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Luke F. Brubaker, Chairman
c/o Douglas L. Eberly, Esq.
Pennsylvania Milk Marketing Board
Room 110, Agriculture Bldg.
2301 North Cameron Street
Harrisburg, PA 17110

RE: November 6, 2013 Over Price Premium Hearing
Motion to Strike Board Staff's Proposal To Recapture So-Called Overpayments

Dear Chairman Brubaker and Members of the Board:

A. Introduction

On behalf of the Pennsylvania Association of Milk Dealers and Dean Foods, the undersigned counsel move to strike that portion of the Board staff's October 9, 2013 pre-submission that proposes to "recapture" so-called overpayments that are said to have taken place over 45-months before the discovery of a calculation error. As the Board staff explains, due to audit errors associated with invoicing from new suppliers, the over price premium was higher than it otherwise would have been by less than 1-cent per gallon in the affected areas. And, while the Board staff's proposal might seem palatable, it is not authorized by law, is bad precedent, and would add insult to the injuries that Pennsylvania milk dealers are already facing.

As discussed herein, Pennsylvania agencies, and in particular the Milk Marketing Board, are prohibited from engaging in retroactive ratemaking just as are Federal agencies. And there is no doubt that is precisely what Board staff's pre-submission proposes. Board staff is clear that their intention is to reduce those rates that were "overstated" for a 45-month period by increasing rates going forward for a 45-month period. Making adjustments to future prices to undo past rates is nothing more than retroactive ratemaking (*see e.g.*, *Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission*, 467 A.2d 1367, 1371 (Commw. Ct. 1983)(discussing retroactive ratemaking as considering prior inadequate rates in setting future rates)**)**, and absent express statutory authority to do so, such agency action is unlawful. *Finucane v. Pennsylvania Milk Marketing Board*, 581 A.2d 1023, 1025 (Commw. Ct. 1990); *National Fuel Gas Distribution v. PUC*, 464 A.2d 546, 565-67 (Commw. Ct. 1983), *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)**.**

B. Pennsylvania Rate And Milk Marketing Board Cases Reveal The Unlawfulness Of Board Staff's Proposal

Since at least 1942, Pennsylvania has followed the rule against retroactive rate making absent an express statutory provision to the contrary. The idea is that once the agency had approved rates, those rates were the lawful rates and the revenue generated by those rates was the property of the regulated entity. In *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission*, 25 A.2d 334 (Pa. 1942), the Pennsylvania Supreme Court reversed a decision by the Public Utility Commission that granted reparations to a complainant who sought compensation for rates that were subsequently found to be unreasonable, oppressive and extortionate. *Id.* at 367.

The Supreme Court of Pennsylvania explained that the utility was entitled to rely on the rates until such time as the Commission determined that they needed to be changed. *Id*. 369. In other words, any change in the otherwise unreasonable, oppressive and extortionate rates could only be prospective. In that case, the rates were the result of actions by the utility (*i.e.*, their tariff request and the concomitant evidence of costs) that were subsequently approved by the Commission. The utility's culpability made no difference to the court, which noted "[w]e do not regard it of any significance that the tariffs designed to yield the specified gross annual revenue were prepared by appellant and approved by the commission rather than that they were set by the commission in the first instance. " *Id*. 369. Rather, the court explained that "[t]he company … was entitled to rely upon the declaration of the commission as to what was a lawful and reasonable rate until a change was made by the commission acting in its quasi legislative capacity." *Id*. 369.

The Commonwealth Court reviewing Milk Marketing Board decisions has had occasion to confirm that the Board has no authority to institute refunds to consumers, as here proposed, in the event Board-announced prices were later found to have resulted in prices higher than they otherwise should have been. In *Finucane v. Pennsylvania Milk Marketing Board*, 581 A.2d 1023, 1025 (Commw. Ct. 1990) a consumer representative questioned whether the Board could be required to provide a consumer refund for a challenged pricing order "through future adjustments and price orders." The Commonwealth Court rejected the notion that the Board could grant refunds, absent a change to the legislation, to consumers for inflated prices previously charged explaining:

> This issue was raised in *Milk Marketing Board Appeals*, 7 Pa.Commonwealth Ct. 180, 299 A.2d 197 (1973), *cert. dismissed, Alliance for Consumer Protection- Hill Dist. Branch v. Pennsylvania Milk Marketing Board*, 415 U.S. 902, 94 S.Ct. 1460, 39 L.Ed.2d 499 (1974), wherein the Court discussed the differences between utility rate cases allowing for refunds and the impossibility of refunding milk consumers. The Court stated:
>
> First, the statutes which set forth the authority of the administrative agency usually specifically refer to refunds for overcharges by the utility. Secondly, in utility cases, there are metered sales from which the utility can readily determine the amount of the refund due each of its customers. It is recognized . . . that the consuming public makes millions

> of purchases of milk and milk products in a year, creating an almost impossible circumstance under which specific refunds could be determined.
>
> *Administrative agencies in this Commonwealth have only those powers and authority granted to them by the Legislature. Regulatory agencies can do no more than the law permits. There is no specific statutory authority granted to this Board to grant refunds.*
>
> *Id.* 7 Pa.Commonwealth Ct. at 187-88, 299 A.2d at 200. To order the Board to grant refunds would constitute a usurpation by this Court of a legislative function, and that we are not prepared to do. Therefore, we conclude that if petitioner wishes to seek such relief, he should do so by way of the legislative process.

581 A.2d at 1029 (emphasis added).

Notably, even the Public Utility Commision, which has express statutory authority for refunds (*see e.g.*, 66 Pa. C. S. 1312) and which provides for refunds under strictly limited circumstances, follows the rule against retroactive ratemaking in all instances not specifically outlined in the statute in order to protect the regulated entity from confiscatory rates.

In *National Fuel Gas Distribution v. PUC*, 464 A.2d 546, 565-67 (Commw. Ct. 1983), for example, the Commonwealth Court sustained the utilities objection to an order to refund revenue generated from off-system sales (*i.e.*, spot sales) of power first concluding that the expressly stated statutory criteria for a refund has not been established and then explaining the importance of avoiding retroactive rulemaking in order to avoid confiscatory rates:

> The Legislature's failure to authorize refunds in case an item of the utility's revenue is greater than anticipated at the time of tariff approval or an item of expense is or should have been less than anticipated and approved, is sensible and equitable. It is equitable because the utility may not receive retroactive rate relief on account of expense items which are greater than anticipated or of revenue items which are lesser. It is sensible because the consideration of expense and revenue items in isolation and the requirement of refunds based only on such narrow consideration could result in the setting of confiscatory rates.

C. Staff's Refund Proposal Violates The Rule Against Retroactive Ratemaking

Here, although we have no doubt that the Board staff means well, their proposal runs afoul of the Milk Marketing Law, which does not expressly provide for refunds to consumers or disgorgement of revenue earned as a result of published prices later found in error, the rule against retroactive ratemaking, and the precedent of the Commonwealth Court.

Unlike the Pennsylvania Utility Commission, the Milk Marketing Board's authorizing statute does not have an express provision for retroactive ratemaking. Moreover, it is axiomatic that due to the ebb and flow of who sells to whom and in which areas, the proposed refund will have impacts on dealers now doing more or new business in Areas 1-4 than previously, which are inconsistent with benefits from the previous time period. Moreover, dealers still have the same costs that they would have had going forward but will now face a reduction in the

minimum price. Given the longstanding recognition that wholesale pricing continues to be driven by minimum prices, this means that the reduction will be felt in a very real way by milk dealers. Given the negative profitability and declining sales year over year, dealers cannot afford to be subjected to this retroactive rate change. Moreover, dealers relied on the prices that were announced and rationally treated the revenue generated therefrom as theirs to use in the business operations. Some used the revenue to invest, others may have paid expenses, but in all cases, they had a right to use that revenue and cannot reasonably be expected to have it sitting in a bank somewhere poised to give back. To allow this, absent express notice that this could occur by way of a statutory mandate, would be disruptive to business operations within Pennsylvania.

Further, as explained in *Finucane*, it is impossible to match customers (stores and subdealers) and consumers who may have paid overstated prices in the 45-months preceding with those who would receive the benefit going forward. The record of prior hearings (*e.g.*, May Over Order Premium hearing) shows that there have been major customer shifts recently. In other words, intentional or not, Board staff's proposal would simply foist an auditing mistake onto milk dealers, including those who may not have received a benefit (or at the same level as now extracted) during the preceding 45-months.

What is clear, however, is that the Board would not provide milk dealers with retroactive relief if they admitted to a mistake during cost replacement hearings that caused prices to be understated. Instead, the Board would grant a hearing and make changes prospectively. It simply is not rational, especially where minimum prices are known to drive pricing for wholesale sales, that the Board would not permit retroactive claims by dealers, but somehow would permit retroactive claims against dealers. That is certainly not a rational way of operating a business or regulating an industry that is by all accounts in a fragile state. Indeed, the Board staff is asking the Board to confiscate the milk dealers property right that was lawfully obtained because they sold based on the Board-announced prices at the time.

D. Federal Ratemaking Precedent Provides Further Support For A Decision to Strike Board Staff's Refund Proposal

The strong Pennsylvania precedent against retroactive ratemaking is reinforced and the underlying principles further explained in the federal ratemaking and administrative rulemaking case law, which is referenced from time to time by Pennsylvania courts. *See e.g.*, *Cheltenham*, 25 A.2d at 337 (citing *Arizona Grocery Co. v. Atchison T. & S. F. Ry.*, 284 U.S. 370, 386-389 (1932); *Mercy Reg'l Health Sys. v. Dep't of Health*, 645 A.2d 924, 928 n.7 (Pa. Commw. Ct. 1994) (noting that state administrative procedure rules were consistent with the federal APA); *Commonwealth of Pa., Unemployment Comp. Bd. of Review v. Ceja*, 427 A.2d 631, 638-39 (Pa. 1981) (citing APA standard for administrative fact finding).

There are two separate reasons arising out of the federal cases why Board Staff's proposal to collect in the future alleged past over-charges under the over price premium is unlawful. First, in the absence of express Congressional authority to the contrary, the U.S. Supreme Court affirmed in 1988 a presumption against retroactive agency action where the agency impairs the past legal rights of parties based upon prior actions. This is especially true where an agency attempts to correct an error of its own making and tries to recoup an over or

under charge. Second, in federal ratemaking cases, the D.C. Circuit Court of Appeals has separately held that agencies, again without express statutory authority to the contrary, lack the ability to correct ratemaking errors that overcharged consumers or under reimbursed providers of regulated services. In both instances, the courts have called these actions "retroactive rulemaking" and found such retroactive rulemaking to be unlawful.

The U.S. Supreme Court affirmed a presumption against retroactive rulemaking in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) (holding that an HHS attempt to cure an earlier rulemaking failure could not result in application of reimbursement rule that related back to 1981 its original action). According to Justice Scalia in his *Bowen* concurrence (now applied by the lower courts as if it were the majority), a retroactive rule forbidden by the APA is one which "alter[s] the *past* legal consequences of past actions." *Id.* 488 U.S. at 219 (Scalia concurring). The Court further defined its retroactive rule jurisprudence as prohibiting agencies from taking actions that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (holding that new jury trial right under Title VII of the Civil Rights act did not apply to cases pending at the time amendment was passed).

In *Bowen*, the Supreme Court majority discussed only HHS's lack of authority to act retroactively under the Medicare Act even though the lower court had found that neither the Medicare Act nor the APA supported retroactive rulemaking. Justice Scalia's concurrence in *Bowen* also concluded that the APA (with its "future effect" language) could not support retroactive rulemaking altering past legal consequences of past actions. The D.C. Circuit later endorsed and accepted Justice Scalia's no retroactive rulemaking authority under the APA reasoning in *Bergerco Canada*, 129 F.3d 189, 193 (D.C. Cir. 1997); and *DIRECTV v. FCC*, 110 F.3d 816, 825–26 (D.C.Cir.1997).

The presumption against agency authority to alter past legal rights through retroactive rulemaking is paramount when agency error is involved in creating the legal right later sought to be recouped. Prior to 1996, under the Food Stamp program, states were prohibited from collecting agency caused over payments out of future food stamp payments made to the same recipient. Congress amended the law in 1996 to require states to make just such future collections. But when Indiana attempted to make future collections for pre-1996 over payments resulting from Indiana's error, the court had little difficulty concluding that that result could not stand especially in light of the equities involved. *Stone v. Hamilton*, 308 F.3d 751, 757 (7th Cir. 2002) ("For years the food stamp recipients have reasonably relied on the settled expectation that their food stamp allotment would be relatively safe from forfeiture. Although the State may change the rules going forward, it would be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations to alter the rules applied to agency error overissuances which occurred prior to the enactment of the new amendment").[1]

[1] Similarly, the *Bowen* Court was clearly troubled by the Agency's lack of ability to assure that entities charged for over reimbursement were actually responsible for the amounts to be collected. "Indeed, it is difficult to see how a corrective adjustment could be made to the aggregate reimbursement paid "a provider" without performing an individual examination of the provider's expenditures in retrospect." *Bowen, supra*, 488 U.S. 210.

Beyond the general rule against retroactivity, various courts of appeal, led by the D.C. Circuit, have repeatedly held that statutory language such as found in Section 801 of the Milk Marketing Law ("to be paid") is insufficient to support retroactive ratemaking under the Federal Power Act and Natural Gas Act even where such a ratemaking is designed either to compensate consumers for over charges or utilities for under reimbursement.[2] *Consolidated Edison Co. of New York v. F.E.R.C.*, 347 F.3d 964, 969-970 (D.C. Cir. 2003) (holding that FERC correctly concluded that is lacked authority to cure through retroactive ratemaking alleged utility overcharges resulting from a failure in the deregulated market to operate properly); *City of Anaheim, Cal., v. F.E.R.C.*, 558 F.3d 521 (D.C. Cir. 2009) (vacating FERC order that retroactively permitted electricity generators to raise rates collected in the future); *City of Redding, Cal. v. F.E.R.C.*, 693 F.3d 828 (9th Cir. 2012) (holding that FERC lacked ability to retroactively revise rates applied during the California energy crisis of 2000). Most critically as with Board Staff's attempt at retroactive rulemaking here, the D.C. Circuit links its presumption against retroactive ratemaking to "rate predictabililty," "preventing discriminatory pricing," and promoting equity: "[t]he [] rule against retroactive ratemaking 'prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior months.'" *Con. Edison, supra,* at 969 *quoting Towns of Concord, Norwood, & Wellesley, Mass. V. F.E.R.C.*, 955 F.2d 67, 71 (D.C. Cir. 1992) (explaining that authority to give refunds derives from FPA section 309). Board Staff's proposal cannot stand the scrutiny of these cases and should be denied on this basis as well.

E. Conclusion

For the numerous reasons discussed herein, the Milk Dealers and Dean Foods Company respectfully file this motion to strike and therefore urge the Board to limit the hearing to issues that the Board has authority to address and grant this motion to strike Board staff's proposal to incorporate 45-months of refunds into the minimum prices going forward. There are no factual findings needed to decide this purely legal issue and therefore the Board should save the industry time and resources by focusing the scope of the hearing. Thank you.

Respectfully submitted,

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[2] The language in the Federal Power Act and Natural Gas Act is "to be thereafter paid," but Section 801's "to be paid" language clearly refers to the future acts of the Board just as Hamlet clearly was referring to his future existence in his soliloquy "to be or not to be."