The Trade Deadline Day at the Race for the Franchise

More was going on behind the scenes in the Legislative Office Building on Wednesday October 10 than was going on at the hearings themselves. Not only were there changes in personnel, but there was talk in the media of a merger between Empire Racing and Capital Play. What you saw in public was not what went on in private. Transparency was in short supply.

We learned – I think - the following:

1. There may not be a new NYRA, but there sure is a new Excelsior Racing. When Excelsior won the Ad Hoc Committee’s approval last November, its equity partners were: the Steinbrenner family interests, the Johnston family interests from Balmoral, Tishman-Speyer and Richard Fields. With the announcement that Richard Fields (who always appeared to be the dominant force behind Excelsior) has left the enterprise, not one of the original investors remains with Excelsior.

Now Excelsior appears to be William Mulrow, Steve Wynn, Vornado Realty (Steve Roth), the Related Group, (Steve Ross), and the Bronson Companies (Skip Bronson.) In a move of opacity, the Related Group, which signed up with Capital Play last May, is now aligned with Excelsior.

When Related signed up with Capital Play in May of this year, Capital Play’s CEO Karl O'Farrell noted, “We've now combined the best in Australian and international racing with the best in real estate development.” Related supposedly agreed to purchase 20% of Capital Play and was to serve as a partner in all development operations as they relate to Aqueduct, Belmont and Saratoga racetracks. Perhaps, Related was traded to Excelsior for a mixed use development to be named later.

The reason given for Richard Fields departing Excelsior was his decision to devote full-time to his efforts to bring a casino to Suffolk Downs in Boston. Apparently, that reasoning did not extend to William Mulrow, who is the chairman of the board at Suffolk Downs and is still able to devote his time to Excelsior. While Fields may not be a part of Excelsior, it may be worth wondering whether his full-time efforts at Suffolk Downs would also mean that he is no longer pursuing his long time efforts to work with the Wisconsin Oneida s to establish a casino in the Catskills.

2. The Inspector General may have concluded that Empire Racing was not designed for the benefit of New York horsemen. Now it is. Churchill Downs and Magna Entertainment have opted out of Empire along with Mary Lou Whitney on Wednesday October 10. Delaware North followed suit on Thursday October 11. Now other than New York horsemen, it seems to consist of Woodbine Entertainment. It is not clear whether Scientific Games and/or the Cordish Company remain part of Empire. (Back in the summer of 2006, Cordish was supposed to be part of the Excelsior bid.) If Empire retains any vitality, it may actually be because it is truly composed of New York horsemen. If it
has that level of vitality, that might be the reason why Capital Play would find something of value to merge with.

3. The rationales given for leaving Empire by the various entities were predictably lame. Mary Lou Whitney stated, “Empire Racing has evolved into an entity with a vastly different feel and look, one that I no longer recognize.” Churchill in its release said that “the make-up of Empire Racing has changed significantly, and the bidding and selection process is now undefined.” The makeup of Empire Racing – other than the defection of the New York horsemen from support of Empire to a neutral stance in the early July - has remained constant. Additionally, the process has always been undefined. Their excuses just make it appear that they see Empire as a loser, and they’re bailing out.

4. Delaware North’s departure from Empire really puts that corporation in a favorable position for the VLT bid for Aqueduct. Assuming that Empire cannot compel Delaware North to keep out of the bidding for VLT’s at Aqueduct, Delaware North has a ton of strategic assets at its disposal. It is one of the few major companies headquartered in Western New York, an area which both the Spitzer administration and its Republican rivals want to benefit. It has run New York VLT’s effectively at Saratoga and its own track at Finger Lakes. It also runs VLT’s at Buffalo Raceway – where VLT’s have certainly not hurt the track’s operation. Delaware North has a ton of political support on both sides of the aisle, and they are far less likely to complain about the overall tax consequences and oversight operation of VLT’s in New York than other bidders.

One irony is that Delaware North will be trying to operate VLT’s at NYRA, an organization that opposed the operation of VLT’s at Saratoga Raceway back in 2002.

5. Excelsior Racing clearly deemphasized the racing aspect of its presentation. It basically was a call for the State to authorize VLT’s and development at Belmont. The emphasis was on creating conditions favorable for gaming development at Belmont. The points were: we need a lower tax rate; we can’t just put VLT’s in a box, and while we can run racing, we can work right along with NYRA.

This left Jerry Bailey, Excelsior’s racing point person, with little to say or do. Jerry largely was relegated to making most of the points that he made in the Spitzer hearings of April 2007. On the other hand, William Mulrow, who was thrown by ordinary questions from the Spitzer panel in April, seemed much more polished and comfortable at these hearings.

6. The Republican Senators seemed less interested in NYRA’s presentation than in scoring certain points against NYRA. These points were: the amount of the contract and the lack of bidding on the monitoring contract of Getnick and Getnick, the state of the poor relations between NYRA and its neighbors in the Belmont Park vicinity, and the statement that it would shut down racing on January 1, 2008 if there was no extension of its franchise.
While one presumes that Steve Duncker did not earn his chairmanship position at NYRA by his ability to stay composed at legislative hearings, he did an excellent job of deflecting many of the criticisms aimed at NYRA. The one deflection that may not have worked as well as the others was his assertion regarding the Getnick contract. The NYRA assertion was that this was a sole source contract under the Racing Law. To qualify procedurally as a sole source contract, NYRA would have had to notify the Racing Board at least 15 days before its contract that it intended to offer Getnick and Getnick a sole source contract. That 15 day notice would have to include “facts establishing the unique nature of such source.” (See Racing Law, Section 213.5) It is doubtful that this was done. If it was not done, it makes the sole source nature of the contract look to be an ex post facto justification of the monitoring contract.

7. Empire Racing used only Jeff Perlee and Denis Brida to make its presentation. Their point was that NYRA’s threat to close racing on January 1, 2008 was a gun with no blanks. They testified that Empire Racing was the bridge to take over racing in the even that no franchise extension had been granted. They complained about the lack of economic development in the MOU between the state and NYRA and the failure to improve backstretch conditions which they called “worse than you can possibly imagine.” There were intimations from Empire about possible collusion between NYRA, Excelsior, and the Spitzer administration. Empire claimed that he horsemen were largely forced out of Empire because they could not talk to the Spitzer administration about other racing issues until they left Empire. Empire made no statements at its presentation about its intentions to partner with Capital Play.

8. Capital Play’s presentation also made no mention about its intention to merge with Empire Capital Play utilized a heavily scripted combined PowerPoint and video presentation. The problem was that Capital Play utilized a process which suffered from “too many cooks spoiled the broth” syndrome. Utilizing eight speakers, clearly some of whom knew little about New York racing and the franchise process (Sorry, Steve Cauthen), the presentation was truly disjointed. Karl O’Farrell, the chairman of Capital Play, was clearly ailing, and his presentation suffered.

The best of the Capital Play presenters were Jacques Cornet of CIBC World Markets and Mitchell Etess of Mohegan Sun. They did a good job of showing the value of the Capital Play bid and the fact that Mohegan Sun could do an excellent job with video lottery terminals.

Capital Play’s presentation was actually much more anti-NYRA than Empire’s presentation. Capital Play showed video of poor conditions on the Belmont backstretch and the overall deterioration of Aqueduct. There was a chart that showed NYRA’s attendance drop of 24% over the past three years when it was under new management. There was a representation that NYRA had no claim to land, and the Oversight Board took control on January 1, 2008, and that the MOU would hurt the State and not resolve NYRA’s problems.
Capital Play’s more interesting spin was to say that the fact that the Inspector General’s report was so bare about Capital Play was that there was nothing bad to be found about Capital Play. This contrasted with NYRA which had been indicted, was in bankruptcy, was still seeking a bailout from New York taxpayers, and which had reneged on its deals with horsemen and the Breeders Fund.

Capital Play’s racing partner is the Victoria Racing Club, but nobody has ever heard from the Victoria Racing Club. When your racing spokesman is Steve Cauthen, who hasn’t been active in New York in nearly three decades, (and who talked about there being 20,000 fans at the 1995 Breeders’ Cup at Belmont. The actual attendance was 37,246.) you need to show far more about how you would change the culture of racing in New York.

Capital Play also said nothing in its presentation about any joint operation with Empire Racing. The first media reports of a possible merger came out before Capital Play began its testimony.

9. It would have been helpful if we could have learned of the actual equity partners and their percentage shares in each of the franchise bidders.

10. The Spitzer administration franchise review process did not fare well at the hearing. Empire and Excelsior claimed that the first they found out about a 30 year franchise bid period was when they saw the NYRA MOU in print. Capital Play was not asked this question.

The NYRA MOU itself ended up being described as just a starting point rather than a substantive document.

Empire claimed that the horsemen were compelled to leave that organization because otherwise they could not communicate to the Governor about legislation that increased the share of purse funds withheld to support the operations and benevolent activities of the New York Thoroughbred Horsemen's Association. (See Chapter 440, L. 2007)

Empire Racing said its contacts with the Executive Chamber amounted to two physical meetings and one phone call.

Capital Play described a process where their first contact with the Executive Chamber was on the Thursday before Labor Day. (The franchise recommendation was made on the day after Labor Day.) Capital Play was asked on that day to summon its partners for a phone meeting which was conducted on the Friday before Labor Day.

11. All this is likely to be reviewed in greater detail by the State Commission of Investigation (SIC) which has apparently decided to review the franchise award by the Spitzer administration. The SIC has always been an odd body. It is a six member group with two representatives each from the Senate majority, the Assembly majority, and the Executive Chamber. There are no Spitzer appointees on the Commission, and the Pataki
gubernatorial appointees include the chairman Alfred Lerner (a former Republican judge and assemblyman) and John Cahill, who was Governor Pataki’s Chief of Staff.

Any review of the work of the SIC over the past 15 years would show that it has demonstrated almost no inclination to review the workings of State agencies, let alone the Governor’s office. If you’re looking for investigations into sheriff’s offices or local district attorney’s offices, the SIC is the place to go. But realistically, it hasn’t looked at a State agency since a review of the Harlem Urban Development Corporation towards the beginning of the Pataki administration. (Many Democrats viewed that as an attempt by the Pataki administration to go after the Cuomo administration, Comptroller Carl McCall, and Congressman Charles Rangel.) The SIC did take on bigger issues in the 1960’s, 1970’s and 1980’s, but even then, there have traditionally been beliefs that the SIC’s decisions to undertake State investigations have been inspired by the political makeup of its board.

The SIC does have subpoena power, and its political makeup could prove to be problematic for the Spitzer administration. It does have the power to conduct nasty investigations; it just hasn’t done so against a State agency in recent years.