

2014 WL 7881702

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UNPUBLISHED OPINION. CHECK COURT RULES  
BEFORE CITING.

Superior Court of New Jersey,  
Appellate Division.

In the Matter of the Order of the NEW JERSEY  
RACING COMMISSION Approving the New  
Jersey Sports and Exposition Authority's  
Application for Approval of an Account Wagering  
Management Agreement.

In the Matter of the Order of the New Jersey  
Racing Commission Approving the New Jersey  
Sports and Exposition Authority's Continued Use  
of Darby Development, LLC to Manage the Affairs  
of the Account Wagering System Under the  
Account Wagering Management Agreement for  
the Year 2014.

Argued Nov. 3, 2014. | Decided Feb. 17, 2015.

On appeal from the Orders of the New Jersey Racing  
Commission.

#### Attorneys and Law Firms

Kellen F. Murphy argued the cause for appellant New  
Jersey Account Wagering, LLC (Riker Danzig Scherer  
Hyland & Perretti LLP, attorneys; John M. Pellicchia, of  
counsel and on the briefs; Mr. Murphy and Cristin M.  
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Judith A. Nason, Deputy Attorney General, argued the  
cause for respondent New Jersey Racing Commission  
(John J. Hoffman, Acting Attorney General, attorney;  
Lewis A. Scheindlin, Assistant Attorney General, of  
counsel; Ms. Nason, on the brief).

Kevin W. Weber argued the cause for respondent New  
Jersey Sports and Exposition Authority (Gibbons P.C.,  
attorneys; Mr. Weber and Peter J. Torricollo, on the  
brief).

Before Judges SIMONELLI, GUADAGNO and LEONE.

#### Opinion

PER CURIAM.

\*1 Appellant New Jersey Account Wagering, LLC  
(NJAW) appeals from the December 6, 2012 order of  
respondent New Jersey Racing Commission  
(Commission). The order granted the petition filed by  
respondent New Jersey Sports and Exposition Authority  
(NJSEA), to approve an agreement (the Darby  
Agreement) between the NJSEA and Darby  
Development, LLC (Darby), whereby Darby, as a  
non-agent independent contractor, would manage and  
operate all aspects of a horse race wagering system  
known as the "account wagering system" (AWS).

On appeal, NJAW contends the order is void because the  
Commission violated its procedural rules in considering  
the petition on an expedited basis, the Commission and  
the NJSEA violated the Open Public Meetings Act  
(OPMA), *N.J.S.A.* 10:4-6 to -21, and the order  
impermissibly appoints Darby as a non-agent independent  
contractor in violation of the New Jersey Off-Track and  
Account Wagering Act (OTAWA), *N.J.S.A.* 5:5-127 to  
-160, and an agreement between the NJSEA and NJAW.  
NJAW also contends the order is arbitrary, capricious and  
unreasonable because it conflicts with the Commission's  
prior decision prohibiting Darby, as a non-agent  
independent contractor, from managing a racetrack and  
off-track wagering facility, and conflicts with the terms of  
the Darby Agreement.

NJAW also appeals from the Commission's December  
12, 2013 order, which approved Darby to continue to  
manage and operate the AWS. We affirm in part, and  
remand in part for the Commission to modify the orders  
to require an amendment to the Darby Agreement  
providing that Darby is acting as the NJSEA's agent with  
respect to Darby's management and operation of the  
AWS.

#### *Statutory Background*

In 1940, the Legislature established the Commission and  
granted it full regulatory authority over horse racing in the  
State. *L.* 1940, *c.* 17, § 1; *see N.J.S.A.* 5:5-22. The  
Legislature empowered the Commission to prescribe the  
rules, regulations, and conditions under which all horse  
races are conducted in the State, *N.J.S.A.* 5:5-30, and to  
issue and regulate the licensing of those connected with  
horse racing, *N.J.S.A.* 5:5-33, -51. *See also Delguidice v.*  
*N.J. Racing Comm'n*, 100 *N.J.* 79, 90, 494 A.2d 1007  
(1985) (citing *State v. Dolce*, 178 *N.J. Super.* 275, 285,  
428 A.2d 947 (App.Div.1981)).

In 1971, the Legislature established the NJSEA to promote horse racing in the State, among other things. *See* New Jersey Sports and Exposition Authority Law, *N.J.S.A.* 5:10-1 to -38. The Legislature granted the NJSEA broad powers, including the power to enter into contracts and establish and enforce rules and regulations for the use or operation of its projects or conduct of its activities. *N.J.S.A.* 5:10-5(a)-(z).

In 2001, the Legislature enacted the OTAWA to promote horse racing and related projects and facilities in the State. *N.J.S.A.* 5:5-128. Prior to the OTAWA's enactment, wagers on horse races had to be made in person at a racetrack in the State. The OTAWA created two new wagering options: (1) "off-track wagering;"<sup>1</sup> and (2) "account wagering,"<sup>2</sup> whereby a person could open an account and place a wager via telephone, mobile phone, or the internet. *N.J.S.A.* 5:5-128, -144. The AWS is the system through which account wagering is processed. *N.J.S.A.* 5:5-129.

\*2 Pursuant to the OTAWA, the Commission issued an off-track wagering license and an account wagering license to the NJSEA. *N.J.S.A.* 5:5-130, -139. With the Commission's approval, the NJSEA could assign either license to a permit holder;<sup>3</sup> however, the NJSEA had to "retain responsibility for license renewals." *N.J.S.A.* 5:5-133(b), -140(c).

As an off-track wagering licensee, the NJSEA was permitted to contract directly with vendors:

With the approval of the [C]ommission, an off-track wagering licensee may enter into a contract or agreement with a person or entity to conduct or operate an off-track wagering facility for the licensee *and to act as the agent of the licensee in all off-track wagering matters* approved by the [C]ommission.

[*N.J.S.A.* 5:5-133(b) (emphasis added).]

As an account wagering licensee, the NJSEA was permitted to contract directly with vendors:

With the approval of the [C]ommission, the account wagering licensee may enter into a contract or agreement with a person or entity to conduct or operate an [AWS] wagering system or facility for the licensee *and to act as the agent of the licensee in all account wagering matters* approved by the [C]ommission.

[*N.J.S.A.* 5:5-140(c) (emphasis added).]

The language of the corresponding regulation permitting the NJSEA as an off-track wagering licensee to contract

with vendors differs from the statute in that it uses the word "or" with respect to the vendor acting as the NJSEA's agent:

With the prior approval of the Commission, the off-track wagering licensee may enter into a written contract or written agreement with a person or entity to conduct or operate an off-track wagering facility for it, *or* to act as its agent in all off-track wagering matters approved by the Commission[.]

[*N.J.A.C.* 13:74-4.2(a) (emphasis added).]

However, like the statute, the regulation uses the word "and" with respect to the vendor acting as an agent in contracting with the NJSEA as an account wagering licensee:

With the prior approval of the Commission ... the account wagering licensee may enter into a written contract or agreement with a person or entity to conduct or operate an [AWS] or facility for it, *and* to act as its agent in all off-track wagering matters approved by the Commission.

[*Ibid.* (emphasis added).]

As a prerequisite to obtaining either an off-track wagering license or an account wagering license, the OTAWA required the NJSEA to enter into a "participation agreement" with persons or entities that held a valid permit to hold or conduct a race horse meeting in this State in the 2000 calendar year.<sup>4</sup> *N.J.S.A.* 5:5-130(a)(1)-(3), -139(a)(1)-(3). The OTAWA also required the Commission and Attorney General to review the participation agreement and any modifications thereto to determine compliance with the OTAWA. *N.J.S.A.* 5:5-130(b)(1), -139(b).

### *The NJSEA's Participation Agreement with NJAW*

\*3 In 2000, there were only two valid horse race permit holders in New Jersey: the NJSEA, which held permits for the Meadowlands Racetrack (the Meadowlands) and Monmouth Park Racetrack (Monmouth Park); and F.R. Park Racing, L.P., which held a permit for Freehold Raceway.<sup>5</sup> F.R. Park Racing, L.P. formed NJAW to represent its interests with respect to account wagering in the State.

As required by *N.J.S.A.* 5:5-139, in June 2004, the NJSEA and NJAW entered into a participation agreement with respect to the AWS for a term of forty years (the

Participation Agreement). The Participation Agreement established the scope of the parties' rights regarding the AWS, including their respective revenue shares (seventy percent for NJSEA and thirty percent for NJAW) and membership on the five-member operating board (three members for the NJSEA and two for NJAW).

Pursuant to the Participation Agreement, the NJSEA was responsible to manage the day-to-day operations of the AWS as long as it continued as a party to the agreement. In performing this function, the Participation Agreement provided that the NJSEA "may, at its discretion, either use its own employees ... or retain employees and vendors directly on behalf of the [AWS]." (Emphasis added). In 2007, the NJSEA awarded a contract to a vendor, Scientific Games Racing, LLC, now known as Sportech Racing, LLC (Sportech), as the platform wagering services provider that would supply internet, phone, and mobile phone services for the AWS. The contract expired on December 31, 2012.

#### *The Commission's Prior Decision Regarding Darby*

In 2011, the NJSEA leased the Meadowlands to New Meadowlands Racetrack, L.L.C. (New Meadowlands), and in 2012, it leased Monmouth Park to the New Jersey Thoroughbred Horsemen's Association (NJTHA). In each lease agreement, the NJSEA assigned its rights to several of its off-track wagering licenses and fifty percent of its AWS revenue share. The NJSEA did not transfer or assign its rights to the account wagering license or its interest in the AWS, and it retained its management responsibilities for the AWS.

In 2012, the NJTHA submitted an application pursuant to *N.J.S.A.* 5:5-133<sup>6</sup> for approval to acquire an assignment of the NJSEA's off-track wagering license to operate the Woodbridge off-track wagering facility (Woodbridge OTW). The NJTHA sought approval pursuant to *N.J.S.A.* 5:5-47<sup>7</sup> and -130 to acquire off-track wagering permits for the calendar year 2012 to conduct live thoroughbred horse races at Monmouth Park and a thoroughbred race meet at the Meadowlands,<sup>8</sup> engage in intrastate, interstate and casino simulcast horse races, and conduct parimutuel wagering thereon. The NJTHA also sought approval to acquire approximately fifty percent of the NJSEA's AWS revenue share for the remainder of the 2012 calendar year. The application noted that the NJTHA intended to enter into an agreement with Darby whereby Darby, as a non-agent independent contractor, would manage the day-to-day operations of Monmouth Park, the Meadowlands, and the Woodbridge OTW (the NJTHA

Agreement).

\*4 The Commission found that the "public interest," as defined in *N.J.S.A.* 5:5-44,<sup>9</sup> would be served by granting the off-track wagering permits to the NJTHA and an assignment of the NJSEA's off-track wagering license. The Commission also found that the NJTHA "established by clear and convincing evidence" that Darby's personnel "was qualified in all aspects" to manage the day-to-day operations of Monmouth Park, the Meadowlands, and the Woodbridge OTW.

Despite these findings, the Commission expressed concern that the NJTHA's delegation of its management responsibilities to Darby as an independent contractor "with no or insufficient oversight on the part of the NJTHA to take steps to ensure fulfillment of law and regulatory requirements would be inconsistent with *N.J.S.A.* 5:5-47 and *N.J.S.A.* 5:5-130." Thus, the Commission required the NJTHA to retain sufficient management, control and oversight over Darby, and be the ultimate decision-making authority. The NJTHA subsequently amended the NJTHA Agreement to provide that Darby had no final decision-making authority, the NJTHA retained ultimate control and decision-making authority, and the NJTHA shall oversee and manage Darby.

#### *The Commission's Approval of the Darby Agreement*

After leasing the Meadowlands to New Meadowlands and Monmouth Park to the NJTHA, the NJSEA no longer employed staff to conduct the day-to-day operations of the AWS. The NJSEA sought a vendor to perform this function, as permitted by *N.J.S.A.* 5:5-140(c) and the Participation Agreement, and chose Darby. On October 1, 2012, the NJSEA and Darby entered into the Darby Agreement, which provided as follows:

[T]he [NJSEA] hereby appoints [Darby], and [Darby] hereby accepts its appointment, as the manager to manage the day-to-day affairs and business of the [AWS] in accordance with the duties outlined herein and delegates to [Darby] full authority and power to take such actions as [Darby] deems necessary to fulfill such duties. *The Parties recognize and acknowledge that [Darby] is acting as an independent contractor to manage and operate all aspects of the [AWS] and shall not represent itself as or be deemed to be the [NJSEA]'s agent, nor shall [Darby] act in any official or fiduciary capacity on behalf of the [NJSEA] in the performance of its duties hereunder.*

[ (Emphasis added).]<sup>10</sup>

The NJSEA sent the Darby Agreement to the Commission for approval, as required by *N.J.S.A. 5:5–140(c)*, and NJAW received it as well.

On October 2, 2012, NJAW submitted its first objection to the Darby Agreement, asserting that the NJSEA's delegation of the management and operation of the AWS to Darby constituted a breach and default under the Participation Agreement. NJAW demanded that the NJSEA cure the default within thirty days and requested that the Commission and Attorney General issue an order enjoining the NJSEA from breaching the Participation Agreement, delegating its management responsibilities for the AWS to Darby, or performing under the Darby Agreement unless and until the Commission and Attorney General approved the agreement.

\*5 On November 5, 2012, NJAW submitted a second objection. NJAW expanded its prior objection and also asserted that *N.J.S.A. 5:5–140(c)* prohibited Darby from acting as a non-agent independent contractor in managing and operating the AWS.

At the Commission's direction, on November 14, 2012, the NJSEA submitted a formal petition to approve the Darby Agreement. The NJSEA asserted, in part, that: *N.J.S.A. 5:5–140(c)*, *N.J.A.C. 13:74–4.2(a)*, and the Participation Agreement authorized it to retain Darby to manage and operate the AWS; Darby was well-qualified for the task; Darby's appointment as an independent contractor had no bearing on the NJSEA's continuing management responsibilities for the AWS under *N.J.S.A. 5:5–140(c)* and the Participation Agreement; and *N.J.S.A. 5:5–140(c)* and *N.J.A.C. 13:74–4.2(a)* did not mandate that Darby act as the NJSEA's agent. The NJSEA further requested an expeditious decision because the contract with Sportech was expiring on December 31, 2012, and Darby had to review and approve a platform provider proposal prior thereto.

On November 15, 2012, the Commission notified the NJSEA, NJAW, Darby, New Meadowlands, and the NJTHA that it would consider the petition at a public meeting thirteen days later, on November 28, 2012. The Commission directed the parties to submit written objections on or before November 21, 2012.<sup>11</sup>

On November 19, 2012, NJAW submitted a third objection, asserting that the Commission's expedited consideration of the petition violated the thirty-day notice requirement of *N.J.A.C. 13:70–1.34*, which provides as follows:

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 [thirty] days prior to the anticipated date of action unless unforeseen [sic] 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.

[ (Emphasis added).]

NJAW alleged a violation of the fifteen-day requirement of *N.J.A.C. 13:70–1.35(a)*, which provides as follows:

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 [fifteen] days after the date of notice.*

\*6 [ (Emphasis added).]

NJAW also asserted that the expiration of the Sportech contract did not create an exigent or unforeseen circumstance because only the operating board and the NJSEA's commissioners, not Darby, could review and approve platform provider proposals.

On November 21, 2012, NJAW submitted a fifteen-page, single-spaced fourth objection. NJAW expanded its prior objections and also argued that Darby was not qualified to manage the AWS and the NJTHA Agreement created a conflict of interest.

The Commission responded that: the rules of practice and procedure recognized the need for expeditious action when the circumstances required; *N.J.A.C. 13:70–1.33(a)*<sup>12</sup> authorized it to liberally construe the rules to make an expeditious determination; and *N.J.A.C. 13:70–1.33(b)*<sup>13</sup> permitted the Commission's Executive Director to relax the rules where there was a need for expeditious action. The Commission rejected NJAW's assertion there were no exigent circumstances and found, in pertinent part, that:

exigent circumstances establish a clear need for expeditious action in considering the NJSEA request seeking approval of the [Darby Agreement]. Expeditious action is consistent with the best interests of the horse racing industry because of the need to ensure the continuation of account wagering past the expiration of the Sportech agreement on December 31, 2012. It is necessary for the Commission to as soon as possible because much has to be accomplished before this date. A choice between Sportech and TVG<sup>14</sup> must be made. If the TVG proposal is selected, TVG must complete and file an application to be licensed as a vendor. Before a license can be issued, it will be necessary for the Commission to investigate TVG's qualifications and ability to provide internet wagering platform and voice response telephone system services.

All of this must be completed prior to January 1, 2013.

The Commission stated that because *N.J.A.C.* 13:70–1.33(a) and (b) applied to the submission of comments permitted by *N.J.A.C.* 13:70–1.35, it was authorized to require comments to be filed expeditiously when necessary. Nonetheless, the Commission found no prejudice because NJAW submitted its objections prior to the November 21, 2012 deadline and could file a request to make oral comments at the public meeting.

Finally, the Commission noted that *N.J.A.C.* 13:70–1.34 and –1.35 only applied to “interested parties,” as defined by *N.J.A.C.* 13:70–1.34. The Commission stated that the NJSEA brought its petition pursuant to *N.J.S.A.* 5:5–140(c), which only granted the NJSEA the right to proceed thereunder. Accordingly, the Commission concluded that NJAW was not an “interested party” entitled to submit comments.

On November 27, 2012, the Commission issued a public notice that the November 28, 2012 meeting was postponed and rescheduled for November 30, 2012. At the meeting, the NJSEA responded to the Commission's questions about: Darby's duties under the Darby Agreement; the oversight NJSEA would maintain over the AWS; the factors the NJSEA considered in determining that Darby was well-qualified to manage the AWS; Darby's role in selecting a platform services provider; whether the Darby Agreement was in compliance with the applicable law; and the impact on the AWS if the Darby Agreement and a subsequent agreement with a platform services provider were not approved by the end of the year.

\*7 Darby responded to the Commission's questions about: its qualifications to manage the AWS and perform the functions required under the Darby Agreement; how it would report its activities to the NJSEA; what role it

would play in selecting a platform services provider; and whether there were any agreements between Darby or the NJTHA and any of the proposed platform services providers. Others attending the meeting made oral comments. NJAW had filed a request to make oral comments, but did not attend.

In a December 6, 2012 order, the Commission noted that Darby had effectively performed under the NJTHA Agreement and found by clear and convincing evidence that Darby was qualified to manage the AWS. The Commission emphasized that it had “paid much attention” to NJAW's procedural and substantive objections. The Commission rejected those objections and also found that NJAW's conflict of interest claim was unsubstantiated and speculative. The Commission approved the Darby Agreement for the calendar year 2013, subject to thirteen conditions, including that the NJSEA must maintain sufficient oversight responsibilities over Darby's management of the AWS.

The Commission also maintained substantial oversight over Darby's management of the AWS. The Commission required Darby and its employees to obtain a license and required Darby to file with the Commission: (1) the name of any person or entity performing any function or acting on Darby's behalf with respect to management of the AWS; (2) detailed bi-monthly status reports concerning the AWS; (3) notice of “any significant event or occurrence [that] could negatively impact the continued operation of any aspect of the AWS; (4) prior notice of any compensation agreement with any person or entity with respect to the management of the [AWS];” and (5) written internal control procedures or guidelines relating to management of the AWS, including “procedures or guidelines directed toward ensuring that no actual conflict of interest arises as a result of Darby also functioning as management company with regard to the NJTHA's racing concerns.” The order also required Darby to cooperate with the Commission in all account wagering investigations and made Darby responsible for the regulatory requirements and conditions imposed on the NJSEA for management of the AWS. NJAW appeals from the December 6, 2012 order.

Thereafter, on October 29, 2013, the NJSEA filed a petition to approve Darby to continue to manage and operate the AWS for the 2014 calendar year. NJAW did not object to the petition. The Commission considered the petition at a November 20, 2013 public meeting, which NJAW did not attend. The Commission found that the AWS had “operated efficiently and smoothly” under the Darby Agreement, and also found by clear and convincing evidence that Darby and its employees

“continue[d] to [be] well-qualified to perform their respective function with regard to the [NJSEA] and the [AWS]” for 2014. The Commission determined the requirements of the OTAWA “continue[d] to be met, clearly and convincingly,” including as concerns the provisions of *N.J.S.A.* 5:5–140(c) and *N.J.A.C.* 13:74–4.2.

\*8 In a December 12, 2013 order, the Commission approved Darby to continue to manage and operate the AWS for the 2014 calendar year, subject to the conditions imposed in the December 6, 2012 order. The Commission imposed the additional condition that by October 15, 2014, Darby must apply for continued approval to manage and operate the AWS for the 2015 calendar year. NJAW also appeals from the December 12, 2013 order.

### Standard of Review

We have long-recognized the Commission’s expertise in regulating the racing industry, and we afford substantial deference to its decisions. See *De Vitis v. N.J. Racing Comm’n*, 202 *N.J. Super.* 484, 489, 495 A.2d 457 (App.Div.), *certif. denied*, 102 *N.J.* 337, 508 A.2d 213 (1985). Our review of the Commission’s findings is limited to determining

whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility ... and ... with due regard also to the agency’s expertise where such expertise is a pertinent factor.

[*Ibid.* (quoting *Mayflower Sec. Co. v. Bureau of Sec.*, 64 *N.J.* 85, 92–93, 312 A.2d 497 (1973)) (internal quotation marks omitted).]

We do not substitute our judgment of the facts for that of the Commission. *Campbell v. N.J. Racing Comm’n*, 169 *N.J.* 579, 587, 781 A.2d 1035 (2001). In reviewing the Commission’s decisions, we “must undertake a ‘careful and principled consideration of the agency record and findings.’” *Ibid.* (quoting *Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm’n*, 98 *N.J.* 458, 468, 487 A.2d 714 (1985)). “If [we are] satisfied after [our] review that the evidence and the inferences to be drawn therefrom support the [Commission’s] decision, then [we] must affirm even if [we] feel[ ] that [we] would have reached a different result[.]” *Ibid.* (internal quotation marks omitted).

Moreover, we “should give considerable weight to a state

agency’s interpretation of a statutory scheme that the legislature has entrusted to the agency to administer.” *In re Election Law Enforcement Comm’n Advisory Op. No. 01–2008*, 201 *N.J.* 254, 262, 989 A.2d 1254 (2010). “We will defer to an agency’s interpretation of both a statute and implementing regulation, within the sphere of the agency’s authority, unless the interpretation is ‘plainly unreasonable.’” *Ibid.* However, we are “not bound by an agency’s interpretation of a statute or its determination of a strictly legal issue [.]” *Lavezzi v. State*, 219 *N.J.* 163, 172 (2014) (internal quotation marks omitted). “Thus, to the extent [the agency’s] determination constitutes a legal conclusion, we review it de novo.” *Ibid.*

### NJAW’s Appeal

#### I.

NJAW contends the December 6, 2012 order is void because the Commission violated its procedural rules by considering the NJSEA’s petition on an expedited basis on November 30, 2012.<sup>15</sup> NJAW argues that because there were no exigent circumstances warranting expedited review, the Commission violated the thirty-day notice requirement, *N.J.A.C.* 13:70–1.34, and the fifteen-day submission requirement, *N.J.A.C.* 13:70–1.35.

\*9 In response, the NJSEA and Commission argue, in part, that NJAW was not an “interested party” entitled to notice and an opportunity to submit objections. They posit that *N.J.A.C.* 13:70–1.34 limits “interested parties” to those persons or entities that have been given the express statutory authority to submit applications, comments or information to the Commission. Thus, they contend that NJAW was not an “interested party” because the statute at issue here, *N.J.S.A.* 5:5–140(c), only expressly authorized the NJSEA to submit a petition, comments, or information.

It appears the Commission and the NJSEA may be correct. However, the Commission notified NJAW of the petition, afforded it an opportunity to submit objections, and considered those objections. As a result, we will assume NJAW was an “interested party” for the purpose of this matter only.

With that assumption, we are satisfied the Commission did not violate *N.J.A.C.* 13:70–1.34. The record confirms that at the time the NJSEA submitted the petition on November 14, 2012, the platform services contract with

Sportech was nearing expiration and new platform services proposal had to be selected before then in order to ensure the continuation of the AWS. We defer to the Commission's determination that this constituted exigent circumstances warranting expeditious review. *De Vitis, supra*, 202 N.J. Super. at 489, 495 A.2d 457.

We are also satisfied the Commission did not violate N.J.A.C. 13:70–1.35. When providing notice pursuant to N.J.A.C. 13:70–1.34, the Commission must “inform the interested parties ... that they shall have the opportunity to submit information regarding their position on the matter to the Commission for its consideration.” N.J.A.C. 13:70–1.35. The regulation then requires parties choosing to submit information to do so “within [fifteen] days after the date of notice.” *Ibid.* Here, on November 15, 2012, the Commission provided notice to NJAW pursuant to N.J.A.C. 13:70–1.34 and informed NJAW of the opportunity to submit comments by November 21, 2012. NJAW submitted two objections within fifteen days after the date of the notice. Thus, there was compliance with the regulation.

More importantly, NJAW has not shown any prejudice. NJAW made its opposition to the petition abundantly clear in the four objections it submitted to the Commission by the November 21, 2012 deadline, which the Commission considered before rendering its decision. The NJAW was also afforded the opportunity to orally oppose the petition at the November 30, 2012 meeting and had another opportunity to object to the NJSEA's second petition and orally oppose it at the November 20, 2013 meeting. Because the NJAW had ample opportunity to present its objections before the Commission rendered its decision, it suffered no prejudice in this case.

## II.

NJAW contends the December 6, 2012 order is void because the NJSEA and Commission violated the OPMA with respect to the November 30, 2012 meeting.<sup>16</sup> NJAW argues that the NJSEA violated the OPMA by: “hiding” its actions from NJAW, the operating board, the NJSEA's commissioners, and the public; negotiating and agreeing on the terms of the Darby Agreement without input from the operating board, the NJSEA's commissioners, and the public; and failing to publicly bid a vendor management agreement. NJAW argues the Commission compounded the OPMA violation by “preordaining” the petition, failing to substantively examine the terms of the Darby Agreement in public, and failing to consider NJAW's objections.

\*10 NJAW's arguments lack merit. The Participation Agreement gave the NJSEA sole discretion to either use its own employees to manage the AWS or *directly contract* with vendors. The Participation Agreement contains no provision requiring input from or the approval of the operating board, the NJSEA's commissioners, or the public for the NJSEA's selection of or contract with a vendor. In addition, because the Darby Agreement was a no fee contract that was below the public bidding threshold, it was not subject to public bidding. *See N.J.S.A. 5:10–21.1(a)*. Finally, the NJSEA did not hide the Darby Agreement from anyone; rather, it submitted the Darby Agreement to the Commission and NJAW shortly after it was executed and filed a formal petition for approval of the agreement, which the Commission considered at an open public meeting. Thus, the NJSEA did not violate the OPMA.

Nor did the Commission violate the OPMA. The OPMA only required the Commission to provide the public with adequate notice of a scheduled meeting, afford the public the right to attend, and allow the public to witness the decision-making process. *N.J.S.A. 10:4–7, –8(d)*. The OPMA did not require the Commission to substantively examine the terms of or adopt the Darby Agreement in public or grant the public the right to be involved in its decision-making. The record confirms the Commission provided adequate public notice of the November 30, 2012 meeting, afforded the public the right to attend, substantively deliberated the petition in public, and fully considered NJAW's objections.

## III.

NJAW contends the December 6, 2012 and December 12, 2013 orders are void because they impermissibly appoint a non-agent independent contractor to manage the AWS in violation of *N.J.S.A. 5:5–140(c)*, *N.J.A.C. 13:74–4.2(a)*, and the Participation Agreement. NJAW argues that the word “and” in *N.J.S.A. 5:5–140(c)* mandates that Darby must act as the NJSEA's agent with respect to managing and operating the AWS.

The NJSEA and Commission counter that the Commission correctly interpreted the word “and” in the disjunctive to mean “or,” thereby allowing the NJSEA to choose whether to retain Darby as an agent or as an independent contractor. For support, they rely on that part of *N.J.A.C. 13:74–4.2(a)*, which permits an off-track wagering licensee to enter into a contract with a vendor “to conduct or operate an off-track wagering facility for it,

or to act as its agent in all off-track wagering matters[.]” (Emphasis added). They also rely on a 2007 rule summary for *N.J.A.C. 13:74–4.2(a)*, which explains that “*N.J.A.C. 13:74–4.2* sets forth the procedures which must be followed where the off-track wagering licensee or account wagering licensee seeks to designate another person or entity to conduct or operate an off-track wagering facility for it, or to act as an agent on its behalf.” 39 *N.J. R. 2606(a)* (July 16, 2007) (emphasis added).

\*11 The Commission’s interpretation of *N.J.S.A. 5:5–140(c)* was plainly unreasonable. “The words chosen by the Legislature are given their plain meanings, unless the Legislature has used technical terms, or terms of art [.]” *612 Assocs., L.L.C. v. N. Bergen Mun. Utils. Auth.*, 215 *N.J. 3*, 15 (2013) (internal quotation marks omitted). The words “and” and “or” are not technical terms or terms of art. The word “and” is commonly “used as a function word to indicate connection or addition esp[ecially] of items within the same class or type,” *Merriam–Webster’s Collegiate Dictionary* 43 (10th ed.1997), whereas the word “or” is commonly “used as a function word to indicate an alternative.” *Id.* at 817.

Here, the Legislature used the word “and” in *N.J.S.A. 5:5–133(b)* and *–140(c)*, indicating its intent that a vendor for both an off-track wagering licensee and an account wagering licensee must act as the licensee’s agent. “A court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language.” *O’Connell v. State*, 171 *N.J. 484*, 488, 795 *A.2d 857* (2002). “If the language [of a statute] is plain and clearly reveals the meaning of the statute, [our] sole function is to enforce the statute in accordance with those terms.” *State, Dep’t of Law & Pub. Safety v. Bigham*, 119 *N.J. 646*, 651, 575 *A.2d 868* (1990).

The Commission’s interpretation of those statutes in *N.J.A.C. 13:74–4.2(a)* and the 2007 summary to that rule, reaching a contrary conclusion, was also plainly unreasonable. Where there is a conflict between a clear and unambiguous statute and a regulation, we have held as follows:

It is well settled that when the provisions of the statute are clear and unambiguous, a regulation cannot amend,

#### Footnotes

<sup>1</sup> *N.J.S.A. 5:5–129* defines “off-track wagering” as “parimutuel wagering at an off-track wagering facility as authorized under [the OTAWA]” and “parimutuel” as “any system whereby wagers with respect to the outcome of a horse race are placed with, or in, a wagering pool conducted by an authorized person, and in which the participants are wagering with each other and not against the person conducting the wagering pool.”

alter, enlarge or limit the terms of the legislative enactment. Where there is a conflict, the statute prevails over the regulation. Moreover, [s]tatutes, when they deal with a specific issue or matter, are the controlling authority as to the proper disposition of that issue or matter. Thus, any regulation or rule which contravenes a statute is of no force, and the statute will control.

[*Flinn v. Amboy Nat’l Bank*, 436 *N.J. Super. 274*, 293–94 (App.Div.2014) (citations and internal quotation marks omitted).]

*N.J.S.A. 5:5–133(b)* and *–140(c)* clearly and unambiguously mandate that a vendor retained by an off-track wagering licensee and an account wagering licensee must act as the licensee’s agent with respect to all off-track wagering matters or account wagering matters, respectively. The provisions of *N.J.A.C. 13:74–4.2(a)* that contravene the statute have no force whatsoever. Accordingly, *N.J.S.A. 5:5–140(c)* requires Darby to act as the NJSEA’s agent in all AWS matters.

Although the Commission should have required the NJSEA to designate Darby as its agent in the Darby Agreement, we cannot undo the past two years. Thus, we affirm the orders in part, and remand to the Commission to modify the orders to require that the Darby Agreement be amended to provide that Darby is acting as the NJSEA’s agent with respect to all AWS matters, and that Darby has no final decision making authority, the NJSEA retains ultimate control and decision-making authority, and the NJSEA shall oversee and manage Darby.

\*12 Having reached this conclusion, we decline to address NJAW’s remaining arguments that two orders are arbitrary, capricious and unreasonable because they are inconsistent with the Commission’s prior decision regarding the NJTHA Agreement and the Darby Agreement.

Affirmed in part, remanded in part. We do not retain jurisdiction.

- 2 *N.J.S.A.* 5:5–129 defines “account wagering” as “a form of parimutuel wagering in which an account holder may deposit money in an account with the account wagering licensee and then use the account balance to pay for parimutuel wagers by the account holder.”
- 3 *N.J.S.A.* 5:5–129 defines a “permit holder” as “the holder of an annual permit to conduct a horse race meeting issued by the [C]ommission.”
- 4 *N.J.S.A.* 5:5–129 defines “participation agreement” as follows, in pertinent part:  
[T]he written contract ... that provides for the establishment or implementation of ... an [AWS]. Each such contract shall set forth the manner in which the ... [AWS] shall be managed, operated and capitalized, as well as how expenses and revenues shall be allocated and distributed by and among the [NJSEA] and the other eligible participants subject to the agreement.
- 5 New Jersey racetracks offer standardbred and thoroughbred horse racing. “Thoroughbred horses are ‘a breed of horse originating from a cross of Arabian stallions with English mares’ and are raced by a jockey in a saddle, while standardbred horses are ‘[o]ne of an American breed of horses developed for harness racing.’” *Fitzgerald v. Tom Coddington Stables*, 186 N.J. 21, 26 n. 1, 890 A.2d 933 (2006) (quoting *Webster’s II New College Dictionary* 1148, 1075 (1995)). Monmouth Park offers only thoroughbred horse racing, Freehold Raceway offers only Standardbred, and the Meadowlands offers both. See *Racetrack Information*, N.J. Racing Commission, <http://www.nj.gov/oag/racing/tracks.html>.
- 6 *N.J.S.A.* 5:5–133(b) provides, in pertinent part, that “[w]ith the approval of the [C]ommission, the [NJSEA] may assign an off-track wagering license to a permit holder, provided that the [NJSEA] shall retain responsibility for license renewals.”
- 7 *N.J.S.A.* 5:5–47, provides as follows, in pertinent part:  
Upon compliance with the foregoing conditions, the [C]ommission shall issue a permit to such applicant to hold or conduct such horse race meeting ... No such permit shall be transferable nor shall it apply to any place, track or enclosure other than the one specified therein unless otherwise directed by the [C]ommission.
- 8 Although the NJTHA sought to conduct a thoroughbred race at the Meadowlands, New Meadowlands continued as the lessee of that racetrack.
- 9 *N.J.S.A.* 5:5–44(b) defines “public interest” as follows:  
[P]ublic interest shall include 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 situate; (4) Maintaining and improving this State’s competitive position with regard to neighboring racing states.
- 10 New Meadowlands and the NJTHA were parties to the Darby Agreement.
- 11 New Meadowlands and the NJTHA notified the Commission that they supported the petition.
- 12 *N.J.A.C.* 13:70–1.33(a) provides as follows:  
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.
- 13 *N.J.A.C.* 13:70–1.33(b) provides as follows:  
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.
- 14 In addition to Sportech, TVG Network submitted a platform provider proposal.

15 NJAW does not assert a procedural violation with respect to the November 20, 2013 public meeting.

16 NJAW does not assert an OPMA violation with respect to the November 20, 2013 meeting.