

LAW AND PUBLIC SAFETY

NEW JERSEY RACING COMMISSION

Horse Racing

General Rules

Proposed New Rules: N.J.A.C. 13:70-1.32 through 1.41.

Authorized By: New Jersey Racing Commission,
Frank Zanzuccki, Executive Director

Authority: N.J.S.A. 5:5-30

Calendar Reference: See Summary below for explanation of exception
to calendar requirement

Proposal Number: PRN 2008-237

Submit written comments by September 19, 2008 to:

Michael Vukcevich, Deputy Director
Department of Law and Public Safety
New Jersey Racing Commission
P.O. Box 088
Trenton, New Jersey 08625-0088

The agency proposal follows:

Summary

The proposed new rules, N.J.A.C. 13:70-1.32 through 1.41 set forth the procedures and practices utilized by the New Jersey Racing Commission. These rules are being proposed in response to the court's directive in In the Matter of Consideration of Distribution of the Casino Simulcasting Special Fund (Accumulated in 2005) in the Amount of \$1,820,699.42 Pursuant to N.J.S.A. 5:12-205d, 398 N.J. Super. 7 (App. Div. 2008) to promulgate rules pursuant to N.J.S.A. 52:14B-3(2) which set forth the nature and requirements of the Commission's formal and informal procedures.

New rule, N.J.A.C. 13:70-1.32, explains that the proposed rules, N.J.A.C. 13:70-1.32 through 1.41, govern the practices and procedures of the Commission that are not otherwise addressed by the rules in Chapter 70. The proposed new rule specifies that when an appeal of a licensee is transmitted to the Office of Administrative Law, or the Commission elects to hear the appeal as a contested case, the Uniform Administrative Procedure Rules set forth at N.J.A.C. 1:1 shall govern the proceedings.

New rule, N.J.A.C. 13:70-1.33, indicates that the proposed rules governing the practices and procedures of the Commission shall be liberally construed to permit the Commission and its Executive Director to discharge the Commission's statutory and regulatory functions, as well as to secure just and expeditious determinations of matters before the Commission. Subsection (b) of this proposed new rule authorizes the Executive Director to relax the application of N.J.A.C. 13:70-1.32 through 1.41 upon notice to all parties who possess a statutory right to participate in a proceeding before the Commission pursuant to N.J.S.A. 5:5-22 through 160 or 5:12-191 through 210, when, in his or her discretion, the Executive Director determines that certain factors warranting relaxation are present. These factors include, but are not limited to, fundamental fairness, the need for expeditious action, and party requests for more time. Finally, proposed new rule N.J.A.C. 13:70-1.33(c) authorizes the Executive Director to utilize his or her discretion to determine, in any matter that arises which is not governed by the Commission's rules, whether to place that matter before the Commission.

New rule, N.J.A.C. 13:70-1.34, establishes a procedure for providing notice to interested parties of proceedings before the Commission in matters that are not contested cases as defined in N.J.S.A. 52:14B-2(b). The rule defines "interested parties" to mean "those persons or entities that are identified by statute and given the express authority to submit applications, comments or other information to the Commission for its consideration before or when reaching a decision at a scheduled meeting." Pursuant to the terms of the new rule, the Commission must provide written notice to all interested parties informing them of the issues to be considered and the date upon which it is anticipated that the Commission will act. This notice shall be sent by the Commission, to the extent possible, at least 30 days prior to the anticipated date of action unless unforeseen or exigent circumstances necessitate otherwise.

New rule, N.J.A.C. 13:70-1.35, codifies the procedures currently followed by the Commission regarding the submission of information for its consideration and it establishes a schedule for doing so. Subsection (a) of the rule requires that when providing notice pursuant to N.J.A.C. 13:70-1.34 to interested parties, the Commission shall inform them that they shall have the opportunity to submit information to the Commission regarding their position on the matter within 15 days after the date of notice. Pursuant to subsection (b), at least 10 days prior to the date upon which it is anticipated that the Commission will act, the Commission shall circulate copies of all information received from interested parties to all other interested parties. Whether the Commission will accept

further written comment from the interested parties before it is scheduled to act lies within the discretion of the Executive Director. If further comment is to be allowed, the Commission shall notify all interested parties in writing of their ability to do so.

Pursuant to N.J.A.C. 13:70-1.35(c), if the date upon which the Commission is scheduled to act on a particular matter is unavoidably delayed, the Commission shall notify the interested parties of the new date upon which the Commission anticipates that it will act. At the rescheduled meeting, the Commission shall consider all information submitted to it pursuant to this rule.

N.J.A.C. 13:70-1.35(d) addresses requests by interested parties to comment verbally prior to Commission action at the scheduled public meeting. The decision whether to allow verbal comments lies within the Commission's discretion. To be considered, all such requests must be filed with and received by the Commission at least seven days prior to the scheduled meeting. If the Commission grants the request of one interested party to be heard verbally at the meeting, it must grant the requests of any other interested party to be similarly heard. Pursuant to the terms of the rule, the Commission may, in its discretion, limit the amount of time allotted for the verbal comments of each interested party.

Finally, N.J.A.C. 13:70-1.35(e) applies to requests made on behalf of a person or entity, who has not been designated as an interested party, to be heard verbally at a meeting prior to the Commission reaching a decision. Pursuant to the rule, any such request must be in writing and received by the Commission at least 14

days prior to the meeting upon which the specific matter is scheduled. The decision whether to grant such a request lies within the discretion of the Executive Director in determining whether the person or entity has a sufficient interest in, or possesses important information on, the matter before the Commission which would warrant the opportunity to be heard. The Executive Director may, in his or her discretion, refer the request to be heard to the Commission for decision at the scheduled meeting.

New rule, N.J.A.C. 13:70-1.36, addresses requests to place an issue on the meeting agenda for the Commission's consideration. The rule provides that other than petitions for rulemaking governed by N.J.A.C. 13:1D-1.1, any person or entity with an identifiable interest in horse racing, or the parimutuel wagering attendant upon it, may request, in writing, that a specified issue be placed before the Commission at one of its meetings. The rule requires that all such requests shall be submitted to the Executive Director who is authorized to determine, in the exercise of his or her discretion, whether and when the matter should be placed upon the agenda of a Commission meeting. Alternatively, the Executive Director may refer the request to the Commission for decision.

New rule, N.J.A.C. 13:70-1.37, codifies the procedures currently followed by the Commission for the annual disbursement of Casino Simulcasting Special Fund (CSSF) monies pursuant to N.J.S.A. 5:12-205. Setting forth the court's determination in In the Matter of Consideration of Distribution of the Casino Simulcasting Special Fund (Accumulated in 2005) in the Amount of \$1,820,699.42 Pursuant to

N.J.S.A. 5:12-205d, 398 N.J. Super. 7 (App. Div. 2008) that the disbursement of CSSF monies does not constitute a contested case as defined in N.J.S.A. 52:14B-2(b) or require a public hearing, the rule defines "interested parties" for the purpose of the disbursement of CSSF monies to include all permitted New Jersey racetracks, the horsemen's organization that represents a majority of the owners, breeders and trainers of standardbred horses in this State and the horsemen's organizations that represent a majority of the owners, breeders and trainers of thoroughbred horses in this State.

Pursuant to subsection (c) of the rule, the written submissions of each permitted New Jersey racetrack must, to the extent it wishes to present information for the Commission's consideration, set forth detailed facts in support of any claim that the racetrack's financial well-being has been negatively impacted by casino simulcasting or that the racetrack is financially distressed.

Subsection (d) of the rule requires that the written submissions of a horsemen's organization must, to the extent the organization wishes the Commission to consider it, set forth detailed facts as to how it will use any monies awarded to fund a project that will be beneficial to the racing industry in New Jersey. The rule requires that the information submitted to the Commission must clearly set forth in detail all aspects of the proposed project, how the project will benefit the horse racing industry in this State and how the requested funds will be used. Any failure to submit such detailed information may result in a decision by the Commission that it is unable to disburse CSSF monies for the proposed project.

Subsection (e) states, consistent with current law, that the amount of CSSF monies to be disbursed, pursuant to N.J.S.A. 5:12-205d, to permitted New Jersey racetracks and the horsemen's organizations lies within the Commission's discretion and the disbursements shall be in such amounts as the Commission deems appropriate.

Subsection (f) indicates, consistent with current law, that the Commission's Order of Disbursement of CSSF monies shall constitute a final decision of the agency and any appeal of such Order shall be made to the Appellate Division of the Superior Court of New Jersey upon notice to the Commission and all other recipients of CSSF monies. Subsection (e) also provides that the Commission will not grant any request to stay or escrow the amounts disbursed pending appeal because of the recipients' need to rely upon timely receipt of the monies disbursed and the statute's requirement of annual distributions. This subsection also requires that in the event a court alters the amount disbursed to an interested party on appeal, the Commission shall effectuate any such modification in the next annual disbursement of CSSF monies. Pursuant to the rule, no recipient shall be required to return a prior year's disbursement of CSSF monies unless the amount available in the next annual disbursement is insufficient to cover the modifications ordered by the court or unless exigent circumstances warrant otherwise.

Finally, N.J.A.C. 13:70-1.37(g) authorizes the Commission to order a recipient to return any or all of the CSSF monies disbursed to it if information comes to the attention of the

Commission that the recipient is not using the monies for the purposes or projects intended or the recipient is otherwise misusing or unable to account for such monies.

New rule, N.J.A.C. 13:70-1.38, codifies the procedures currently followed by the Commission in the annual allocation of race dates. The rule states that because the allocation of race dates does not constitute a contested case as defined in N.J.S.A. 52:14B-2(b) or require a public hearing, the Commission shall consider and decide the awarding of racing dates at a public meeting. The rule defines "interested parties" for the purpose of the allocation of racing dates as all permitted New Jersey racetracks.

Pursuant to subsections (c) through (f) of the rule, all applications for racing dates must be made on the form prescribed by the Commission, which shall be mailed to all of the permitted racetracks on or before October 1 of each year. Applications for racing dates must be filed with the Commission before October 15 of each year and the Commission shall act upon the filed applications at a meeting to be held not later than December 1 of the same year. For any application filed on or after October 15 of any year, the Commission must act upon it at a meeting to be held not later than 60 days following the filing of such application. All applicants for racing dates may be present in person or through an agent or counsel and be heard verbally by the Commission with respect to such allotment at the meeting upon which the Commission is scheduled to act.

N.J.A.C. 13:70-1.38(g), references the statutory mandate that in allocating racing dates, the Commission shall endeavor to allot to each applicant, subject to the restrictions set forth in N.J.S.A. 5:5-43 et seq., the dates requested in the respective applications, after giving due consideration to all of the factors involved and the interests of such respective applicants and the public. Pursuant to subsection (h), the "public interest" for the purposes of this rule shall include considerations related to: protecting the State's revenues from racing and generating additional revenues to the State, its agencies and subdivisions; providing for the continuity of racing and year-round racing so as to promote the racing industry and maintain and enhance the employment which it provides in this State; providing a recreational opportunity for residents in the several areas of the State where licensed tracks are situated; and maintaining and improving this State's competitive position with regard to neighboring racing states.

N.J.A.C. 13:70-1.38(i) references the mandate set forth in N.J.S.A. 5:5-44 that a permitholder may reject any or all of the racing dates allotted by the Commission. For any such dates rejected, any or all of the remaining permitholders may amend their applications to request the dates rejected. Should more than one permitholder seek to obtain the same rejected dates, then the allocation of such dates shall lie within the Commission's discretion as most appropriate for providing continuity of racing in the State and furthering the public interest, provided that the Commission shall not allocate any of these dates to any permitholder which has

been determined to be in violation of the Racing Act, N.J.S.A. 5:5-22 et seq.

New rule, N.J.A.C. 13:70-1.39, establishes procedures for the waiver of the Commission's rules. Pursuant to subsection (a), any person or entity desiring a waiver or release from the express provisions of the Commission's rules in this chapter, N.J.A.C. 13:71, 13:72 and 13:74 shall submit a written request to the Commission, to the attention of the Executive Director, which shall set forth in detail all facts that support the necessity of the requested relief and identify all persons or entities who might be affected if the relief were granted.

Pursuant to subsection (b), the Commission may, within its discretion, grant a waiver from specific provisions of its rules if it determines that: such a waiver will benefit the horse racing industry in this State; such waiver is consistent with the intent of, if not the letter of, the Commission's rules; or strict application of the rule would create an unnecessary hardship that is contrary to the legislative intent of the underlying statutes, the public interest or the integrity of the sport.

Under subsection (c), the Commission may seek waiver of its rules upon its own motion. The Commission may approve such waiver upon finding that relief is warranted by the factors set forth above in subsection (b). Subsection (d) clearly states, however, that the Commission may not grant a waiver of its rules where to do so would be contrary to, or inconsistent with, an applicable statute.

Finally, pursuant to N.J.A.C. 13:70-1.39(e), all decisions on requests for waiver shall be made at a public meeting of the Commission.

New rule, N.J.A.C. 13:70-1.40, sets forth procedures governing the Commission's modification of penalties imposed by racing officials. Subsection (a) states that the Commission may modify any penalty or decision imposed by a racing official, either on its own motion or when requested to do so by the Executive Director, prior to the transmittal of the matter, upon the request of the licensee affected, to the Office of Administrative Law as a contested case. The rule specifically states that the Commission's modification of any penalty or decision recommended by the Administrative Law Judge in an initial decision shall continue to be governed by the applicable provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

Pursuant to N.J.A.C. 13:70-1.40(b), at least 15 days before the scheduled meeting at which the issue of modification will or may be addressed, the Commission shall notify the licensee involved and allow him or her to submit in writing any information he or she wishes the Commission to consider. All such submissions shall be filed with the Commission at least 5 days prior to the date of the meeting.

Subsection (c) specifies factors that the Commission may consider in deciding whether to modify such penalty or decision. These factors include: penalties imposed by the Commission in similar matters; whether the actions of the licensee placed the

safety of other race participants at risk; whether the actions of the licensee had the potential to jeopardize the health of any race horse; the extent to which the licensee's actions constituted conduct detrimental to the sport; the extent to which the licensee's actions had a negative impact on the integrity of the sport; and whether the actionable conduct of the licensee appears to be an isolated incident or a pattern of disregard of the Commission's rules.

Pursuant to subsection (d), in deciding whether to modify such penalty or decision, the Commission shall consider the evidence before the racing official and any information submitted by the licensee pursuant to subsection(b) of this rule. In considering such evidence, the Commission may rely upon a staff summary and analysis of the evidence below.

Subsection (e) requires that when modifying a penalty or decision, the Commission shall issue a written ruling setting forth the modification and the basis of its decision.

Finally, N.J.A.C. 13:70-1.40(f) instructs that this rule shall not be interpreted to mean that the Commission's authority to impose penalties is limited to licensees as the Commission's regulatory authority to issue penalties extends to all persons or entities engaging in conduct that requires licensure.

New rule, N.J.A.C. 13:70-1.41, establishes requirements for representation by attorneys in matters before the Commission or stewards as well as the Commission's position on representation by attorneys not licensed in this State who seek to appear at the Office of Administrative Law. Subsection (a) provides that in any matter

before the Commission or its stewards, a licensee may represent him or herself or be represented by an attorney authorized to practice law in this State, except that a licensee which is a corporate entity must be represented by an attorney authorized to practice law in this State.

Subsection (b) is being proposed in response to a pattern of practice in which an attorney who is not licensed to practice in New Jersey seeks multiple admissions pro hac vice over the course of a calendar year to appear in Commission matters. Because there is no lack of experienced attorneys admitted in this State who have expertise in this area of law, subsection (b) limits the admission pro hac vice of attorneys not licensed in this State, as well as attorneys admitted in this State who do not maintain a bona fide office for the practice of law here, to one appearance per calendar year in a matter pending before the Commission or its stewards.

This subsection also requires that applications for admission before the Commission or its stewards shall be submitted to the Executive Director. The application to be admitted pro hac vice shall be made by motion of an attorney authorized to practice in New Jersey on the form prescribed by N.J.A.C. 1:1-5.2(a)1. The motion seeking admission shall be served on all parties and have attached a supporting affidavit, signed by the attorney seeking admission, which, except for attorneys who are employees of and are representing the United States of America or a sister state, shall state that payment has been made to the New Jersey Lawyers Fund for Client Protection. The affidavit shall also specify how the attorney

seeking admission satisfies each of the conditions, including good cause, set forth in New Jersey Court Rule 1:21-2(a). The attorney seeking admission shall agree in the affidavit to comply with the dictates of New Jersey Court Rule 1:21-2(b).

N.J.A.C. 13:70-1.41(c) applies to matters pending before the Office of Administrative Law, in which the appearance of an attorney from any other jurisdiction, of good standing there, or an attorney admitted in this State, of good standing, who does not maintain a bona fide office for the practice of law here, shall be governed by the procedure set forth in N.J.A.C. 1:1-5.2. Subsection (c) of the new rule mandates that the Commission shall not consent to the appearance of any attorney seeking admission pro hac vice, who has already appeared once, either before the Commission, its stewards or at the Office of Administrative Law in a matter involving the Commission, in that calendar year.

The Commission has provided a 60-day comment period on this notice of proposal. Therefore, this notice is excepted from the rulemaking calendar requirements in accordance with N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules will likely have neither a positive nor negative social impact as they largely codify practices and procedures already utilized by the Commission. The proposed rules may have a positive social impact to the extent that the codification of these procedures facilitates the public's access to this information.

Economic Impact

The proposed new rules will likely have neither a positive nor negative economic impact as they do not institute or impose any financial requirements. The proposed new rules may have a positive economic impact on attorneys licensed in this State who handle racing-related matters. The new rules limit the admission pro hac vice of attorneys not licensed in this State, as well as attorneys admitted in this State who do not maintain a bona fide office for the practice of law here, to once per calendar year in a matter pending before the Commission or its stewards. The rules also provide that in a matter pending before the Office of Administrative Law, the Commission shall not consent to the appearance of any attorney seeking admission pro hac vice, who has already appeared once, either before the Commission, its stewards or at the Office of Administrative Law, in a matter involving the Commission in that calendar year.

Federal Standards Statement

A Federal standards analysis is not necessary as there are no Federal standards or requirements applicable to the proposed new rules. The Commission proposes these rules pursuant to its rulemaking authority set forth in N.J.S.A. 5:5-30.

Jobs Impact

The proposed new rules will not result in the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules will have no impact on the agriculture industry in the State.

Regulatory Flexibility Statement

The proposed new rules do not impose any reporting or record keeping requirements on small businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-1 et seq. The proposed new rules may possibly have a positive economic impact on certain attorneys licensed in this State who practice as small businesses and who handle racing-related matters. The new rules limit the admission pro hac vice of attorneys not licensed in this State, as well as attorneys admitted in this State who do not maintain a bona fide office for the practice of law here, to once per calendar year. As a result of this limitation, New Jersey-licensed attorneys practicing as small business may be retained to handle more racing-related matters in this State.

Smart Growth Impact

The proposed new rules will have no impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

13:70-1.32 Rules of practices and procedures

This section and N.J.A.C. 13:70-1.32 through 1.41 shall constitute rules governing the practices and procedures of the Commission. These rules shall apply to all practices and procedures that are not otherwise addressed by the rules in this chapter. When

an appeal of a licensee is transmitted to the Office of Administrative Law, or the Commission elects to hear the appeal as a contested case, the provisions of the Administrative Procedure Act, N.J.A.S. 52:14B-1 et seq. and 52:14F-1 et sequ. and the Uniform Administrative Procedure Rules, shall govern the proceedings.

13:70-1.33 Liberal construction of rules of practice and procedure

(a) The rules governing the practices and procedures of the Commission in this subchapter, N.J.A.C. 13:70-1.32 through 1.41, shall be liberally construed to permit the Commission and its Executive Director to discharge the Commission's statutory and regulatory functions and to secure just and expeditious determinations of matters before the Commission.

(b) The Executive Director may, upon notice to all parties given the statutory right to participate in a proceeding before the Commission by N.J.S.A. 5:5-22 through 160 or 5:12-191 through 210, relax the application of these rules when, in his or her discretion, factors including, but not limited to, fundamental fairness, the need for expeditious action and party requests for more time would warrant doing so.

(c) In any matter that arises, which is not governed by these rules of practices and procedures, the Executive Director shall have the authority to exercise his or her discretion in deciding whether to place the matter on the meeting agenda and present it to the Commission.

13:70-1.34 Notice of proceedings before the Commission

When acting to carry out its statutory authority in matters that

are not "contested cases," as defined in N.J.S.A. 52:14B-2(b), the Commission shall provide written notice to all interested parties informing them of the issues to be considered and the date upon which it is anticipated that the Commission will act. This notice shall be sent by the Commission, to the extent possible, at least 30 days prior to the anticipated date of action unless unforeseen or exigent circumstances necessitate otherwise. "Interested parties" shall be those persons or entities that are identified by statute and given the express authority to submit applications, comments or other information to the Commission for its consideration before or when reaching a decision at a scheduled meeting.

13:70-1.35 Opportunity to submit information to the Commission

(a) When providing notice pursuant to N.J.A.C. 13:70-1.34, the Commission shall inform the interested parties, as defined therein, that they shall have the opportunity to submit information regarding their position on the matter to the Commission for its consideration. To be considered, all such information shall be filed and received by the Commission within 15 days after the date of notice.

(b) At least 10 days prior to the date upon which it is anticipated that the Commission will act, the Commission shall provide copies by facsimile of all information received from interested parties, in accordance with (a) above, to all other interested parties. In the discretion of the Executive Director, the Commission may allow further written comment from the interested parties before the date upon which the Commission is scheduled to act. Under such circumstances all interested parties shall be

notified in writing of their ability to do so.

(c) If the date upon which the Commission is scheduled to act is unavoidably delayed, the Commission shall notify the interested parties of the date upon which the Commission anticipates that it will act on the matter. At the rescheduled meeting, the Commission shall consider all information submitted to it pursuant to this rule.

(d) The Commission may, in its discretion, allow an interested party to comment verbally prior to Commission action at the scheduled public meeting. All requests to be heard verbally shall be filed with and received by the Commission at least seven days prior to the scheduled meeting. If the Commission grants the request of one interested party to be heard verbally at the meeting, it shall grant the requests of all of the other interested parties to be heard. The Commission may, in its discretion, limit the amount of time allotted for the verbal comments of each interested party.

(e) Any person or entity who has not been designated as an interested party by the Commission and does not have a statutory right to be heard on a specific matter before the Commission in accordance with N.J.A.C. 13:70-1.34, may, at least 14 days prior to the meeting upon which the specific matter is scheduled, request in writing the opportunity to be heard at the meeting. All such requests shall be considered by the Executive Director who shall, in the exercise of his or her discretion, determine whether this person or entity has a sufficient interest in, or possesses important information on, the matter before the Commission which

would warrant the opportunity to be heard. Alternatively, the Executive Director may, in his or her discretion, refer the request to be heard to the Commission for decision at the scheduled meeting.

13:70-1.36 Requests to place issues on the meeting agenda for the Commission's consideration

Other than petitions for rulemaking which are governed by N.J.A.C. 13:1D-1.1, any person or entity with an identifiable interest in horse racing, or the parimutuel wagering attendant upon it, may request in writing that a specified issue be placed before the Commission at one of its meetings. All such requests are to be considered by the Executive Director who shall, in the exercise of his or her discretion, determine whether the matter should be placed upon the agenda of a Commission meeting. If the Executive Director determines that the matter should be heard by the Commission, he or she shall determine at which meeting it will be addressed. Alternatively, the Executive Director may, in his or her discretion, refer the request to the Commission for decision.

13:70-1.37 Annual disbursement of Casino Simulcasting Special Fund monies

(a) The rules of practices and procedures N.J.A.C. 13:70-1.32 through 1.41 set forth in this subchapter shall be applicable to the annual disbursement of Casino Simulcasting Special Fund (CSSF) monies pursuant to N.J.S.A. 5:12-205. The disbursement of CSSF monies, which does not constitute a contested case as defined in N.J.S.A. 52:14B-2(b) or require a public hearing, shall be

considered and decided at a public meeting of the Commission.

(b) "Interested parties" for the purpose of the disbursement of CSSF monies shall include all permitted New Jersey racetracks, the horsemen's organization, which represents a majority of the owners, breeders and trainers of standardbred horses in this State and the horsemen's organizations which represent a majority of the owners, breeders and trainers of thoroughbred horses in this State.

(c) The written submissions of each permitted New Jersey racetrack shall, to the extent it wishes to present information for the Commission's consideration, set forth detailed facts in support of any claim that:

1. the racetrack's financial well-being has been negatively impacted by casino simulcasting; and
2. the racetrack is financially distressed.

(d) The written submissions of each horsemen's organization shall, to the extent the organization wishes the Commission to consider it, set forth detailed facts as to how it will use the monies to fund a project that will be beneficial to the racing industry in New Jersey. The information submitted to the Commission shall detail clearly all aspects of the proposed project, how the project will benefit the horse racing industry in this State and how the requested funds will be used. Failure to submit such detailed information may result in a decision by the Commission that it is unable to disburse CSSF monies for the

project.

(e) The amount of CSSF monies to be disbursed, pursuant to N.J.S.A. 5:12-205d, to permitted New Jersey racetracks and the horsemen's organizations shall lie within the Commission's discretion and be in such amounts as the Commission deems appropriate.

(f) The Commission's order of disbursement of CSSF monies shall constitute a final decision of the agency and any appeal of such Order shall be made to the Appellate Division of the Superior Court of New Jersey upon notice to the Commission and all other recipients of CSSF monies.

1. Because of the recipients' need to rely upon timely receipt of the monies disbursed and the statute's requirement of annual distributions, the Commission shall not grant any request to stay or escrow the amounts disbursed pending appeal.

2. In the event that the court alters the amount disbursed to an interested party on appeal, the Commission shall effectuate any such modification in the next annual disbursement of CSSF monies. No recipient shall be required to return a prior year's disbursement of CSSF monies unless the amount available in the next annual disbursement is insufficient to cover the modifications ordered by the court or unless exigent

circumstances warrant otherwise.

(g) The Commission may order a recipient to return any or all of the CSSF monies disbursed to it if information comes to the attention of the Commission that the recipient is not using the monies for the purposes or projects intended or the recipient is otherwise misusing or unable to account for such monies.

13:70-1.38 Annual allocation of race dates

The rules of practices and procedures N.J.A.C. 13:70-1.32 through 1.41, set forth in this subchapter shall be applicable to the annual allocation of racing dates. The allocation of racing dates, which does not constitute a contested case as defined in N.J.S.A. 52:14B-2(b) or require a public hearing, shall be considered and decided at a public meeting of the Commission.

(b) "Interested parties" for the purpose of the allocation of racing dates shall include all permitted New Jersey racetracks.

(c) Applications for racing dates shall be made on the form prescribed by the Commission, which shall be mailed to all of the permitted racetracks on or before October 1 of each year.

(d) Applications for racing dates shall be filed with the Commission before October 15 of each year and shall be acted upon by the Commission at a meeting of the Commission to be held not later than December 1 of the same year.

(e) In the event that any such application is filed with the

Commission on or after October 15 of any year, the Commission shall act upon the same at a meeting of the Commission to be held not later than 60 days following the filing of such application.

(f) All applicants for racing dates may be present in person or through an agent or counsel and be heard by the Commission with respect to such allotment at the Commission's scheduled meeting.

(g) In allocating racing dates, the Commission shall endeavor to allot to each applicant, subject to the restrictions set forth in N.J.S.A. 5:5-43 et seq., the dates requested in the respective applications, after giving due consideration to all of the factors involved and the interests of such respective applicants and the public.

(h) For the purposes of this section the "public interest" shall include considerations related to the following factors:

1. Protecting the State's revenues from racing and generating additional revenues to the State, its agencies and subdivisions;
2. Providing for continuity of racing and year-round racing so as to promote the racing industry and maintain and enhance the employment which it provides in this State;
3. Providing a recreational opportunity for residents in the several areas of the State where licensed tracks are situated; and
4. Maintaining and improving this State's competitive

position with regard to neighboring racing states.

(i) A permitholder may reject any or all of the racing dates allotted by the Commission.

1. If racing dates are rejected, any or all of the remaining permitholders may amend their applications to request the dates rejected.

2. Should more than one permitholder seek to obtain the same rejected dates, the allocation of such shall lie within the Commission's discretion as most appropriate for providing continuity of racing in the State and furthering the public interest.

3. The Commission shall not allocate any of the rejected racing dates to any permitholder, which has been determined to be in violation of the Racing Act, N.J.S.A. 5:5-22 et seq.

13:70-1.39 Waiver of the Commission's rules

(a) Any person or entity desiring a waiver or release from the express provisions of the Commission's rules in this chapter, N.J.A.C. 13:71, 13:72 and 13:74 shall submit a written request to the Commission, to the attention of the Executive Director, in accordance with the provisions below. Any such request shall set forth in detail all facts that support the necessity of the requested relief and identify all persons or entities who might be affected if the relief were granted.

(b) The Commission may, within its discretion, grant a waiver

from specific provisions of its rules if it determines:

1. That such a waiver will benefit the horse racing industry in this State;
2. That such a waiver is consistent with the intent of, if not the letter of, its rules; or
3. Where strict application of the rule would create an unnecessary hardship that is contrary to the legislative intent of the underlying statutes, the public interest or the integrity of the sport.

(c) The Commission may waive application of any rule in an individual circumstance on its own motion upon finding that such relief is warranted by the factors set forth in (b) above.

(d) The Commission shall not grant a waiver of its rules where to do so would be contrary to or inconsistent with an applicable statute.

(e) All decisions on requests for waiver shall be made at a public meeting of the Commission.

13:70-1.40 Procedure for modification of penalties

(a) The Commission may modify any penalty or decision imposed by a racing official either on its own motion or when requested to do so by the Executive Director. The application of this rule applies to the modification of penalties prior to the transmittal of the matter to the Office of Administrative Law as a contested case. The Commission's modification of any penalty or decision recommended by the Administrative Law Judge in an

initial decision shall continue to be governed by the applicable provision of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

(b) At least 15 days before the scheduled meeting at which the issue of modification will or may be addressed, the Commission shall notify the licensee involved and allow him or her to submit in writing any information he or she wishes the Commission to consider. All such submissions shall be filed with the Commission at least 5 days prior to the meeting.

(c) In deciding whether to modify such penalty or decision, the Commission shall consider factors may include:

1. Penalties imposed by the Commission in similar matters;
2. Whether the actions of the licensee placed the safety of other race participants at risk;
3. Whether the actions of the licensee had the potential to jeopardize the health of any race horse;
4. The extent to which the licensee's actions constituted conduct detrimental to the sport.
5. The extent to which the licensee's actions had a negative impact on the integrity of the sport.
6. Whether the actionable conduct of the licensee appears to be an isolated incident or a pattern of disregard of the Commission's rules.

(d) In deciding whether to modify such penalty or decision,

the Commission shall consider the evidence before the racing official and any information submitted by the licensee pursuant to (b) above. In considering such evidence, the Commission may rely upon a staff summary and analysis of the evidence below.

(e) When modifying a penalty or decision, the Commission shall issue a written ruling setting forth the modification and the basis of its decision.

(f) Nothing in this section shall be interpreted as meaning that the Commission's authority to impose penalties is limited to licensees. The Commission's regulatory authority to issue penalties extends to all persons or entities engaging in conduct that requires licensure.

13:70-1.41 Representation by attorney

(a) In any matter before the Commission or its judges prior to the determination that the matter is a contested case, a licensee may represent himself or herself or be represented by an attorney authorized to practice law in this State. A licensee which is a corporation must be represented by an attorney authorized to practice law in this State.

(b) An attorney from any other jurisdiction, of good standing there, or an attorney admitted in this State, of good standing, who does not maintain a bona fide office for the practice of law here, may, upon application to and at the discretion of the Executive Director, be admitted once per calendar year to appear pro hac vice in a matter pending before the Commission or its judges.

1. Admission before the Commission pro hac vice shall be by motion of an attorney authorized to practice in New Jersey on the form prescribed by N.J.A.C. 1:1-5.2(a)1.

2. The motion seeking admission for the one occasion shall be served on all parties and have attached a supporting affidavit, signed by the attorney seeking admission, which, except for attorneys who are employees of and are representing the United States of America or a sister state, shall state that payment has been made to the New Jersey Lawyers Fund for Client Protection. The affidavit shall state how he or she satisfies each of the conditions for admission, including good cause, set forth in New Jersey Court Rule 1:21-2(a). He or she shall also agree in the affidavit to comply with the dictates of New Jersey Court Rule 1:21-2(b).

(c) In a matter pending before the Office of Administrative Law, the Deputy Attorney General representing the Commission shall not consent to the appearance of any attorney seeking admission pro hac vice, who has already appeared once before the Commission or its judges pursuant to (b) above or at the Office of Administrative Law, in a matter involving the Commission in that calendar year.