

February 25, 2022

**Via e-mail**

Robert N. Barley, Chair  
c/o Douglas L. Eberly, Esq.  
Pennsylvania Milk Marketing Board  
2301 North Cameron St, Room 110  
Harrisburg, PA 17110

**Re: PAMD Motion to Strike and Exclude PFB's Testimony  
Over-Order Premium Hearing, March 2, 2022**

Dear Chairman Barley and Members of the Board:

Pennsylvania Farm Bureau (PFB) objects to the Pennsylvania Association of Milk Dealers' (PAMD) motion to strike and exclude the testimony of PFB's witness, John Painter. In support, PAMD alleges the testimony is outside the scope of the upcoming over-order premium hearing and that it is late-filed rebuttal. Both points are unconvincing and erroneous.

*Scope of Hearing*

This Board's over-order premium notice of hearing and presubmission schedule, dated February 2, 2022, provides that the purpose of the hearing is to "receive testimony and exhibits concerning the level and duration of the Class I over-order premium." Notice of Hearing and Presubmission Schedule for All Milk Marketing Areas, Over-Order Premium, Feb. 2, 2022. In essence, the dispute surrounding the proper scope of the hearing relates to what's relevant in effectuating the hearing's purpose: determining the level and duration of the over-order premium.

In determining relevance, this Board's proceedings are governed by Section 505 of the Administrative Agency Law, which provides, in part, that state agencies "shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received." 2 Pa.C.S. § 505. This standard has generally been interpreted to provide a relaxed standard for evidentiary rules. *See, e.g., A.Y. v. Commonwealth*, 641 A.2d 1148 (Pa. 1994) ("This statutory maxim has been correctly interpreted to mandate a relaxation of the strict rules of evidence in Agency hearings."). An item is probative if it has a quality or function of proving something. *See Commonwealth v. Drumheller*, 808 A.2d 893, 904 (Pa. 2002).

In our view, the fact that multiple public and private agricultural entities with longstanding participation before this Board and deep ties within the dairy sector have independently submitted testimony as to the perception and inequities of the over-order premium is an issue that has a reasonable "quality or function of proving" the general level of support for the over-order premium within Pennsylvania's agricultural community. As noted in our proposed testimony, PFB is the state's largest general farm organization, having been in existence since 1950. The Pennsylvania Department of Agriculture is the Commonwealth's official state agricultural agency and regularly espouses the Administration's official view on agricultural policy matters. The Pennsylvania Association of Dairy Cooperatives represents some of the largest dairy cooperatives in the state. If a policy instrument or tool has materially lost support or is under significant criticism, as formally attested to by a wide spectrum of stakeholders, we think such a fact, and the reasons underlying that fact, are reasonably legitimate issues for the Board to consider and hear in determining what level and for how long to set said policy tool. This Board is certainly free to weigh the testimony and credibility of witnesses appearing before it, but PFB

respectfully submits that granting PAMD's motion to not even allow the testimony to be heard would not adhere to the liberal evidentiary and relevancy standards outlined for administrative hearings under the law.

### *Surrebuttal Characterization*

The term "surrebuttal" is not formally defined anywhere in Pennsylvania law or regulations. Generally, an undefined term is subject to its ordinary and common meaning. *See* 1 Pa.C.S. § 1903(a). Dictionaries are commonly used in aiding in this task. *See, e.g., Love v. City of Philadelphia*, 543 A.2d 531, 532 (Pa. 1988) ("We have generally used dictionaries as source material for determining the common and approved usage of a term."). At its most basic form, "surrebuttal" is a response to a "rebuttal." *See* Legal Information Institute, Wex Online Legal Dictionary, <https://www.law.cornell.edu/wex/surrebuttal> ("Surrebuttal is the response to a rebuttal that the responding party may be allowed to make in rare circumstances."). Additionally, this concept of "surrebuttal" is supported by court cases and administrative procedures, which although not defining surrebuttal, plainly describe or reference it in the context of a response. *See, e.g., UGI Utilities, Inc. v. Pennsylvania Public Utility Commission*, 863 A.2d 144, 147 (Pa. Cmwlth. 2004) (describing witness providing surrebuttal testimony in response to a rebuttal); 34 Pa. Code § 131.53(e) (describing administrative procedures before workers' compensation judges). Finally, this concept is also in line with the plain language of this Board's notice of hearing and resubmission schedule. This Board's first deadline is that of the petitioner, which is followed by rebuttal responses, and lastly surrebuttal. Just as rebuttal would logically be the response to the petition under the Board's order, surrebuttal would be the response to any rebuttal filings.

It's undisputed that there were three submissions filed in response to the petition filed by the Pennsylvania State Grange: a summary of anticipated testimony by Tim Wood, testimony by the Pennsylvania Department of Agriculture (PDA), and a statement of non-objection by PAMD. Of these three filings, the only substantive filing was that of the PDA. Therefore, to comply with a basic concept of the term "surrebuttal," PFB specifically limited its surrebuttal testimony to points made by PDA. For example, we explicitly state the points and concepts made by PDA that we agree with and those we don't. We note that we agree with their assessment of the viability of the over-order premium and that we disagree with their hesitation to take a position on a level and duration of the over-order premium—the purpose of the hearing. And because of our partial disagreement to PDA's rebuttal, PFB specifically takes a position on the level (or numerical amount) and duration of the over-order premium. Zero is number and has a long historical acceptance among math experts and civilizations. *See* Nathaniel Scharping, DISCOVER MAGAZINE, Jan. 9, 2021, <https://www.discovermagazine.com/planet-earth/how-we-discovered-the-number-zero>. The reasons for taking the position as to the hearing's purpose are specifically outlined in Mr. Painter's testimony, but heavily relate to farmer sentiments concerning the substance of the over-order premium. As previously noted, we think those are reasonably relevant considerations for this Board to consider in determining the level and duration of the over-order premium.

We thank this Board for the opportunity to respond and urge it to deny PAMD's motion in its entirety.

Sincerely,



Joe D. Montenegro  
Government Affairs Counsel

JDM

cc: Distributed per Interested Parties List