

MINUTES

OREGON RACING COMMISSION JANUARY 17, 2002

The Oregon Racing Commission met on Thursday, January 17, 2002, at 1:30 p.m. for their regular meeting in Room 140 of the Portland State Office Building located at 800 NE Oregon Street, Portland, OR. Commissioners in attendance were Steve Walters, Chair; Vice Chair Tom Towslee, Lisa Metcalf Jeff Gilmour and Todd Thorne. Agenda items were discussed in the following order with resulting actions:

1. Approval of December 21, 2002, Minutes

ACTION: MOTION(Gilmour) Approve minutes as submitted.

VOTE: 5 Aye, 0 Nay

2. Acceptance of Magna Entertainment Corp. Audited Financial Statements in Lieu of Individual Audited Financials for Oregon Racing, Inc. dba Portland Meadows and MKC Acquisition Co. dba Multnomah Greyhound Park

Carl Wilson the request that the commission accept the audited statements of Magna Entertainment Corp. in lieu of individual audited statements of each track. He stated he felt the request was reasonable due to the fact that MEC owns 100% of each track and would, therefore, be responsible for any financial obligations. Steve Barham recommended approval of the request. The key part for him is the fact that upon request the commission can look at the internal financials of each of the divisions to see what is happening. That is what commission staff is primarily interested in beyond the financial capabilities as reported by Mr. Wilson.

ACTION: MOTION(Towslee) Accept auditor's financial statements for Magna Entertainment Corp. in lieu of individual financials for Portland Meadows and Multnomah Greyhound Park.

VOTE: 5 Aye, 0 Nay

3. Portland Meadows Race Meet Report

Carl Wilson reported the total live handle is up 7% and the Oregon live handle is also up 7%. They were down on exports but after adding Miami and Chicago they actually doubled their daily handle a couple of weekends ago. The average daily live handle is up 14%. Simulcast handle have been declining, especially the horse handle which is down 7%. The grand total handle with the addition of the exports is now down 4%.

Following is a transcript of the report dealing with the EPA issues:

Walters: Welcome, gentlemen.

McFadden: Art McFadden, Magna Oregon

Daruty: Scott Daruty with Magna Entertainment Corp. Just to give you all an update on where we are; where to begin.

Walters: Are you going to get into trouble with the EPA for telling us?

Daruty: Yeah. Actually that is the case, but we'll tell you anyhow. We're still working with the EPA to try to get the Consent Decree finalized. So that you know, on the permitting side the City of Portland has been extraordinarily cooperative with us and I think even exceeded my expectations in terms of how quickly they were going to react. The only thing right now holding up the issuance of the city building

permits is the fact that they need to see the Consent Decree before they issue them, signed. So it really falls to the EPA as to why it is we're not under construction at this point. The Consent Decree itself, you know, we've been working with the EPA for many months now. I do have to, we joked about it a little bit earlier, I do have to tell you that the EPA's view is that our negotiations with them are confidential. The EPA's view is that I am not allowed to discuss that with the Racing Commission and they've told me that. My response to them was you're the licensing agent which allows us to operate and I owe an obligation to you to keep you fully informed of what's going on.

Walters: Just so we're clear on that, Scott. It is more than you concluding that you owe an obligation to us. I think this commission has made it very clear that we expect Magna Entertainment to keep us posted on the course of these negotiations and what is happening in these negotiations. Frankly, I find it more than a little offensive that a public agency would take the view that the state agency that is responsible for regulating the industry whose future they are very much affecting should be kept in the dark about the course of those negotiations. Just so we have it clear on this record, this commission has directed you to keep us informed and we have directed our executive director to monitor and stay on top of the negotiations. So, it's even stronger, I think, than you in your usual understated manner have suggested to the EPA.

Daruty: Well, with that said then I think...

Towslee: We'll be happy to write a letter to the EPA stating that, Scott, if you'd like.

Daruty: There are essentially two issues that remain, and but for these two issues we would have signed the Consent Decree long ago. The first is that the EPA is now telling us that even if we remove the horses on February 15th they will fine us, and the reason they will fine us is since we will not have built our system yet when it rains water is going to not go in the sewer as it would under our system but is going to run off site and that that's a discharge event and that that discharge event is unauthorized because we're a CAFO facility. Even though the horses are gone the test for whether or not you're a CAFO facility is whether you had a certain number of horses there for 45 days or more in the last twelve months. So, by virtue of the fact that you look back, their view is that we would be subject to a fine. My view is that that's absolutely contradictory to what they told us back in October they were going to do. I've told them we simply cannot and will not sign something that's going to allow them to fine us when it rains. It's a significant fine, and if you count every time it's going to rain in February and March it would be astronomical the amount of penalties we'd be exposed to. That's one issue. The other issue relates to their refusal, basically, to make the agreement binding on the EPA. We had agreed back in October prior to bringing the horses back that there would be this penalty matrix and if there were certain discharge events from our system then we would pay fines based on how frequent those discharges were and the amount of contamination contained in the discharges. We negotiated with them over that and came to an agreeable penalty matrix which was still pretty steep when you look at the numbers, but it was something we were willing to live with. They're now saying that that is binding on us essentially but that the EPA retains the discretion to fine us more if they want to. Those are the two things that prohibit us from signing the Consent Decree.

As of last Friday, in the EPA's mind, the situation was complicated a little bit by the letter that this commission sent to them. They, first of all, were very angry at Magna. They believed that Magna orchestrated that letter and accused us of trying to negotiate in public, so to speak, and try to use the commission to apply pressure on them. I told them that was not the case.

Walters: And again, just let me interrupt you there, Scott. Just so there is no lack of clarity on this issue. Again, I'm more than a little offended that the EPA would suggest that a public agency of the State of Oregon would allow itself to be manipulated by its licensee for PR purposes or to advance their negotiating position. Again, so there's no lack of clarity, that letter was drafted by members of the Racing Commission and our executive director. We did not share drafts with Magna. We gave Magna the "heads up" that we were going to do it and you expressed the view to me that you were worried that it would complicate the relationship with the EPA. After having taken your advice under consideration, we decided it was our obligation to let the administrator of the EPA know what was going on from our perspective and the effect that we felt that it would have on an industry that we are charged with regulating. So, again, there should be no misunderstanding on that point, and to the

extent that your contacts at the EPA believe otherwise I invite them to call me or Commissioner Towslee or any other members of the commission and we can clear up that misunderstanding.

Towslee: I would encourage them to do that.

Walters: Right.

Thorne: would concur.

Towslee: I would look forward to that conversation.

Metcalf: If not we'll call them.

Walters: Excuse me for interrupting.

Daruty: Okay, thank you. So, in their view the situation has gotten complicated by virtue of the fact that now the industry, so to speak, is asking for right to continue operating after February 15th. In their view that takes this from a place where we had two issues we were fighting over and now we have three. What I was told was that by raising that issue there was no way we were going to get it resolved within the next week to ten days, that that was going to drag things out and the significance of that, of course, is that we received a 60 day notice of intent to sue from a couple of citizens environmental groups. We received it on November 27th which means their 60 days would expire actually over the weekend and I think they'd be allowed to bring a lawsuit starting on Monday, January 28th. It's very important that if we're going to get all this resolved that we have a signed Consent Decree prior to that January 28th date. So, to move hopefully in that direction what I did was on Tuesday wrote a letter to David Allnut setting forth our position once again and offering an alternative to their approach of fining us after February 15th whether or not the horses were gone. I proposed basically an outside date when we would have the system up and running and that we would accept reasonable fines after that date if we didn't meet that deadline. The deadline, just so you know, and this was an idea we actually talked about in a phone call, the deadline they had suggested I use in my proposal was April 15th. Given the large hammer they are going to hold over our heads to meet that date we need to get a little bit more comfort from our contractors before we agree to that or before we go back and say we just can't do that date. We've always said that our construction schedule was about 60 days and we continue to believe that's true, which means if we have the Consent Decree signed in the next week and we get the building permit and a couple of days after that it gets started, April 15th should not be a problem. But, if somebody tells you they're going to fine you say \$10,000 a day for every day you miss your deadline, you want to leave yourself a little bit of a cushion. Anybody whose ever done any kind of construction project knows that unexpected things come up and cause delays.

So, that's where we're at. I am at this time waiting to hear back from the EPA to find out whether or not basically what their response to my proposal was and hopefully it will be favorable and we'll move forward. If it's not, things get extraordinarily complicated if and when the citizens group files a lawsuit which they've threatened to do.

Walters: Questions or comments by members of the commission?

Thorne: I was just going to ask you, Art, or yourself Scott. Art reported last meeting on December 21st, I was just trying to get an idea of the status of your general contractors, your subs, they went out to bid I think between December 21st and now, is that correct?

Daruty: Yes. We received the bids in and are actually going to be opening them later today, so we'll be ready to go. One thing I would like to mention is that the City of Portland was terrific in how quickly they worked. Our engineers told us quite honestly they've never seen the city work that quickly to get something approved. The EPA, and I hope and I don't think anybody on the commission is of this opinion, the EPA told me they were very disappointed in the speed with which Magna moved in the permitting process. They thought that it was too slow, they thought we could have got our permit more quickly which, of course, is nonsense because even if we had gotten our permit a month ago, you know had everything ready, we still wouldn't get the final permit until the Consent Decree was

done. So, the only limiting factor at this point is the EPA's willingness to sign a reasonable Consent Decree. That's what's holding us up. We do have our bids in, we have everything done on the permitting side other than the Consent Decree, so we'll be ready to go as soon as we get this issue or couple of issues with the EPA resolved, hopefully next. Again, if it doesn't get resolved I don't know what's going to happen. The lawsuits will start flying and it will get ugly.

Walters: Other questions or comments? And just so there's no misunderstanding, Scott, that we expect that you or Art or Carl will keep us posted about the course of these negotiations. When you get a response from the EPA we need to know what it is and we need to know what your plans are. You can communicate it to Steve or you can communicate it to any of the commissioners, but if they're listening in Washington we expect that.

Daruty: We will comply with that.

Walters: Alright. Thank you.

Towslee: Scott, clarify for me once again the April 15th date versus the February 15th date.

Daruty: Okay. What we talked about...

Towslee: Should I be encouraged by that?

Daruty: No. What we talked about last Friday, which was my last conversation with them, was I continued to express my extreme dismay that they were now essentially changing the deal and telling us if we got the horses off on February 15th they were going to fine us after that time. You've got to understand in their mindset every discussion we've ever had they have taken it as the absolute written in stone that the horses were going to be gone by February 15th. They've not shown flexibility on that. We've not really even discussed it because they've always just taken that as a matter of certainty, and their view is that that was something that the industry agreed to when they allowed us to bring the horses back on. They don't like using that phrase but that's essentially what happened. In their defense I will say that I think the one thing that has changed between some of our prior conversations last October and now is the citizens' suit or the threat of it. That certainly complicates things and I don't know if that's why the EPA is so insistent on the February 15th date or not, but the fact of the matter is they are.

So, to get to your question, what the April 15th date is I told the EPA that Magna will not sign a Consent Decree that says we will pay penalties after February 15th if the horses are gone and it rains and because it rains the water runs off the property and it's a discharge event. We're not going to do that. When I tried to find out what is your concern, why do you care, if the horses are gone what is the problem. What the ultimately said was that they were worried that we were going to run through the 15th, the horses would leave and then we'd say aha! we fooled you guys, we're not doing any work, we're going to go away, and we ran this four-month meet and that's all we ever really wanted. I told them that wasn't the case. I offered that we'd post a bond to make sure the construction is done and they didn't like that idea. I said what can we do to guarantee you that we will do the work, and they said, well, we might agree to not fine you on February 16th if the horses are gone if in place of that there's a drop dead date of April 15th after which if the system isn't done and hooked to the sewer we're fining you \$10,000 a day.

McFadden: Regardless of discharge.

Daruty: Regardless of discharge plus whatever discharge does occur we'll fine you for that, too. And as unreasonable as that is, Magna wants to make this work and so we're considering that and will really be agreeable to that as long as we get comfort from our contractors that they can really do the work by then. It's not going to do us any good to make up a date and say, yeah, we'll hit April 15th unless our contractor tells us it can really happen. We don't want to make a promise we can't keep, and we need to have that communication with our contractor and get back to the EPA as to whether April 15th works or is it going to be April 30th or May 15th, or may April 15th is the day but you start out with a much smaller penalty per day and have the penalty grow as you miss that date by more and more days. There's a lot of different ways to come at it, but I think the question you were asking was

is the EPA now considering an April 15th date as opposed to a February 15th date for when the horses leave, and that's not the case.

Walters: Not to prolong this unnecessarily, but the sort of comments that you were just describing to us by the EPA about having planned all along to run a four-month horse meet, that's the sort of thing that causes people members of this commission to haul off and start writing letters to the EPA saying you have no concept of this industry and what your machinations are doing to this industry. The notion that someone would spend the amount of money you have spent on renovating the track and renovating the facility and want to run a four-month race meet where you're running two to three times a week is just absolutely ludicrous. Just as it is ludicrous for the EPA to say, well, the industry has agreed to take the horses off on February 15th. I know how that agreement got made and I don't criticize the people who made it, but the industry didn't make it and certainly the Racing Commission didn't make it and because as we all know taking the horses off on February 15th will hurt if anyone a bunch of horse men and women who don't have any place to run their horses. I won't launch into the comparisons with New Jersey that we drew in the letter we sent to the administrator, but to me that is just the epitome of this federal agency's ignorance of this industry and the effect that their actions are having on this industry. Maybe we'll write another letter and maybe we won't, and we understand you don't want us to.

Daruty: Let me just add, we want to work something out that would allow racing to continue, but our fear is that if we, Magna, continue to push for that then we're never going to get any Consent Decree signed and we're going to get sued and then...

Walters: We are not asking nor expecting Magna to push for that. I don't think you proposed but you accepted the February 15 date, and we understand perfectly well that in your discussions with the EPA you need to take that as a given. What this commission was asking was for a bit of common sense on the part of the EPA in its enforcement just as had been suggested earlier in this process this fall that enforcement discretion could be used to allow racing to continue so the horse men and women that I mentioned would not be put out of work. That has nothing to do with Magna and it is not meant as any criticism of Magna at all. If you hadn't accepted that date we probably wouldn't have a race meet that started, so we do not expect or at least I do not expect Magna to now push to extend the February 15 date. It would continue to be my hope that somebody in the EPA would come to their senses about the effect that this has on individuals who can't afford to be put out of work, for them to buy a couple months of saying, yeah, see we made them take the horses off. And again, I probably ought to shut up before I say too much more.

McFadden: We meet tomorrow morning with the plaintiffs in the lawsuit and they are also urging, the February 15th is the date on their minds also, so this thing is very complicated and the two problems...

Walters: All these persons want their pound of flesh. Other questions or comments? Thank you, gentlemen.

4. Proposed Distribution Plan for Hub Revenue

Commissioner Tom Towslee reported a meeting had taken place on January 5, 2002, with members of the racing industry involved in the summer race meets. Out of that meeting came a proposal to use hub money to supplement purses at the summer race meets in the amount of \$1,000 per race which, when adding up the number of races for each of the summer meets, would come to a total of \$170,000. The total amount could be increased by \$40,500 if the Grants Pass meet decides to add 7 to 10 races over the number that they raced in 2001. In addition, \$15,000 will be made available in a jockey bonus program in order to encourage jockeys to go to the smaller race meets. Any rider that rides at any of the summer meets and finishes first, second, third or fourth will earn points and will, therefore, share in some of the money. They have to ride in four of the five race meets to be eligible, and the more they ride and the better they do the more money they can earn. In summary, the proposal is a plan to spend \$225,500 out of the hub account to supplement these meets.

ACTION: MOTION(Gilmour) Approve the distribution of hub revenue as proposed.
VOTE: 5 Aye, 0 Nay

5. Proposed Final Order for Robert R. Renney

AAG Raul Ramirez presented the proposed order as submitted by the ALJ. The ALJ proposed that Mr. Renney be eligible to reapply after three years. Mr. Ramirez pointed out that our rules state a person is eligible to reapply in two years unless the commission sets the period longer than that. Chair Walters suggested the commission strike from the order the provision that Mr. Renney would be eligible to reapply in three years and instead leave it to the rules which would allow him to reapply in two years.

ACTION: MOTION(Towlsee) Approve the proposed final order as amended.
VOTE: 5 Aye, 0 Nay

6. Confirmation of Next Commission Meeting - February 21, 2002

Meeting date is okay as scheduled. Commissioner Thorne will not be attendance.

7. Request from Ron Martinez to Address The Commission Regarding Phone Lines at Off-Track Sites

Mr. Martinez called and requested this item be tabled until a later meeting. The item will be placed on the February agenda.

8. Request by Ohio TAB, Ltd. to Sell One Percent of Its Interest in America TAB, Ltd. to Tampa Bay Downs, Inc.

Todd Bowker, America Tab, was present to answer any questions regarding the request to add a new affiliate member. He did state America TAB had had a record December during which they handled 4.3 million dollars. Steve Barham reported the background checks have been completed and he recommended approval contingent upon the commission receiving a contract between America Tab and Tampa Bay Downs, Inc. just to make sure Tampa Bay agrees to deal with the operating plan.

ACTION: MOTION(Towslee) Approve sale of one percent of Ohio TAB, Ltd. interest in America TAB, Ltd. to Tampa Bay Downs, Inc.
VOTE: 5 Aye, 0 Nay

In a related matter Chair Walters stated Mr. Bowker reported at the last meeting that part of Ohio TAB's business plan is to admit shareholders a one percent interest in the company. The request for Tampa Bay Downs is second request to come before the commission for approval. The question now is in circumstances such as this is whether the commission ought to delegate to the executive director the authority to approve future requests of this nature. The applicants tend to be an operator that is already licensed in the racing industry, it is a one percent transfer and would be subject to conducting a background check which comes up clean and providing a contract in which they agree to comply with the existing operating plan.

ACTION: MOTION(Towslee) Delegate to the executive director authority to approve future requests submitted by Ohio TAB to sell one percent of its interest in America TAB to a new affiliate member. The approval would be subject to a clean background check and providing a contract in which the new shareholder agrees to comply with the existing operating plan.
VOTE: 5 Aye, 0 Nay

There being no further business, the meeting was adjourned.

