

FOR PROFIT; BUT AT WHAT PRICE?

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If there is only one thing stated here that is irrefutable, it is that Jackie Mason² is one of the greatest stand-up comedians of all time. One of his stock political jokes goes something like this:

“The government never has a good season. I keep telling everybody; if you want to have Senators that work for a living, then put them on commission!”

Undoubtedly, the concept of “privatization,” that is, handing off to the for-profit sector those functions normally conducted by government in the public interest, is a modern-day reality. This is certainly true in New York. In 1997, a jointly issued Request For Proposal (“RFP”) by the Empire State Development Corporation and the State Department of Transportation for operation and partial development of Stewart Airport in Montgomery made New York the first state in the nation to issue an RFP for the privatization of a commercial airport under a federal program.³ More recently, Governor Pataki proposed the leasing of MTA assets such as bridges, highways, and subway lines to private companies and allow the operators to collect the tolls or fares.⁴ Even in the area of electricity distribution on Long Island, where the Governor engineered a coup in 1998 by taking the troubled private Long Island Lighting Co. (LILCO) into the State-controlled hands of the Long Island Power Authority (LIPA), the re-privatization of the public utility’s transmission and distribution assets is under serious consideration.⁵

There is no more glaring example of this public-private transition phenomenon than in the area of penology. In the United States, the concept of prison privatization was first proposed early in the 1980s.⁶ After fairly expansive implementation in the years

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² An exhaustive biography of Mr. Mason can be found at:
<http://www.playbill.com/celebritybuzz/whoswho/biography/6553>

³ *Governor: Strong Private Sector Showing In Stewart Proposals*, October 17, 1997, *New York Executive Branch Press Release*, Read on-line 8/9/05 at http://www.state.ny.us/governor/press/oct17_97.html

⁴ *Privatize Triborough Bridges and Tunnels - NEW YORK SUN article*. February 14, 2005, *TOLLROADnews*, Read on-line 8/9/05 at <http://www.tollroadsnews.com/cgi-bin/a.cgi/ueZY7n6!EdmcEIJ61nsxIA>

⁵ *KeySpan CEO says interested in LIPA assets*. August 4, 2005, *Reuters.com*. Read on-line 8/9/05 at http://yahoo.reuters.com/financeQuoteCompanyNewsArticle.jhtml?duid=mtfh98117_2005-08-04_19-35-05_n04154048_newsml

⁶ See: Greene, Judith; *Prison Privatization: Recent Developments in the United States*, Presented at the

hence, news reports of incidents in private prisons involving violence, physical and sexual abuse of prisoners, riots, escapes and homicides have triggered a fierce debate about their effectiveness. Private prison executives claim that they offer better-quality correctional services at a lower price. It is clear, however, that privatization offers no special protection against the most serious kinds of operational difficulties.⁷ Judith Greene, a Soros Justice Fellow and criminal justice policy analyst, has observed:

*In the face of these developments, government is beginning to address a serious threat that its own legitimacy, and the legitimacy of the criminal justice system, may suffer due to the foibles of its private prison contractors. Public officials are responding with necessary measures: they are tightening the requirements they write into “requests for proposals” and contracts; they are strengthening their capacity to monitor contract compliance; they are beginning to “fine” companies by holding back payment where services are found to be deficient; and they are terminating contracts – and in a few cases have assumed control and are running facilities where contracting has brought more problems than benefits. It is still too early to tell exactly how the industry will respond to these pressures. **But it seems unlikely that firm demands from government such as these can be met without hampering private sector opportunities for growth and profit-taking.** (emphasis added)⁸*

The call for privatization of racetracks is neither new, nor a uniquely New York experience. In 2004, officials at the quasi-governmental New Jersey Sports & Exposition Authority (NJSEA) planned to lease Monmouth Park and the Meadowlands to a private racetrack operator. The plan had the blessing of then Governor James McGreevey. Reportedly, interest in the proposal was expressed by at least three “major players” in the racing industry.⁹ Under the leadership of a new Governor, one with significant ties to, and a purportedly enhanced knowledge of, the New Jersey racing industry,¹⁰ the privatization plans were scrapped.¹¹ The result of the decision to leave horseracing operations in the hands of NJSEA appears to have already paid handsome dividends: On Hambletonian Day (August 6th) 2005, the total Meadowlands Racetrack handle surpassed \$9 million; a one-day harness racing industry record. The almost \$3.4 million bet on-track was the highest since 1994. The crowd of over 31,000 was the best attendance figure since 1990.¹² The next day (August 7th), Haskell Day at Monmouth Park, a day

International Conference on Penal Abolition, May 12, 2000

⁷ Ibid.

⁸ Ibid.

⁹ DeMartini, Tom; *New Jersey officials working on plan to lease Monmouth, Meadowlands*, March 4, 2004, *The Thoroughbred Times*, read on-line 8/9/05 at <http://www.thoroughbredtimes.com/todaysnewsarchive/ttodaysnewsviewarchive.asp?ArchiveDate=03/04/2004#42831>

¹⁰ Acting Governor Richard J. Codey’s brother, Don Codey, is the general manager of Freehold Raceway, America’s oldest pari-mutuel harness track and, ironically, a privately owned facility.

¹¹ Handleman, Bill; *Losing the For Sale Sign*, May 13, 2005 *Asbury Park Press*, read on-line 8/9/05 at <http://www.app.com/apps/pbcs.dll/article?AID=/20050513/SPORTS/505130486>

¹² *\$9 Million Hambletonian Day Wagering Sets Industry Record*, August 7, 2005, *Meadowlands Racetrack Press Release*, read on-line 8/9/05 at <http://www.thebigm.com/racingNewsDetail.asp?newsid=5202>

without injured Preakness-Belmont winner *Afleet Alex*, over 43,000 patrons wagered almost \$4 million of the over \$12 million total handle, the third highest in history.¹³ The combined “Hambo-Haskell” weekend generated a record \$21,144,855 in total wagering, an all-time NJSEA record.¹⁴ The numbers are even more impressive given the fact that, also on August 6, New York Racing Association (NYRA) set an on-track Saratoga handle record for a non-Travers day.¹⁵

The question of privatization of the franchise to operate racing at NYRA’s three racetracks has been bandied about for years. It picked up considerable attention in 2003, when a highly critical Comptroller’s audit and report branded NYRA, “...like too many other independent, government-related entities, ... out of control without appropriate oversight.”¹⁶, and a Federal corruption indictment ensued.¹⁷ While the 19 months that followed saw NYRA, “clean house” through new management’s implementation of stringent financial controls and integrity protocols, all to the apparent satisfaction of a court-appointed federal monitor¹⁸ and some critical industry observers¹⁹, it remains the stated intentions of some of those with control or “concern” regarding New York racing to grant the franchise to a private, for-profit entity.²⁰

It is submitted that the concept of things being run by something termed a “for-profit entity” does not necessarily translate into the important terms “revenue for the State” or “integrity of the product.” Enron and WorldCom were for-profit concerns which can both properly be labeled disasters for reasons so renown that they need not be stated. Even an indicted NYRA was able to consistently produce a World-class product, provide

¹³ *New Jersey Racing Weekend Sets a Few Records*, August 8, 2005, The Blood-Horse, read on-line 8/9/05 at <http://news.bloodhorse.com/viewstory.asp?id=29426>

¹⁴ Ibid.

¹⁵ *Whitney Day Sets Record Handle*, August 6, 2005, NYRA Press Release, read on-line 8/9/05 at <http://nyra.com/saratoga/news.asp?track=S&id=1679>

¹⁶ *Hevesi Plan: Inspector General for NYRA, Strengthen the Racing & Wagering Board, Ensure Video Lottery Comes to Aqueduct*, September 17, 2003, Press Release of New York State Comptroller Alan G. Hevesi, read on-line 8/9/05 at <http://www.osc.state.ny.us/press/releases/sept03/091703a.htm>

¹⁷ Heller, Bill, *NYRA fined \$3-million, six former employees indicted*, December 11, 2003, The Thoroughbred Times, read on-line 8/9/05 at http://www.thoroughbredtimes.com/todaysnews/newsview_print.asp?recno=40556

¹⁸ Alber, Warren, *Federal monitor complimentary of NYRA during law conference*, August 2, 2005, The Thoroughbred Times, read on-line 8/9/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=56430>

¹⁹ See, Heller, Bill, *Last stand a good one*, August 12, 2005 (though read on-line 8/9/05), The Thoroughbred Times, <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=56617>; See also, *NYRA on right track with security barns*, August 4, 2005, Editorial, The Saratogian, read on-line 8/9/05 at http://www.capitalcentral.com/site/index.cfm?BRD=1169&dept_id=17711&newsid=14975557&PAG=461&rfi=9

²⁰ Drape, Joe, *New Member Joins Board for NYRA*, August 5, 2004, The New York Times (see quotes of Senate Majority Leader Joseph L. Bruno regarding bidding on the NYRA franchise) read on-line 8/9/05 at <http://www.nytimes.com/2005/08/05/sports/othersports/05racing.html>; See also, *Friends of New York preliminary report urges for-profit structure*, June 27, 2005, The Thoroughbred Times, read on-line 8/9/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=55649>

jobs and pay taxes. Yet, these are admittedly extreme examples. What of a publicly traded, for-profit concern that does everything it's supposed to do; one that attempts to lawfully maximize profit for the benefit of its shareholders? Could such a model be any worse than NYRA?

Magna Entertainment Corp. ("Magna"), a publicly traded company (NASDAQ) is one of the largest operators of racetracks in the United States. On July 5, 2001, Magna, subject to regulatory approval, acquired the operating rights to Portland Meadows Thoroughbred Racetrack and Multnomah Greyhound Park, a dog racing facility opened in the 1930s, both located in Portland, Oregon. At the time of acquisition, Magna's CEO stated:

"We are pleased to announce our entry into the State of Oregon. We believe that our operation of both Portland Meadows and Multnomah Greyhound Park presents a good opportunity for the rejuvenation and expansion of the Oregon racing industry."²¹

On August 28, 2001, less than two months after this very positive announcement, the EPA informed Magna that the backside storm water retention plan at Portland Meadows was unacceptable. Three days later, Magna issued the following statement in response:

*"We are disappointed with this eleventh hour turn of events and realize that the EPA's position will have a devastating effect on the Oregon horse racing industry. Under the present conditions, we believe that a short spring meet may be the only alternative that would meet EPA requirements. We will be reviewing this alternative with Oregon horse owners and trainers in more detail shortly. **At the same time, we are working on a plan to relocate to a new facility.**" (emphasis added)²²*

By the end of October 2001, Magna announced the completion of its acquisition of Multnomah Greyhound Park and the commencement of the delayed live thoroughbred meet at Portland Meadows. Through its CEO, Magna stated:

"We look forward to establishing MEC as an important member of the Oregon racing and business communities. We believe the State's established system of fifteen off-track wagering facilities and regulatory climate fit well with our ongoing initiatives in the account wagering and electronic media fields. Our plans for the future include the establishment of a new thoroughbred racetrack in the Portland area. We are anxious to continue to work with local horsemen and racing enthusiasts to develop a successful racing operation."²³

On February 7, 2003, Magna purchased long-term operating rights, as well as a real estate interest in Portland Meadows. Magna's CEO could not have been more positive:

²¹ MEC acquires two Oregon racetracks, July 5, 2001, MEC Press Release, read on-line 8/10/05 at <http://phx.corporate-ir.net/phoenix.zhtml?c=98631&p=irol-newsArticle&ID=188474&highlight=oregon>

²² Magna Entertainment Corp. Portland Meadows not to open September 1, August 31, 2001, MEC Press Release, read on-line 8/10/05 at <http://phx.corporate-ir.net/phoenix.zhtml?c=98631&p=irol-newsArticle&ID=203739&highlight=oregon>

²³ Magna Entertainment Corp. announces acquisition of Multnomah and opening of Portland Meadows, October 26, 2001, MEC Press Release, read on-line 8/10/05 at <http://phx.corporate-ir.net/phoenix.zhtml?c=98631&p=irol-newsArticle&ID=221189&highlight=oregon>

"We have long believed that the Oregon racing industry offers tremendous potential for growth. Oregon's favorable regulatory environment and established system of off-track wagering fit well with our ongoing initiatives in the account wagering and electronic media fields."²⁴

Magna's President of Oregon operations was additionally optimistic:

"Today's announcement shows that MEC is committed to the Oregon horse racing industry for the long term."²⁵

Yet, less than five weeks after these statements, Magna's Oregon lobbyist, Larry Campbell, in an attempt to push through Video Lottery Terminals at the tracks, stated:

"When Indian and video poker came on, horse racing declined precipitously... We're trying to help horse racing succeed."²⁶

Then, in November 2003, Magna abruptly pulled their highly touted "Instant Racing" machines from the two tracks, to the stated disappointment of the Chairman of the Oregon Racing Commission which had approved the machines earlier in the year.²⁷

In early December 2004, two of Magna's track managers were fined \$1,000 each for encouraging a mutuel manager to set up a wagering account in a fake name. Magna was not fined.²⁸

On December 23, 2004, things drastically changed for Oregon's pari-mutuel industry. Magna announced that it would not renew its lease, which expired just eight (8) days later, for Multnomah Greyhound. The stated reasons for closing the seven-decade old dog track were:

- In 2003, the Oregon legislature authorized a 20% increase in the number of video lottery terminals operated in restaurants and taverns throughout the state; and it appears that further expansion of the state lottery will take place in the upcoming 2005 legislative session, via the conversion of the state lottery's current video poker machines into slot machines.
- Indian casinos in Oregon have continued to grow and significantly cut into the market share of the pari-mutuel industry. Recent announcements regarding new Indian casinos, both within Oregon and just north of the Oregon-Washington border, highlight the fact that the competition from Indian casinos will only grow more fierce in the coming years.
- Oregon's off-track betting network has suffered significant declines in business, primarily due to account wagering providers who take wagers on greyhound and horse races from Oregon residents over the telephone and Internet.²⁹

²⁴ *Magna Entertainment Corp. announces agreement to purchase Portland Meadows operating rights*, February 7, 2003, MEC Press Release, read on-line 8/10/05 at <http://phx.corporate-ir.net/phoenix.zhtml?c=98631&p=irol-newsArticle&ID=380274&highlight=oregon>

²⁵ Ibid.

²⁶ *Magna lobbies for VLTs at Oregon racetracks*, March 13, 2003, *The Thoroughbred Times*, read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=31282>

²⁷ *Magna pulls plug on instant racing machines at Oregon tracks*, November 25, 2003, *The Thoroughbred Times*, read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=40192>

²⁸ *Magna track officials fined for abetting employee's bogus account at dog track*. December 10, 2004. *The Thoroughbred Times*, read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=51424>

The accompanying statement of Magna's CEO was much more direct:

"We entered the Oregon market three years ago with the expectation that we could help the Oregon racing industry achieve substantially improved operating results. Since that time, however, the competitive pressures on the racing industry have continued to mount. Unfortunately, at this point we don't believe the Oregon industry can support both greyhound racing and horse racing. We anticipate that by closing Multnomah and focusing the industry's resources and energy on Portland Meadows we can help bring about enough change to make Oregon's horse racing industry economically viable." (emphasis added)³⁰

On January 21, 2005, less than one month after pledging to focus resources and energy on Portland Meadows, Magna threatened to pull out of the track unless the Oregon legislature permitted year-round simulcasting and eliminated or reduced the state's 1% pari-mutuel tax. Scott Daruty, Magna's chief counsel in the United States, stated the problem bluntly:

*"The question is whether you can run a race meet on economically reasonable terms in the state of Oregon... We have told people there that we have made the decision that we are not going to continue to operate at a loss in Oregon. We entered the Oregon market in 2001. We knew there would be investment needed and would probably be some short-term losses incurred to get the business up and going. The expectation was that once those investments were made things would get up and going and we'd make a reasonable return on our investment. Since we've arrived there have been a number of changes and there are a number of pending changes to the gaming market in the state that have significantly affected the pari-mutuel industry and at this point, under the existing regulatory structure that is in place, we don't see how we could operate there and make a profit, nor could anyone else."*³¹

Thus, 3 ½ years after taking over operations for the "rejuvenation and expansion" of Oregon's pari-mutuel industry and less than 2 years after acquiring long-term operational and real estate rights, Magna effectively threatened to end the State's pari-mutuel industry unless the legislature granted it significant concessions.

What did Magna do wrong? Not a thing. In fact, Magna did everything right. It made a substantial attempt to show a profit from the conduct of pari-mutuel racing in Oregon. When it started to lose about \$1 million a year, it sought alternative gaming legislation. Still in financial trouble, it closed Multnomah, a venerable, albeit losing, dog racing institution. It then demanded that the legislature either make the racing climate profitable, or it would walk away from the thoroughbred track. Magna obviously acted as a publicly traded, for profit concern should: Shareholders first.

What did Oregon do wrong? It is respectfully submitted that the regulators placed the legislature in a very small box. What choices were left? Needless to say, in May, Magna received favorable year-round simulcast wagering.³² In July, the Oregon House

²⁹ Press release - Magna Entertainment Corp, December 23, 2004, MEC Press Release, read on-line 8/10/05 at <http://phx.corporate-ir.net/phoenix.zhtml?c=98631&p=irol-newsArticle&ID=657466&highlight=oregon>

³⁰ Ibid.

³¹ Lowe, Jeff, *Magna to pull out of Portland Meadows unless state laws change*, January 21, 2005, The Thoroughbred Times, read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=52308>

³² *Oregon governor signs bill allowing year-round off-track betting*, May 20, 2005, The Thoroughbred Times, read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=54831>

approved legislation to expand slot machines at Portland Meadows.³³ What's next remains to be seen.³⁴

In Maryland, where Magna conducts thoroughbred racing, much speculation has involved the possible relocation of the Preakness Stakes. In April 2004, Magna's chairman, Frank Stronach, made a "solemn commitment" not to move the Preakness from Pimlico, and reaffirmed a commitment for Magna to rebuild Pimlico and Laurel Park.³⁵ Was he wrong? Absolutely. His laudable goals aside, Mr. Stronach's commitment is to Magna's shareholders, not to the traditions of the "Old Hilltop." The lower house of the Maryland legislature has consistently and tenaciously blocked all attempts of Magna, two harness tracks, the Governor and a majority of the State Senate to establish much-needed racino gambling at the tracks. If rebuffed again in the next legislative session, who could blame Mr. Stronach if he not only moves the Preakness out of state, but closes one of the two thoroughbred tracks as well? After all, as in Oregon, doesn't Magna have the right to a "reasonable return on investment?"

Thus, like the private prison, the private sector, for-profit racing model sounds good, until the harsh realities of the for-profit marketplace envelop the very reasons the model was employed in the first place. Profit is for the shareholders; the state's cut only lowers that bottom line. Capital investment, revenue to the state, and the like are business expenses, and like all business expenses, it is prudent to pay as little as possible.

On August 3, 2005, Governor Pataki signed legislation accelerating the RFP process for the NYRA franchise.³⁶ Wholly ignoring NYRA's repeated claims that they have title to the properties where racing is conducted, and without any meaningful progress on loadstar issues such as direct competition from off-track betting and lack of state-sanctioned rebating, the Governor is apparently confident that a huge, for-profit conglomerate will pay hundreds of millions of dollars, somehow enter the NYRA tracks, proceed to cure each and every problem plaguing New York racing, and send billions of dollars in revenue to the State coffers. Plainly put; running racetracks isn't *E-ZPass*, and anybody who thinks it is can expect a very rude awakening.

Albany legislators are on the brink of crafting a new era in New York thoroughbred racing. The promise this new era holds is largely dependant upon their fundamental understanding of what has resulted from the ceding of control to private, profit-motivated operators both within the racing industry and in other areas. The observation that the current NYRA model is imperfect is completely true and completely non-dispositive of the issue of NYRA privatization. Tweaking the present model, rather than its wanton abandon, should be a threshold consideration in any discussion regarding

³³ Oregon House approves bill to add machines at Portland Meadows, July 8, 2005, [The Thoroughbred Times](http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=55906), read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=55906>

³⁴ Horse racing could be next sport to leave state. February 24, 2005. [KATU.com](http://www.katu.com/sports/story.asp?ID=75224), read on-line 8/10/05 at <http://www.katu.com/sports/story.asp?ID=75224>

³⁵ *Stronach vows to keep Preakness at Pimlico*, April 17, 2004, [The Thoroughbred Times](http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=44124), read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=44124>

³⁶ Chapter 354, Laws of 2005. See also, *Pataki creates panel to oversee NYRA operations*, August 4, 2005, [The Thoroughbred Times](http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=56490), read on-line 8/10/05 at <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=56490>

ultimate disposition of the franchise. A NYRA with the ability to retain earnings for capital improvements, that doesn't have to be in direct competition with off-track betting corporations, that can offer monetary rebates to loyal customers, that doesn't need prior permission to build a pretzel stand, might just prove the most revenue-producing entity the State could imagine. One it can also readily control.

Those hurriedly embarking on an RFP for the operation of the three tracks should pay heed to the commentary contained in the contemporary folk song:

*"Don't it always seem to go, that you don't know what you've got till it's gone"*³⁷

³⁷ *Big Yellow Taxi*, written by Joni Mitchell, circa 1970