

August 19, 2014

Luke F. Brubaker, Chairman
c/o Douglas L. Eberly, Esq.
Pennsylvania Milk Marketing Board
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Re: Over-Price Premium Hearing Part II

Dear Chairman Brubaker and Members of the Board:

The Pennsylvania Association of Milk Dealers, Dean Foods Company, and the Pennsylvania Food Merchants (collectively, the “Dealers” or the “Dealers/Food Merchants”) hereby move, pursuant to the Protective Order dated March 27, 2014,¹ and applicable law, to unredact Exhibit 9 of GNEMMA’s pre-submissions while maintaining its confidential status under the Protective Order. For the reasons explained herein, the Dealers respectfully urge the Board to require the Petitioners to unredact the identities of the individual operating units and to unredact the remaining material in GNEMMA Exhibit 9.

At the outset, GNEMMA’s redactions are prejudicial to the interested parties. In particular, not only do they preclude counsel from forming cross examination questions that we believe undercut GNEMMA’s cost presentation, but at a minimum, the redacted material would also provide the Board with crucial information and thus the ability to better evaluate the cost study submitted. Additionally, the redactions have precluded expert Carl Herbein, as indicated in Finding No. 8 of this pre-submitted testimony, from obtaining a full understanding of, and offering his expert opinion regarding, the evidence submitted by Mr. Stoner. In particular, the redaction of this critical information prevents Carl Herbein from providing important insight about, and potentially further criticism of, the cost presentation submitted by Mr. Stoner. The Dealers/Food Merchants stand by Mr. Herbein’s assessment that without an audit by Mr. Stoner and the interested parties’ ability to review the work papers and visit the involved facilities, much like the cost replacement process, the Board cannot conclude that the submission is reliable enough to form the basis for a cost-based mandate and pass through. (Herbein Pre-Submission at 3).

¹ Before filing this motion, undersigned counsel requested that GNEMMA unredact the materials discussed herein but the parties were unable to reach an agreement.

In truth, the lack of adequate audit and review should persuade the Board to reject the Petitioner's proposal outright, before industry resources are expended. But the redactions are also problematic for the Dealers/Food Merchants because they prevent counsel and Mr. Herbein from having the opportunity to identify and demonstrate more tangible flaws in the methodology. At this point, counsel on cross examination and Mr. Herbein in surrebuttal to Board Staff's pre-submission cannot provide much more than generalized examples of the problems with the cost data.

The Dealers request that the Board order GNEMMA to unredact the identities of the individual operating units in GNEMMA Exhibit 9 (00001-000094). *See, e.g.*, GNEMMA Ex. 9 at 1, 17, 39, 47, 61, 76, 94. The Protective Order permits parties to provide "Confidential – Attorney Eyes Only" financial information for authorized individuals including outside experts such as Mr. Herbein, in a form that omits the identity of the entity to which that information pertains. Protective Order at 2, ¶ 4. However, a party may request disclosure of that identity by stating why disclosure is appropriate if it "believes that it is necessary to know the identity of the entity to which that information pertains." Protective Order at 2, ¶ 4. The burden of persuasion is on the producing party -- here, GNEMMA -- to demonstrate why the information must be kept confidential. Protective Order at 2, ¶ 4.

Here, the identities of the operating units are necessary for counsel to elicit facts on cross examination that we believe would point out flaws in the cost data as submitted, and reinforce the unreliable nature of the cost data. Moreover, as Mr. Herbein pointed out in his pre-submitted testimony, it is likely he would be able to say more about the cost study if he knew which operating units produced which set of costs in GNEMMA Exhibit 9. Mr. Herbein noted in Finding No. 8 of his pre-submitted testimony:

[REDACTED]

[REDACTED] Without the identities of the operating units tied to the costs submitted, it is impossible to identify allocations that need further inquiry or ones that are clearly flawed. [REDACTED]

[REDACTED]

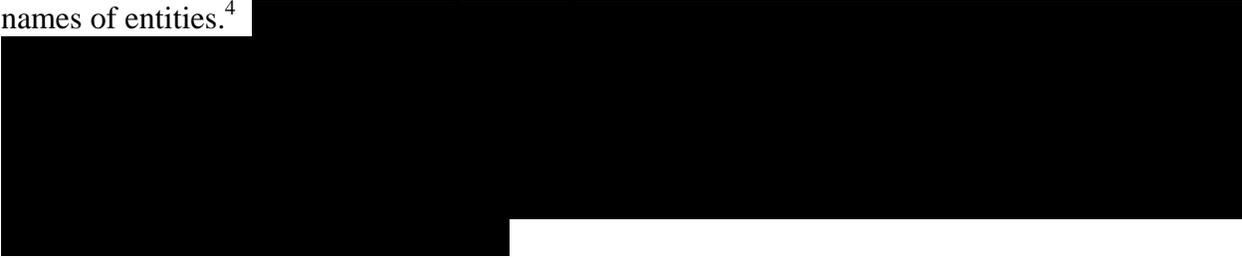
In addition, the remaining information that GNEMMA redacted should be unredacted for approved personnel under the plain language of the Protective Order and to facilitate its purpose of providing an open exchange of information. The Order directs parties that file "Confidential – Attorney Eyes Only" information to provide unredacted copies to interested parties, and a

[REDACTED]

redacted version to the public:

Pages or parts of papers or documents, exhibits, briefs, or transcripts filed with the Board that Contain “Confidential – Attorney Eyes Only” information shall be filed with the Board under seal or *in camera* The party making the filing shall provide the Board and all interested parties with a redacted copy ***for the public record and the unredacted pages or parts of papers or documents or briefs shall be clearly and prominently marked ‘Confidential – Attorney Eyes Only Subject to Protective Order.’***”

Protective Order at 3, ¶ 6 (emphasis added). Thus, under the Protective Order, counsel and authorized outside experts are necessarily entitled to view the cost information without redaction, even if it is confidential.³ See Protective Order at 3-4, ¶ 7 (listing individuals authorized to view information designated “Confidential – Attorney Eyes Only” without a qualification). The Protective Order does not contemplate or permit the redaction of information other than the names of entities.⁴



Indeed, redaction of documents is “disfavored and appropriate only in limited circumstances.” *Orion Power MidWest, L.P. v. Am. Coal Sales Co.*, No. 2:05-cv-555, 2008 WL 4462301, at *1 (W.D. Pa. Sept. 30, 2008) (granting motion to compel production of documents in unredacted form). Accordingly, Pennsylvania courts have issued protective orders permitting redactions only upon a showing that the information to be redacted is not relevant. *McCurdy v. Wedgewood Capital Mgmt. Co., Inc.*, No. Civ.A. 97-4304, 1998 WL 961897, at *2-3 (E.D. Pa. Dec. 31, 1998) (citing Fed. R. Civ. Pr. 26(c), which permits protective orders upon “good cause shown” and to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense”). In *McCurdy*, the court permitted the redaction of certain irrelevant information, but declined to permit redacting information for which the other party showed sufficient need. 1998 WL 961897, at *3. Courts are especially reluctant to permit redactions where, as here, a protective or confidentiality order is already in place. See, e.g., *Orion*, 2008 WL 4462301, at *1 (“No . . . special circumstances or legitimate grounds existed to justify the extensive redactions [because] the strict confidentiality order which is in effect would protect sensitive or proprietary

³ Under principles of contract and statutory interpretation, the Protective Order’s specific reference to omitting (*i.e.*, redacting) the names of entities while not providing this for other information, suggests that the Protective Order was for the other protected information to remain accessible. See, e.g., *Commw. Dep’t of Transp. v. Mosites Constr. Co.*, 494 A.2d 41, 43 (Pa. Commw. Ct. 1985) (under maxim *expressio unius est exclusio alterius*, the mention of particular items implies intent to exclude other items of the same general character).

⁴ As explained above, the Dealers/Food Merchants have demonstrated the relevance of the redacted items.

information from unwarranted disclosure”) (internal quotation marks omitted). Here, the redacted information is relevant to a key aspect of petitioner’s case – the information pertains to the credibility of the cost study the Petitioners are asking the Board to use to set a new mandated minimum price. *See, generally* Pre-submitted Testimony of John Stoner dated March 28, 2014.

Permitting the redactions would run afoul of the forgoing law and underlying policies by denying interested parties access to information that directly pertains to the propriety of the Petitioner’s cost presentation. The situation is compounded by the facts that Board Staff either did not have sufficient access, time, or records to fully audit the information, there is no infrastructure in place to ensure uniform development of this cost data for audit, and Mr. Herbein was denied the access he needed to vet the data at even the top level.⁵ Although there is no substitute for a proper audit, and the unredacted information will not be a panacea to the lack of an audit, the Board and interested parties have a right to determine potential issues with GNEMMA’S unaudited cost presentation. The redactions deprive the parties of this right. In addition, the question of reasonable profit -- which is part of the statutory criteria for producer prices – is impossible to determine without knowing the sources of revenue and whether they have all been accounted for.

In fact, protective orders are meant to protect confidential materials while facilitating the parties’ access to key information. *See, e.g., Zenith Radio Corp. v. Matsushita Elec. Indus. Co., LTD.*, 529 F. Supp. 866, 912 (E.D. Pa. 1981) (“even when a protective order is entered, litigants [must] have access to discovery materials for all the purposes for which they are legitimately acquired through court processes.”); *U.S. v. Luchko*, No. 06-319, 2007 WL 1651139, at *8 (E.D. Pa. June 6, 2007). In addition, the Milk Marketing Law, Administrative Rules, and PMMB’s own Bulletin provide interested parties with an opportunity to review and respond to the evidence submitted by petitioners. *See* Milk Marketing Law § 801, PMMB Bulletin No. 1494 (July 9, 2013) (“The purpose of the hearing is to receive testimony and exhibits concerning the over-price premium.”) *See also*, PA. CONS. STAT. § 505 (admitting “all relevant evidence of reasonably probative value” and permitting “[r]easonable examination and cross-examination”). This goal is at odds with the concept of redacting information that is pertinent to the hearing when a protective order is in place.

GNEMMA’S approach of redacting confidential information circumvents the Protective Order and deprives the Dealers/Food Merchants, Board, and interested parties from accurately assessing substantial data. GNEMMA should not be permitted to withhold key information that is already under the protection of a Board order. If GNEMMA is concerned about maintaining confidentiality among the respective operating units studied, surely GNEMMA can and must bear that responsibility internally. The Protective Order will maintain the information in camera and any disclosure among GNEMMA members can be controlled by GNEMMA’s counsel. To do otherwise would be prejudicial to the Dealers/Food Merchants and other interested parties, and would deprive them of the information that is crucial to developing their opposition to the premium.

⁵ The lack of any audit distinguishes the present GNEMMA effort from the Board’s long-standing and accepted use of cross section dealer data used in the cost-replacement process.

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Therefore, the Dealers/Food Merchants request that the Petitioner be ordered to provide unredacted materials to counsel for all interested parties, including the PAMD, Dean, and the Food Merchants, and permit access to other authorized persons under the Protective Order.

Respectfully submitted,

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cc: Interested Parties List