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July 22, 2011

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Racing Commission

RULE: New Rule, 178CSR7, Simulcast Pari-Mutuel Wagering Gaming Facility in Historic Resort Hotel

DATE FILED AS AN EMERGENCY RULE: July 14, 2011

DECISION NO.11-11

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script, reading "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 11-11)

AGENCY: West Virginia Racing Commission
RULE: New Rule, 178CSR7, Simulcast Pari-Mutuel Wagering at Authorised Gaming Facility in Historic Resort Hotel
FILED AS AN EMERGENCY RULE: July 14, 2011

- par. 1 The West Virginia Racing Commission (Commission) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Commission filed this emergency rule with supporting documents with the Secretary of State July 14, 2011 and with the LRMRC July 14, 2011.
- par. 7 It is the determination of the Secretary of State that the Commission has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §19-23-12d(n) reads:

(n) Promulgation of rules . -- The Racing Commission shall promulgate rules in accordance with article three, chapter twenty-nine-a of this code, it deems necessary to implement and efficiently administer this section: Provided, That the rules are to be consistent with the rules promulgated for pari-mutuel wagering on televised races at the racetracks.

par. 9. W. Va. Code §19-23-12d(d) further states:

(d) Issuance of license. -- Within sixty days after an application is filed pursuant to subsection (b) of this section, the Racing Commission shall act on the application and either grant or deny the application: Provided, That issuance of the license shall not be unreasonably withheld. Once issued, the license shall expire, be renewed, revoked or suspended on the same basis as licenses issued under this article to racetracks to hold live racing and conduct pari-mutuel wagering.

par. 9 It is the determination of the Secretary of State that the Commission has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

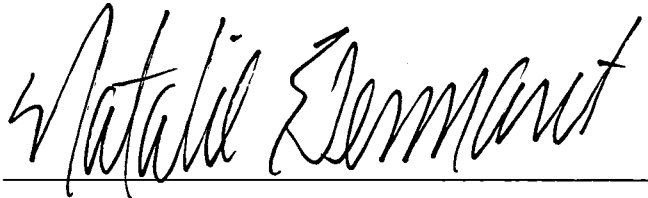
par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Commission are as follows:

West Virginia Code § 19-23-12d authorizes simulcast pari-mutuel wagering at an authorized gaming facility in an historic resort hotel effective July 1, 2011. This new section of the Code requires a historic resort hotel to apply for and obtain a license from the West Virginia Racing Commission before engaging in this gambling activity. With regard to the issuance of the license, West Virginia Code § 19-23-12d(d) states that “[w]ithin sixty days after an application is filed pursuant to subsection (b) of this section, the Racing Commission shall act on the application and either grant or deny the application: *Provided*, That the issuance of the license *shall not be unreasonably withheld.*” (Emphasis added). The Commission is of the opinion that the directive that the license “not be unreasonably withheld” evidences the intent of the Legislature that the simulcast pari-mutuel wagering at a historic resort hotel be approved and licensed by the Commission without delay. Issuing a license authorizing an entity to engage in gambling with no rules in place to regulate that activity is not in the public interest. Therefore, an emergency exists in that, without the approval of this emergency rule to be effective now, there would be unregulated gambling in this State.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "to prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 11-11 or ERD 11-11 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Racing Commission, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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