

**NEW JERSEY RACING COMMISSION
MONDAY, JUNE 3, 2013
RACING COMMISSION OFFICE
140 EAST FRONT STREET, FOURTH FLOOR
TRENTON, NEW JERSEY**

A meeting of the New Jersey Racing Commission was held on Monday, June 3, 2013 in the Racing Commission office located at 140 East Front Street, in Trenton, New Jersey.

The following were present:

Anthony T. Abbatiello, Commissioner
Manny E. Aponte, Commissioner (via phone)
Pamela J. Clyne, Commissioner
Francis X. Keegan, Jr., Commissioner
Peter J. Cofrancesco, III, Commissioner (via phone)
Frank Zanzuccki, Executive Director
DAG Julie Barnes

The following were absent:

Anthony R. Caputo, Commissioner

Executive Director Frank Zanzuccki read the following statement:

“This meeting today conforms with Chapter 231, P.L. 1975, called the “Open Public Meeting Law,” and as per the requirements of the statute, notification of this meeting has been filed with the Secretary of State and with the following newspapers: Daily Racing Form, Bergen Record, Asbury Park Press, Courier-Post and the Newark Star Ledger.

WHEREAS in order to protect the personal privacy and to avoid situations wherein the public interest might be disserved, the Open Public Meetings Act permits bodies to exclude the public from that portion of a meeting at which certain matters are discussed.

NOW, THEREFORE, be it resolved that consistent with the provision of N.J.S.A. 10:4-12(b), the New Jersey Racing Commission will now consider moving into executive session. Discussion of the above matters fall within the exceptions under the law; specifically matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the Commission's attorney to exercise her ethical duties as a lawyer and/or matters involving pending or anticipated litigation."

It was noted that Commissioners Aponte and Cofrancesco were participating by telephone. Also on the phone line was Christina Harvey, Esq., representing the NJ THA, who had asked for an accommodation to participate by phone.

Commissioner Aponte motioned to adopt the resolution to adjourn. Commissioner Clyne seconded the motion. All Commissioners concurring, the Commission adjourned to Executive Session.

The Commission ended the execution session and Commissioner Keegan moved to reconvene the public session. Commissioner Abbatiello seconded the motion and the Commission concurring, the public session resumed.

CONSIDER WHETHER THE NEW JERSEY RACING COMMISSION HAS JURISDICTION, AND IF SO, WHETHER IT SHOULD EXERCISE SUCH JURISDICTION, TO CONSIDER THE PETITION OF F.R. PARK RACING, L.P., FREEHOLD OFF TRACK, LLC, AND NEW JERSEY ACCOUNT WAGERING, LLC, AS DESCRIBED IN AGENDA ITEM 2), IMMEDIATELY BELOW

Subject to the New Jersey Racing Commission's ("Racing Commission") determination of agenda item (1), immediately above, consider the petition of F.R. Park Racing, L.P., Freehold Off-Track, LLC and the New Jersey Account Wagering, LLC (collectively "FREEHOLD"), for the relief described below, or such other relief as the Racing Commission determines appropriate:

- 1) The issuance of an Order that the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") cease and desist any and all efforts to prevent FREEHOLD from receiving intrastate and interstate horse race simulcast signals; and further:

In the event the Racing Commission grants said Order, that said Order include either one of the two alternative conditions (#2 or #3) listed below:

- 2) In the event the NJTHA denies FREEHOLD access to any intrastate or interstate simulcast signal, in violation of any such Racing Commission Order, and effective immediately upon said denial, and without the need for further action by the Racing Commission, that said Order affirmatively provide that: (a) all Racing Commission permits, licenses and approvals that are currently held by the NJTHA be revoked; and (b) that the NJTHA, its officers, agents, etc., be restrained and enjoined from making any payment or expenditure of funds belonging to or in the possession, custody, or control of the NJTHA, or effecting any sale, gift, hypothecation, or other disposition of any asset belonging to or in the possession, custody, or control of the NJTHA, pending further action of the Racing Commission; or
- 3) In the event the NJTHA denies FREEHOLD access to any intrastate or interstate simulcast signal, in violation of any such Racing Commission issued Order, and effective immediately upon said denial, and without the need for further action by the Racing Commission, that said Order affirmatively provide: a) that the NJTHA shall be restrained and enjoined from: transmitting Monmouth Parks' simulcast signal to any New Jersey racetrack, off-track wagering facility, or to the account wagering; and b) that all other New Jersey racetracks, off-track wagering facilities, and the account wagering system, be restrained and enjoined from receiving any simulcast signal (or accepting wagering thereon) that is denied to FREEHOLD.

Executive Director Zanzuccki stated that the Commission has received all documents in regard to this item, up through and including May 31, 2013. The documents have been circulated and reviewed by each Commissioner. The Executive Director indicated that the Commission will open the floor up to the interested parties and then will hear comments from any other parties. He stated that the Commission will hear comments with respect to the first agenda item concerning whether the Racing Commission has jurisdiction of this matter.

Scott Carlson, Esq., of the firm Riker, Danzig, Scherer, Hyland and Perretti, representing F.R. Park Racing, Freehold Racing Off-Track, LLC, and New Jersey Account Wagering, addressed the Commission. He stated that Freehold relies on the petition which has been circulated and the May 31, 2013 submission which addresses the issue of jurisdiction. He reiterated that as stated in the petition, in a 2004 letter from the Attorney General after reviewing the Participation Agreement which states that the Racing Commission is best suited to oversee, license and regulate off-track wagering and account wagering in the State, and the Attorney General also acknowledged that the Legislature has granted the Racing Commission and the Attorney General, broad authority to regulate these

new forms of wagering. Mr. Carlson stated that in the 2004 Attorney General letter, the Attorney General requested an amendment to the Participation Agreement, specifically, section 5.2 concerning jurisdiction over disputes. The Attorney General acknowledges the Commission's statutory authority over racing that the Commission be given initial jurisdiction over disputes such as the one before the Commission today. Mr. Carlson believes that Section 5.2 should be enforced as is and that the Racing Commission should accept jurisdiction, not only on this basis but because of the implications of the recent actions of the NJ THA concerning their withholding of consent for Freehold Raceway to receive both intrastate signals, i.e., Monmouth Park and all interstate signals.

Mr. Carlson stated in November 2012, the Commission granted simulcast approval for 2013 and in doing so, the Commission considered an October 12, 2012 letter from Monmouth Park requesting permission to both send its signal to Freehold and to receive Freehold's signal and to display and wager on those signals. He indicated that now that the Freehold meet has concluded and Monmouth Park has profited from that signal, they are now purporting to withdrawal its consent for Freehold to receive that signal. Mr. Carlson stated that the Commission's 2012 simulcast order is implicated and is being violated and the NJRC should accept jurisdiction to enforce that order.

Finally, Mr. Carlson turned to the Participation Agreement and the amendment to the Agreement which sets forth the State's policy that the NJRC would have primary jurisdiction, which is consistent with other statutes concerning casinos and the like. Mr. Carlson cited N.J.S.A. 5:5-30 which requires that the NJ THA now as the licensee of Monmouth Park and as permit holder of the off-track wagering facility in Woodbridge, become party to the Participation Agreement, and has done so. He stated this is a condition of their licensure and the Racing Commission cannot sit idly by while the Participation Agreement, which was required by this Commission and by statute, to be a prerequisite to NJ THA's licenses and permits. The NJRC should take action to enforce the terms of that statutorily NJRC required agreement.

There were no questions asked of Mr. Carlson.

Christina Harvey, Esq. from the firm of Lomurro, Davison, Eastman and Munoz, on behalf of Monmouth Park and the New Jersey Thoroughbred Horsemen's Association, stated that she does not believe that the Racing Commission should be exercising its jurisdiction because of the issue that this is a private dispute between Freehold Raceway and Monmouth Park as to whether or not the NJ THA is receiving fair compensation for Monmouth's race signal. She stated the Participation Agreement to which counsel previously relied upon requires that the NJ THA be paid fair market value compensation and that for years NJ THA has been arguing that Freehold is not paying such compensation and that this is not a new

issue. Ms. Harvey stated that the relief that Freehold now seeks does not have a procedure in either the statute or the regulation to strip the approvals or to shut down the entire state, and there is no procedure, therefore, there is a Metro Media issue as to what the Commission can actually do. She referenced a case from the Appellate Division in which the NJRC did overstep its bounds under N.J. Div. Horsemen's Benevolent and Protective Association v. the NJRC. In addition, Ms. Harvey stated that the NJ THA is seeking to exercise its rights under Federal law, specifically, 15 U.S.C. Section 3004, as the thoroughbred horsemen is the representative horsemen's group, and also as an operator of a racetrack within 60 miles of Freehold. She indicated that under both scenarios, Monmouth Park has the opportunity to consent to Monmouth's signal being used and because Monmouth Park is not being paid a fair rate, no consent is being granted. She also referenced H.P.B.A. v. Dewine, which was a similar situation in which a racetrack was receiving out-of-state signals without the approval of the horsemen and the Ohio law had permitted such a result. The Federal court opined that because it preempts the Federal Interstate Horse Racing Act, it cannot stand. She stated that the Racing Commission can only approve of the federal right, and the NJ THA has the right to exercise their consent. Ms. Harvey stated that the NJ THA believes the Racing Commission has the power to keep the signals open and believes the jurisdiction ends there, and it would be enforcing the Participation Agreement because the agreement requires that the NJ THA be paid a fair rate.

There were no questions asked of Ms. Harvey.

Grace Chun, Esq., of the firm Inglesino, Pearlman, Wyciskala & Taylor, on behalf of the New Meadowlands Racetrack, had nothing further to add with respect to the issue of jurisdiction.

Mr. Carlson responded to Ms. Harvey's comments and stated she provided no basis on which the Racing Commission should deny jurisdiction, and indicated that this issue is a dispute with Freehold and Monmouth. He stated that this is a dispute with deep-reaching consequences in affecting approvals that have been granted by the NJRC, both of NJ THA's licenses and permits and of everyone's simulcasting rights and obligations in 2013, there is no basis to deny jurisdiction. Mr. Carlson acknowledged that the NJ THA have rights under the Federal law, however, he does not see how that bears on jurisdiction.

Ms. Harvey responded by saying there is no procedure in the regulations or statute for stripping a licensee of approvals once they have been obtained, particularly where there is no other law that suggests how the rights would be exercised in New Jersey under the Federal act.

There were no further comments.

Executive Director Zanzuccki read the following proposed motion:

“On May 13, 2013, F.R. Park Racing, L.P. and Freehold Racing Off Track LLC (hereafter jointly Freehold or petitioners) filed with the Racing Commission (hereafter the Commission) a Petition, Order to Show Cause, Proposed form of Order, and supporting Certification and exhibits. The Petition asks the Commission to exercise jurisdiction and seeks various forms of relief, all related to proposed action by the New Jersey Thoroughbred Horsemen’s Association (hereafter THA).

Specifically, petitioners refer to a series of letters sent by the THA. By letter dated May 1, 2013 addressed to Monmouth Park Race Track, the THA indicated that it would not approve the simulcasting of signals from Monmouth to Freehold Raceway; and further, would not consent to the importing of thoroughbred signals from out of state to Freehold Raceway, pursuant to the Interstate Horse Racing Act, 15 U.S.C. 3001 et seq. Subsequently, by letter dated May 10, 2013 to Commission Executive Director Frank Zanzuccki, the THA indicated that it would consent to the signals being received by Freehold Raceway, until May 17, 2013, in order to permit settlement discussions between the parties to continue. The THA extended its consent a second time, by letter dated May 15, 2013, until May 29, 2013; and then a third time to June 3, 2013.

In their Petition, petitioners contend that in the event the THA were to withhold consent, in the manner that it has threatened, these actions would violate both the Master Off Track Wagering Participation Agreement (hereafter the MPA) executed on September 8, 2003 and amended February 6, 2004, as well as the Commission’s regulations, specifically N.J.A.C. 13:74-8.2. As noted above, petitioners seek various forms of relief.

The Commission has reviewed the papers submitted by the petitioners, as well as those papers submitted in response by the THA and by New Meadowlands Racetrack, LLC. On Friday, May 31, 2013, the Commission received additional submissions past the 1:00 p.m. deadline from Petitioners, as well as counsel for the THA and New Meadowlands Racing, LLC. Notwithstanding the lateness of these submissions, the Commission has reviewed them. The Commission hereby notes that while these have been reviewed the submissions received from [sic] The Commission hereby notes that although they have been late, they have been reviewed. In addition, the Commission has considered the statements made by the parties at the Commission’s public meeting of June 3, 2013. The Commission has also considered the advice of counsel, the Office of the Attorney General, on the legal issues raised by the Petition. It is the Commission’s determination that it is not the appropriate forum to consider at this time the issues raised in the Petition.

The Petition is based primarily on alleged violations of the MPA. Particularly, petitioners assert that the THA's threatened actions would violate Section 2.2 of the MPA, which is captioned "Receipt of Signal and Common Pool Wagering Rights." It provides in part that the signatories agree that each New Jersey track and Off Track Wagering facility (hereafter OTW) be entitled to receive the simulcast signal from all New Jersey tracks, "in exchange for a payment equal to the current rate between racetracks" It goes on to provide that if any New Jersey track or OTW facility is denied access to an out of State transmission, that no New Jersey track or OTW shall receive it. In response to Petitioners' arguments, the THA states that the parties have been unable to negotiate an appropriate rate, as intended by the MPA.

The Petitioners state that, pursuant to the terms of the MPA as amended, this dispute "must" be heard by the Commission. See, Petition, par. 10. This is inaccurate. In reality, the amended MPA states in pertinent part that: "In addition, any dispute arising out of this Agreement ... shall be heard either by the Commission or the Appellate Division of the Superior Court of New Jersey; provided, however, that if either the Commission or the Appellate Division of the Superior Court of New Jersey determines that it does not have jurisdiction over any such dispute, such dispute shall then be heard by any court sitting in Mercer County, New Jersey." See, MPA, Section 5.2.

Thus, contrary to Petitioners' assertion, the MPA recognizes that some disputes may more appropriately be heard in Superior Court. It must be recalled that the MPA is a contractual agreement between private parties, to which the Commission is not a signatory. The present issue revolves around a dispute between those parties over the proper rate to be charged for simulcasting signals. Resolution of that issue does not implicate the Commission's expertise, or involve interpretation of its statutes or regulations. It is the Commission's determination that a court is better situated to assess the underlying issue in question, and to provide for the types of remedies envisioned by the MPA. See, MPA, Section 5.6.

Finally, as noted, the Petition also contends that the THA's actions would violate the Commission's regulations, specifically N.J.A.C. 13:74-8.2. This regulation deals exclusively with the receipt of simulcast signals by OTW facilities. It provides that any race signal transmitted by a New Jersey track to an OTW facility must be transmitted equally to all of them. Although the Petition states that the THA is threatening to withhold consent for signals to the Toms River OTW facility, this is not supported by the record. None of the letters sent by the THA mention stopping that signal, and in the THA's May 15, 2013 brief and supporting certification it states unequivocally that it is not intending to interfere with that signal. See, THA brief, page 3; and Certification of John Forbes at ¶22. There is thus

no issue arising under the Commission's regulations at this point in time that would require resolution.

In regards to the late submissions to the Commission, the Commission notes that the papers largely reiterate the arguments previously made in their earlier submissions, with the exception of considering our November 14, 2012 Order as a basis to exercise jurisdiction. The Commission is of the opinion, however, that this argument does not change our fundamental analysis, as discussed above, and our determination.

Thus, it is the Commission's determination that it will not exercise jurisdiction over the issues raised in the Petition relating to alleged violations of the MPA. In addition, there is presently no issue of alleged violations of the Commission's regulations that needs to be addressed. This is the final administrative action on this Petition."

The Executive Director asked if the Commissioners have any questions or comments in support or opposition of this motion. All of the Commissioners voiced their support of the motion.

Commission Aponte motioned to accept the motion as read by the Executive Director. Commissioner Keegan seconded the motion and all Commissioners voted yes.

There being no further discussion or comments from the public, Commissioner Abbatiello moved that the meeting be adjourned subject to the provisions of the "Open Public Meeting Act." Commissioner Cofrancesco seconded the motion and it was approved unanimously.

ATTEST:



Executive Director Frank Zanzuccki