



COMMONWEALTH OF PENNSYLVANIA

October 25, 2013

Luke Brubaker, Chairman
c/o Douglas Eberly, Chief Counsel
Pennsylvania Milk Marketing Board
2301 North Cameron Street
Harrisburg, PA 17110

Re: Over-Price Premium Hearing – Response to the Motion of PAMD & Dean Foods

Dear Chairman Brubaker and Members of the Board:

This is Board Staff's response to the Motion to Strike of the Pennsylvania Milk Dealers and Dean Foods ("Dealers"). The Dealers essentially assert three R's – refund, retroactivity, and reliance.

Refund

In the *Milk Marketing Board Appeals*¹ case cited by the Dealers, the City of Pittsburgh and a consumer protection group contended that due to Board error, for twenty months "consumers have been overcharged, resulting in unjust enrichment to the dairy dealers and the retail stores." The requested remedy was to pay actual refunds to consumers. The Court acknowledged that there is no specific statutory authority for the Board to grant *refunds*. But the Court continued: "We agree with the dictum quoted above from the *Colteryahn* case, that it would be within the implied power of the agency to adjust the prices fixed for milk and milk products *in the future*" (original emphasis).

In the *Finucane*² case (which is quoted by the Dealers in the context of one of the other *Finucane* cases), amidst a potpourri of issues – none of which were upheld by the Court – the Petitioner asked the Court to *require* the Board to provide a consumer *refund*. The Court quoted *Milk Marketing Board Appeals* and declined.

We did indeed state in our presubmitted testimony that "the consumers in those areas should be able to recapture the overpayment." But we also explained that this was not a refund. "Obviously that cannot be done as refunds based on actual individual past purchases. Therefore we are asking the Board to adjust future prices..." The Board has the authority to do so.

The Pennsylvania Public Utility Commission cases cited by the Dealers are not relevant. They are generally about returning monies paid by specific customers (refunds) or utilities to those specific customers or utilities under the extensive statutory and regulatory regime of the PUC. Our proposal is not about refunds to specific customers, and the PUC statutes and regulations are not applicable.

¹ 7 Pa. Commonwealth Ct. 180, 299 A.2d 197, 200 (1973).

² *Finucane v. Pennsylvania Milk Marketing Board*, 135 Pa. Commonwealth Ct. 606, 581 A.2d 1023, 1029 (1990).

Retroactivity

The *Pennsylvania Electric Co.*³ case segment cited by the Dealers for the proposition that “making adjustments to future prices to undo past rates is nothing more than retroactive ratemaking” is actually about Section 1310 of the PUC Code *which specifically provides that prior temporary rates shall be considered when the Commissioners set permanent rates.* It is not asserting any general principle that would be applicable to the Board.

The federal retroactive rulemaking cases cited by the Dealers are not relevant either. The U.S. Supreme Court in the *Landsgraf*⁴ case cited by the Dealers explains what the test is for retroactivity: “whether it 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.” Staff’s proposal does none of those things. This is not retroactive rulemaking.

Reliance

The Dealers make a “reliance” argument which should not go unaddressed:

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.

The dealers are not being asked to give anything back. There *is* express notice in the statute that the Board has the authority to change prospective milk prices. By this reasoning, any Pennsylvania dairy farmer who built a barn when the over-order premium was at a relatively higher level could bring a challenge when the premium was reduced.

The Board has very broad authority to set prospective milk prices. That is what we are asking the Board to do. This pricing incident and its impact can be considered a “condition affecting the milk industry” within the meaning of Section 801 of the Milk Marketing Law, and therefore worthy of the Board’s consideration.

The Dealers will have the opportunity to try to convince the Board not to adopt our proposal. But there is no basis to strike it.

Thank you for your consideration.

Respectfully submitted,

Andy Saylor

Andrew L. Saylor, Staff Attorney

³ *Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission*, 467 A.2d 1367 (Commonwealth Ct. 1983)

⁴ *Landsgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)