

[11] ZDI argues that it should be entitled to $50, 000 for each level of judicial review because Gerow is also involved. RCW 4.84.350(2), however, clearly bars this type of double recovery.