



Commonwealth of Pennsylvania
Milk Marketing Board

CHAIRMAN

2301 North Cameron Street
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DATE: March 1, 2022

SUBJECT: March 2, 2022, Over-Order Premium Hearing
Pennsylvania Association of Milk Dealers motion to strike certain testimony

TO: Interested Parties

FROM: Robert N. Barley
Chairman

On February 23, 2022, the Pennsylvania Association of Milk Dealers ("PAMD") filed a motion to strike some or all of the testimony of Mr. Wood, Mr. Hostetter, and Mr. Painter. The motion also requested the exclusion of Mr. Painter's testimony as late-filed rebuttal testimony.

On February 25, 2022, the Pennsylvania Food Merchants Association, Board Staff, the Pennsylvania Association of Dairy Cooperatives, the Pennsylvania Department of Agriculture ("PDA), and the Pennsylvania Farm Bureau ("PFB") filed responses. We have thoroughly reviewed the motion, responses, and testimony in question.

The hearing notice provides that the purpose of this hearing is to consider the level and duration of the Class I over-order premium. As noted in responses to the PAMD motion, the Board is not bound by the strict rules of evidence. We have always attempted to allow parties to present their positions to us and have tried to apply expansive analysis to our decisions on the admissibility of testimony and evidence. We also have always tried to be fair to all parties when making decisions regarding the admissibility of testimony and evidence. Evidence and testimony must still be relevant to the purpose of the hearing, which in this case is to consider the level and duration of the over-order premium. Evidence and testimony that do not address the level and duration of the over-order premium are outside the scope of the hearing and cannot be considered when we issue the order that results from this hearing.

PAMD moved to strike Mr. Hostetter's testimony in its entirety because it addresses distribution of the over-order premium. The Board has carefully reviewed Mr. Hostetter's pre-submitted written testimony and we agree that it is outside the scope of this hearing as it addresses neither level nor duration of the over-order premium. The Board must balance our inclination to

allow parties to present their positions and to allow them to present as much testimony as possible against being fair to parties who more closely take into account the purpose of the hearing when preparing their submissions. Of course all of this is subject to due process considerations. In light of all these considerations we will allow Mr. Hostetter to read his pre-submitted statement but we will not consider any information contained in his statement during our deliberations and when we issue our order.

PAMD objects to Mr. Painter's testimony as being outside the scope of the hearing since the evidence to support his request for a zero dollar over-order premium is based on the distribution of the over-order premium. It is true that distribution of the over-order premium is outside the scope of this hearing. However, the Board believes there is a distinction between testifying that the over-order premium should be zero dollars due to a belief that there is an issue with the distribution of the over-order premium and testifying specifically regarding the current distribution method and/or ways the current distribution method should be changed. The former is broadly within the scope of the hearing as a reason a party thinks the over-order premium should be zero dollars, while the latter is not within the scope of the hearing because changes to the distribution method are not the level and duration of the over-order premium.

PAMD also moved to exclude Mr. Painter's testimony because it is not proper surrebuttal. PAMD contends that Mr. Painter's submission is not surrebuttal testimony but is actually rebuttal testimony mischaracterized as surrebuttal testimony. According to PAMD, the purpose of the hearing is to consider the level and duration of the over-order premium, the petitioner submitted testimony in favor of a \$1.00 over-order premium, and therefore the proper time to offer evidence in support of a zero dollar premium was in rebuttal filings.

In its response to PAMD's motion, PFB argues that Mr. Painter's testimony is surrebuttal offered in response to Mr. Hostetter's rebuttal testimony. PFB contends that Mr. Painter's testimony in favor of an immediate zero dollar premium is a response to Mr. Hostetter's "hesitation to take a position on a level and duration of the over-order premium"

As noted above, we attempt to allow parties to say their piece, balanced against fairness to every party. Mr. Espenshade, Mr. Tewksbury, and Mr. Wood are not represented by attorneys. Despite not being represented by an attorney, each filed timely and responsive submissions. Mr. Espenshade submitted testimony on behalf of the petitioner which was confined to the level and duration of the over-order premium with reasons supporting his request. Mr. Wood submitted testimony that rebuts the premium level requested by Mr. Espenshade. Mr. Tewksbury submitted testimony in surrebuttal of the premium level requested by Mr. Wood.

Regarding Mr. Painter's testimony, the Board must balance our preference for being as expansive as possible to allow parties to say their piece against fairness to other parties who have more clearly adhered to our pre-submission requirements. Mr. Painter's testimony does not rebut the level or duration of the over-order premium requested in the rebuttal submissions. This is a close decision, but we conclude in this instance that Mr. Painter's testimony in support of setting the over-order premium at zero dollars immediately generally rebuts Mr. Hostetter's testimony. We have struck through the testimony we conclude is outside the scope of the hearing in the attached copy of Mr. Painter's testimony. Mr. Painter may present his testimony at the hearing in accordance with the attached.

The Board has concluded that Mr. Hostetter's testimony is outside the scope of the hearing. When PFB filed its surrebuttal submission, it did not know that we would conclude that PDA's submission would be outside the scope of the hearing. Therefore, we will allow Mr. Painter to present his testimony in accordance with the attached copy despite that testimony being offered in surrebuttal of testimony that will not be considered in our decision.

PAMD objects to parts of Mr. Wood's testimony as being outside the scope of the hearing. PAMD moved to strike testimony related to "inequities of the distribution of money," testimony related to "the transportation of fluid milk from farmers all over the state trying to either be in or not in the premium pool and the problems that it causes," and testimony related to "some possible solutions that need to be discussed a lot more." As we note above in our discussion of Mr. Painter's testimony, there is a distinction between testimony regarding reasons the over-order premium should be zero dollars and testimony regarding specific issues with those reasons and ways those issues could be addressed or affect milk marketing in Pennsylvania. We have struck through the testimony we conclude is outside the scope of the hearing in the attached copy of Mr. Wood's testimony. Mr. Wood may present his testimony at the hearing in accordance with the attached.

In summary, Mr. Hostetter may read his statement but it will not be considered by the Board when we make our decision. Mr. Wood may provide his testimony in accordance with the attached copy of that testimony in which we have struck through portions we conclude are outside the scope of this hearing. Mr. Painter may provide his testimony in accordance with the attached copy of his testimony in which we have struck through portions we conclude are outside the scope of this hearing.

Dear PMMB Committee Members and Staff,

My Name is Tim Wood. I am a Lifetime Tioga County Farmer. I currently own a Farm along the border with New York in the Town of Tioga. I'm blessed with some of the best ground in Tioga County which allows me to grow more than enough forage and grains that my herd needs.

I come here today representing the untold stories of Hundreds if not Thousands of Farmers from the Northern and Western Parts of the State. We have tried to effect change for 10 or more years, and there has been no significant change in the system to date. Recently this Subject was discussed and deliberated at length at the recent PFB meeting over 2 days of meetings resulted in the overwhelming (approximately 2-1) vote by duly elected delegates through the organization Democratic Process to support the elimination of the over order Premium and the elimination of minimum wholesale and retail price regulations. For those of us in the majority myself included we voted for this change in policy for at least 3 key reasons inherent in the current regulated pricing system that pushes me at this time to ask you to set the Over Order Premium at 0.00 indefinitely in all Milk Marketing Areas.

First, is the basic inequity imbedded in the distribution of the OOP among dairy farmers in the Commonwealth. Ironically, the article by Dr. Hardbarger points this out in dramatic fashion. In her own example, \$2,918,482 was received by only 641 independent producers in the first 6 months of this year for an average of \$4553 per farm. According to Dr. Hardbarger, in the same 6 month period cooperatives received \$3,619,636 for distribution among cooperative members. The Center For Dairy Excellence maintains that there are presently 5430 dairy farms in Pennsylvania. Dr. Hardbarger's article indicates that 1047 independent producers. Therefore, it is safe to assume that the vast majority of the remaining 4383 are cooperative members. Let's assume that number is only 4000. In that case simple math says these farms received only an average of \$905 per farm, compared to \$4553 per farm for the average independent farm. That's a 5-fold difference! What is fair and equitable about a state-mandated regulatory pricing system that picks "winner and losers" among farmers all facing the same challenges in the extremely competitive dairy industry? It was the conclusion of delegates at the PFB annual meeting that this could not be justified.

The Second point of concern for me, and others at Farm Bureau meeting opposed to the OOP, is that the manner in which the Over-Order is administrated by the PMMB provides an incentive to move out-of-state milk into PA Class 1 plants, thereby pushing PA-produced milk to other markets. ~~Many examples of this movement of milk can be used. My Own Farms milk marketed through N.F.O. My Farm is Located on the N.Y. Border and My milk is trucked to Baltimore M.D. to a plant Owned by Lanco Co-Op of Lancaster, PA bottled and then sold at some stores in PA, but because it was not process and sold in PA the Premium is imbedded in the price of all milk sold retail, but none of the minimum retail will go back to any Farmer much less my Farm.~~

While others have talked about Premiums in my world, I get a \$2.35 deduction for marketing and \$2.00 trucking to haul my milk to Maryland adding up to \$4.50 before I get to pay any of the Farms Bills. ~~The money collected at retail on my milk will go to someone else in the chain just disappearing into the system.~~

~~The hardships caused by this moving of milk further and increase hauling costs to the dairy farmers who bear the burden of paying them. Is it any wonder that no new processing has come to PA in decades, while dairy processing is expanding in other States around the country, and as close as neighboring New York State? Prospective Companies are surely concerned about the cost of business in this non-competitive environment in Pennsylvania.~~

~~We also wonder if guaranteed profit to processing in PA might actually be resulting in complacency, stifling improvements in efficiency and innovation. One can only imagine what new markets might be developed for PA milk if only it were on a more competitive footing as other dairy producing states.~~

~~We would maintain that this type of incentive distorts what would otherwise be the free and efficient movement of milk to processors and ultimately consumers. My own farm's milk goes past 3 milk plants on its way to Maryland. From this perspective it is pretty simple to conclude that the more out-of-state milk that is processed by a PA plant and sold in PA, the less premium is required to be paid to farmers. We don't fault the plants themselves, rather the pricing system which encourages and incentivizes this practice,~~

~~And finally, a word on the minimum wholesale (the price that a processor sells milk to a retailer) and minimum retail (what the consumer pays) prices. These minimum prices are necessary to generate the premium dollars paid by consumers which (in theory at least, but not in practice) are all returned to PA farmers. Regardless of whether not this means that PA consumers over pay or whether it is a deterrent to higher volume sales as some maintain, the bottom line is that if OOP can't be justified, then there is no reason to enforce them.~~

In summary my testimony to support the elimination of the over-order premium was not made easily, but the inequity of the current system and the hardship put on all the farmers not receiving a piece of this antiquated pricing system and the overall effects on our dairy community.

We believe it is time to have a 0.00 premium until such time as we can have a candid conversation about how 400 producer's premium should come at the expense of 4000 producers the true cost and unintended consequences of the OOP are weighing heavily on us all.

Sincerely,

Timothy Wood
Tioga County Dairyman

PFB EXHIBIT 1

**Surrebuttal Testimony Offered for
Pennsylvania Farm Bureau (PFB)
Before the Pennsylvania Milk Marketing Board
Regarding the Level and Duration
of the Class I Over-Order Premium**

March 2, 2022

**Presented by John Painter II
Dairy Farmer, Painterland Farms
PFB Executive Board Member**

Introduction

Good morning, my name is John Painter, and I offer this testimony on behalf of Pennsylvania Farm Bureau (PFB)—the largest general farm organization in Pennsylvania.

I serve on both PFB's Executive Committee and Board of Directors, representing District 5, which is comprised of McKean, Potter, Tioga, Bradford, and Sullivan Counties. Since 2016, I've operated, in partnership with my brothers, Painterland Farms, an organic dairy and crop farm in Tioga County where we milk around 400 cows and farm 5,000 acres. The farm has been in my family for 60 years, originally founded by my father in 1962.

At the onset, Pennsylvania Farm Bureau would like to thank the Pennsylvania Milk Marketing Board (Board) for providing the opportunity to offer surrebuttal to the submitted testimony by the Pennsylvania Department of Agriculture regarding the level and duration of the upcoming over-order premium. We agree wholeheartedly with the Department's tone and perspective that the present over-order premium framework is inequitable to all dairy farmers, generally unfair to consumers, and leaves opportunities for parties seeking to avoid payment or distribution of the premium. However—in contrast to the Department—we believe that unless and until a more equitable system can be implemented that the time has come to eliminate the Class I Over-Order Premium,

and therefore recommend setting the upcoming over-order premium at \$0.00 indefinitely for all milk marketing areas.

Structural Issues

Through no fault of their own, the over-order premium meaningfully helps only a small segment of Pennsylvania dairy farmers. In our view, this means that on balance the present system does more overall harm than good by fermenting strong and emotional dissension among Pennsylvania dairy farmers. The dairy farmers that receive meaningful premium dollars undoubtedly support the present system, but the dairy farmers that receive little to no support from the system range from indifferent to openly hostile toward the system. And while many hearings, reports, studies, and testimony have been held or given in recent years, we believe that the biggest impediment to meaningful reform of the current system is beyond this Board's or even the General Assembly's control.

As this Board knows, the Class I over-order premium is limited—largely due to federal constitutional constraints—to Class I fluid milk that is produced, processed, and sold in Pennsylvania. And past attempts to tinker with any of those elements has been met with swift and successful legal action against this Board. Unfortunately, without legitimate options to alter the over-order premium elements, this legal trinity of sorts creates an environment that's often to the detriment of the majority of Pennsylvania dairy farmers and retail milk consumers.

It is largely accepted as fact that the over-order premium is collected on every gallon of retail fluid milk purchased in Pennsylvania. This means that every Pennsylvania-based fluid milk consumer pays an additional fee intended to ultimately be returned to and benefit the Pennsylvania dairy farmer. But as many know through personal experience, the best intentions don't always come to pass.

~~To that point, milk that is not processed in Pennsylvania is not subject to the premium. This Board's recent estimates of the total over-order premiums collected from the point of sale have ranged from approximately \$8 to \$10 million annually. Yet, this Board further estimates that 20% to 30% of collected premiums are never distributed back to Pennsylvania dairy farmers—an issue informally referred to as “the stranded premium.” And because of the “legal trinity,” regardless of one's actual intent, the practices of simply altering the processed element by sending milk to be processed outside of Pennsylvania or by bringing in milk produced out of state are perfectly allowable methods to avoid distributing premium dollars that have already been collected.~~

~~So, in practice, Pennsylvania fluid milk consumers pay a functional tax on every gallon of milk they buy. This “tax,” however, rarely makes it back down to the Pennsylvania dairy farmer in full form. Admittedly, other issues beyond over-order premium elements, such as the role cooperatives play in balancing the milk supply, account for some of this discrepancy. Unfortunately though, as previously~~

~~alluded to, PFB does not believe there are viable legal options to tweak the over-~~
~~over premium elements to create an environment where Pennsylvania dairy~~
~~farmers and milk consumers are not simply resigned to spectator status in a system~~
~~that's structurally incapable of meaningful equity and fairness.~~ As a result, PFB
believes that, while the over-order premium does benefit some dairy farmers, its
time has passed.

~~As suggested by the Department, ultimate and meaningful change must~~
~~come from legislative reform. PFB is committed to exploring those options and~~
~~working with all interested parties on such efforts. However, while PFB is engaged~~
~~and supportive of state legislative changes to provide a more equitable and fairer~~
~~system to producers and consumers alike,~~ we also firmly believe that meaningful
economic changes for dairy farmers must be sought at the federal level through
matters such as federal market order reform. State legislative change may bring
much-needed equitable improvements on the margins, but in our view, the
fundamental economic changes needed for dairy farmers must be sought on the
federal level.

Conclusion

Pennsylvania Farm Bureau understands the gravity of our request and does
not make it lightly. Yet, we respectfully submit that an over-order premium system
that cannot be meaningfully changed without inviting a swift rebuke by way of the

federal Commerce Clause is not a system capable of structural fairness and equity to all involved in the dairy supply chain. Pennsylvania Farm Bureau therefore requests that the upcoming over-order premium be set at \$0.00 indefinitely for all milk marketing areas.