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February 25, 2022

Via Email Only

Robert N. Barley, Chairman
c/o Douglas L. Eberly, Esquire
Pennsylvania Milk Marketing Board
Room 110, Agriculture Bldg.
2301 North Cameron Street
Harrisburg, PA 17110

Re: Response in Opposition to Pennsylvania Association of Milk Dealers' Motion to Strike Over-Order Premium Hearing – March 2, 2022

Dear Chairman Barley and Members of the Board:

The Pennsylvania Association of Dairy Cooperatives (“PADC”) respectfully files this Response in Opposition to the Pennsylvania Association of Milk Dealers’ (“PAMD”) Motion to Strike the witness testimony of the Pennsylvania Department of Agriculture (“PDA”), Pennsylvania Farm Bureau (“PFB”), and Mr. Timothy Wood. While neither PADC nor its witness were identified in PAMD’s Motion, it is anticipated that PAMD intends to extend its Motion to PADC’s surrebuttal.

In its Motion, PAMD argues that the testimony of Mr. Wood, as well as that of PDA and PFB’s witnesses, pertaining to distribution of the Over-Order Premium should be stricken as outside the scope of the March 2, 2022 Over-Order Premium Hearing. Without any reference to the General Rules of Administrative Practice and Procedure (“GRAPP”)¹, PAMD asserts that the scope of the hearing is narrowly limited to the four corners of this Board’s Bulletin No. 1606. By way of background, Bulletin No. 1606 provides the following:

“The purpose of the hearing is to receive testimony and exhibits concerning the level and duration of the Class I over-order premium.”

Bulletin No. 1606 (February 2, 2022).

¹ The General Rules of Administrative Practice and Procedure (“GRAPP”) are applied to the activities of and proceedings before the Pennsylvania Milk Marketing Board. 7 Pa. Code § 141.2 (Rules of Practice and Procedure Before The Board).

A review of GRAPP contradicts the position asserted by PAMD. “It is the most basic premise of an administrative proceeding that both parties may present relevant and material evidence in furtherance of their respective positions.” Westinghouse Electric Co. v. Workmen’s Compensation Appeal Bd. (Pollock), 96 Pa. Cmwlth. 436, 507 A.2d 1287, 1289 (1986) (*citing* 1 Pa. Code § 35.161). Specifically, GRAPP § 35.161 (“Form and Admissibility of Evidence”) provides that “[i]n a proceeding before the agency head or a presiding officer, **relevant and material evidence shall be admissible**, but there shall be excluded evidence that is repetitious or cumulative, or evidence that is not of the kind which would affect reasonable and fair-minded men in the conduct of their daily affairs.” 1 Pa. Code § 35.161 (emphasis added). Moreover, it is well-settled that agencies of the Commonwealth are “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 (emphasis added); *see also*, St. Rd. Bar & Grille, Inc. v. Pa. Liquor Control Bd., 876 A.2d 346 (Pa. 2005).

Testimony proposed by PDA, PFB, PADC, and Mr. Wood concerning the distribution of the Over-Order Premium goes to the heart of both the level and duration of the Over-Order Premium. Put simply, the Over-Order Premium does not continue indefinitely by its own terms; it must be re-authorized by the Board in order to continue for the next six (6) months. All interested parties are permitted to present their respective positions as to the level and duration of the Over-Order Premium. In addition to presenting their simple, static recommendations as to level and duration, all interested parties before this Board are permitted to introduce testimony and evidence relevant to the factors utilized in formulating their respective opinions. Westinghouse Electric Co., 507 A.2d at 1289. Even a cursory review of the rebuttals and surrebuttals in this matter demonstrates that the decision factors weighing upon whether to support or oppose the Over-Order Premium are myriad. Of course, marketplace and economic conditions are given significant weight and testimony to that effect is frequently presented in every Over-Order Premium Hearing. However, other relevant and probative considerations exist, not the least of which being whether the Over-Order Premium equitably treats all Pennsylvania producers. As is evident by the submissions of PFB and Mr. Wood, this factor was given significant weight in arriving at their ultimate positions that the Over-Order Premium should be zero (\$0.00). PAMD’s Motion to Strike seeks to impermissibly limit interested parties from introducing relevant evidence weighing upon their respective decisions to support or oppose the Over-Order Premium. It is respectfully submitted that PAMD’s position flies in the face of GRAPP and well-established Pennsylvania case law. This Board should deny PAMD’s Motion to Strike.

Additionally, in its Motion to Strike, PAMD seems to allege that it is somehow prejudiced by the filings of other interested parties because it is deprived of “the opportunity to respond to a major position change by waiting until surrebuttal.” (PAMD Motion to Strike, February 23, 2022). As a basic tenet, PAMD is not entitled to know the positions and consideration points of other interested parties until they make their respective filings. Furthermore, PAMD undercut its assertion of alleged prejudice when it submitted a Witness and Exhibit List on February 23, 2022, in which it identified two witnesses and their intended testimony which it intends to present in opposition to PDA, PFB, and Mr. Wood. (PAMD Witness and Exhibit List, February 23, 2022). On its face,

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PAMD's Witness and Exhibit List makes clear that it is not prejudiced in any manner by the testimony to which it objects. PAMD will have a fair opportunity to cross-examine the witnesses presented by other interested parties, just as PAMD's witnesses will be subjected to cross-examination themselves. Accordingly, PAMD has suffered no prejudice and its Motion to Strike should be denied.

Very truly yours,

JOHNSON, DUFFIE, STEWART & WEIDNER

A handwritten signature in blue ink, appearing to read "Jason A. Statler".

Jason A. Statler
Marvin Beshore

JXS/tls
cc: All Interested Parties {*via email only*}