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AMENDED RESPONSE TO PADC MOTION TO STRIKE

August 30, 2019

Robert N. Barley, Chairman
c/o Douglas Eberly, Chief Counsel
Pennsylvania Milk Marketing Board
2301 N. Cameron Street
Harrisburg PA 17110

By email: deberly@pa.gov

Dear Chairman Barley and Members of the Board:

The Pennsylvania Association of Dairy Cooperatives (PADC) has asked the Board to strike portions of Board Staff's rebuttal testimony submitted on August 23, 2019 for the October 9, 2019 hearing because they are outside the scope of the hearing. Board Staff asks the Board not to do so, because they are not, and to dismiss the motion.

PADC quotes some of the directions given by the Board for the hearing. They are worth quoting fully. They are on Exhibit A.

NO PART OF BOARD STAFF'S REBUTTAL SHOULD BE STRICKEN

1. The Board's directions about Part 2, which were stated at the hearing and in the January memo, do not expressly exclude anything from Part 2. Rather, the Board said it wanted "the best record possible" and "to give every party a fair chance to understand what's being presented and to be able to give us the information we need."

In both the November 7 and January 31 directions given by Chairman Barley (Exhibit A), the only express exclusion was what would not be covered at the *first* part of the hearing. Nothing was expressly excluded from the second part of the hearing. General parameters were set – but in our view it was not (and was not intended to be) a bright line that could be used to strike relevant submissions.

The Board separated the "implementation" of the cooperative procurement premium (CPP) into a second part of the hearing, but there was not a bright line drawn as to what would or would not be admissible. The bifurcation was, as we understand it, for administrative effectiveness, not for careful segregation of particular evidence. We do not agree with PADC's opinion that the Board carved out a "discrete final session" – we believe the Board bifurcated the hearing to assure "the best possible record."

2. PADC’s own presubmitted testimony for Part 2 includes statements of its position on whether the CPP should be granted. The PADC testimony for Part 2 includes these statements (emphasis added):

“Fundamentally, the costs of procuring milk from cooperative farms *should be* reflected to the Pennsylvania consumer *to the same extent as other costs now reflected.*”

“To reiterate our comments from the previous testimony, ‘Our point is and remains that these costs for cooperative dairy farmers *should be* reflected in the PMMB system *to the same extent* and with the same annual updating *as the costs related to the dealers’ procurement of milk* from Pennsylvania farms of non-cooperative members.’”

PADC is stating its position about *whether* the CPP should be implemented. Board Staff’s rebuttal was therefore both within the scope of the Petitioner’s submission, and within Petitioner’s understanding of the scope of this hearing as evidenced by PADC’s inclusion of that testimony in its submission.

As you see above, PADC submitted some of their own testimony from Part 1 to support their position about whether the CPP should be implemented. It was therefore appropriate for Board Staff to include excerpts of PADC’s testimony from the first part of the hearing as well.

3. Bifurcation was a mid-hearing, unanticipated consequence of perceived deficiencies in the submissions. Bifurcation was deemed necessary because, as Chairman Barley put it, “Mr. English and Ms. Yoviene expressed some concerns regarding the hearing process. We think those concerns have some validity.” PADC acknowledges in its motion that bifurcation was the result of “the procedural due process concerns raised by counsel for the PAMD and Dean Foods.” Part 2 gave PADC the opportunity to remedy that with a new round of submissions. The other parties ought to be given latitude in their Part 2 submissions unless the submissions would be prejudicial.

4. PADC can respond to Board Staff’s rebuttal with its surrebuttal. The parties have ample opportunity to respond to anything they disagree with in surrebuttal, which is not due until September 25, 2019. Thus, there is no prejudice to PADC by allowing Board Staff’s rebuttal in its entirety.

5. Board Staff participation. Board Staff has an obligation to present to the Board its perspective on important issues. Bifurcation provided Board Staff with what Chairman Barley referred to as “a fair chance to understand what’s being presented” and it became compelling that Board Staff should inform the Board of its consequent perspective about the cooperative cost proposal. Board Staff has attempted to do so in its rebuttal.

BOARD STAFF’S RESPONSE TO EACH PADC PROPOSED STRIKE

In addition to the comments above, we have these further comments about the four specific sections proposed to be stricken.

1. Naming the premium. PADC says that how this premium is labeled “has nothing to do with implementation.” Giving it a name is an essential, if mundane, aspect of implementing it.

2. Pennsylvania Producer Impact. PADC has, as mentioned above, opened the door to stating a position on *whether* to implement the CPP.

We learned in Part 1 there is no certainty that any of the money would go to Pennsylvania producers. Therefore – like PADC – we have addressed in our Part 2 submission the issue of whether the premium *should be* implemented.

Board Staff is here expressing our concern that one aspect of implementation is that the money is not necessarily going to benefit Pennsylvania producers. We see this issue as a very relevant and crucial aspect in helping to “fully evaluate the entire process from obligation through implementation and recovery” as stated in Chairman Barley’s memo.

3. Board Staff costs and administrative implications of implementation. Board Staff believe the administrative requirements and costs are an important aspect of the Board being able to “fully evaluate the entire process from obligation through implementation and recovery.”

4. Board Staff’s Conclusion. Board Staff’s rebuttal conclusion reiterates our position about whether the CPP should be implemented, listing several of the reasons for that position. This should not be stricken, because bifurcation was intended to assure a comprehensive record, not to exclude information that the Board can sift and weigh; because PADC has opened the door to inclusion of such material by its own inclusion in its Part 2 submission; because it does not prejudice PADC, who can file a surrebuttal; and for the other reasons stated above.

The rather extraordinary remedy of striking a pre-submission is, in Board Staff’s opinion, not justified. None of Board Staff’s rebuttal should be stricken. Board Staff respectfully asks the Board to dismiss this motion. Thank you for your consideration.

Respectfully submitted,

Andy Saylor

Andy Saylor
Board Staff Attorney

EXHIBIT A

Chairman Barley on November 7, 2019 (Tr. page 618-619).

I have a statement here to read.

Yesterday Mr. English and Ms. Yoviene expressed some concerns regarding the hearing process. We think those concerns have some validity.

The Board wants to have the best record possible to have the best understanding of what we're being asked to decide. We also want to give every party a fair chance to understand what's being presented and to be able to give us the information we need.

With that in mind, we're going to modify the hearing. We're going to continue at this point to receive evidence regarding the amount of the cooperative procurement charge. We'll also receive evidence regarding policy aspects of recognizing the procurement charge, to the extent those considerations aren't based on effects related to payment and recovery of the procurement charge.

For now we're holding off on receiving evidence relating to implementing payment and recovery.

Chairman Barley memo on January 31, 2019:

The Board will issue a presubmission schedule and establish hearing dates for the implementation portion of the cooperative procurement costs hearing upon receipt from the Pennsylvania Association of Dairy Cooperatives ("PADC") of the initial submission regarding implementation.

We request that PADC's submission include evidence relative to calculation of the plant procurement charge obligation. The plant procurement charge obligation was introduced during the course of the hearing and was not thoroughly addressed in light of the Board's decision to bifurcate the hearing. It is essential to the Board's decision to fully evaluate the entire process from obligation through implementation and recovery.