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November 13, 2019

***Via Email Only to: [deberly@pa.gov](mailto:deberly@pa.gov)***

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

Re: Cooperative Procurement Cost Hearing  
Motion for Interim Compromise – Joint Letter Brief

Dear Chairman Barley and Members of the Board:

Please accept this joint letter brief on behalf of the Pennsylvania Association of Dairy Cooperatives (“PADC”) and the Pennsylvania Association of Milk Dealers (“PAMD”). This letter brief is submitted in reply to the letter brief of Board Staff dated November 7, 2019 and in response to the Board’s allowance of briefs post the hearing of November 6, 2019 in this matter.

The interim compromise before the Board is a product of an extended and protracted process of negotiation between the PADC and PAMD and further reflects communications with all the interested parties, including Board Staff. As we have stated and explained from the beginning, it is of the essence of the interim compromise that it not represent, in any manner, the concession by either of the primary parties of the contested legal or factual issues in the hearing. This aspect of the compromise is absolutely indispensable to the compromise itself. Within that context, the particulars agreed to, including the proposed interim order with the price sheet exhibits, have been discussed at great length and agreed to in precise detail. That precision has included the language of the footnotes to the price sheets which provide “The Class I price reflects an Interim Additional Charge of \$0.20/Cwt. pursuant to OGO A-100x” and “An Interim Additional Charge of \$0.20/Cwt. must be applied to a dealer’s minimum due calculation as applicable per OGO A-100x.” This proposed language should not be changed.

The Board Staff requests in its post-hearing letter brief that the word “cooperative” be inserted into the footnotes. The primary justification for this request is “transparency”. Upon analysis, however, the interests of transparency would not be furthered, but could be set back by the proposed Board Staff editorial insertion. As proposed, the use of the word “interim” indicates that this is not a permanent

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adjustment and minimizes the significance of the item. Moreover, the footnote points the reader to the Official General Order for those who wish to probe further into the source and basis of the interim additional charge. The fact that the charge is expressly noted to be “interim” and that there is information available to further explicate it is fully appropriate and sufficiently “transparent” under the circumstances.

The addition of the word “cooperative” to the interim additional charge rather than clarifying, the charge would inevitably add in the reader’s mind the question: “Why? Why would this charge only be for cooperatives?” Because that question would arise, the need to seek out additional information in the OGO would be more urgent than under the language as proposed. So, if the Board Staff gets what it wants and the word “cooperative” is added, resort to the OGO would also be necessary for those that want to understand why the new charge is applicable to cooperative milk only. That is the nature of the Price Sheets, which have many footnotes directing the reader to the Board’s Official General Orders for additional detail.

PADC and PAMD submit that if a producer, subdealer, or processor is reviewing the price sheet and they do not have a computer, that price sheet was likely mailed to them. Just as price sheets are mailed to those that request to be on the Board’s mailing list, so too are OGOs mailed. Whether there are many producers on that mailing list is unknown to us, but if a producer wishes to have information, they can access it. Moreover, the price sheet has a contact phone number on it whereby anybody with questions may call the Board offices. Thus, although the Board publishes the price sheets and the OGOs on the website, which makes access easier for many, a computer is not essential to a producer or any other party operating under PMMB’s regulatory program to have access to information about the program or the proposed compromise.

If “cooperative” is added to the footnote, then PADC has explanatory language that it would require. However, that explanatory language characterizes the charge in a way that is not acceptable to PAMD because it would imply concessions with respect to issues being litigated in the hearing. Therefore, the proposed language of the compromise as presented specifically avoids characterizing the charge and refers to the OGO where there is room to clearly state the facts. Furthermore, Board Staff can readily review the OGO with any farmer, subdealer, or processor that calls to discuss the new charge based on the price sheet and/or can offer to mail the OGO.

Lest there be any doubt about the legal sufficiency of the language in the price sheets, the law is clear that those dealing with the government are expected to and presumed to know the law and regulations. *See e.g., Fed. Crop Ins. Corp. v. Merrill*, 332 US 380, 384-85 (1947); see also *Dept. of Rev. v. Marros*, 431 A.2d 392, 394 (Pa. Commw. Ct. 1981). Additionally, the US Supreme Court has held, with respect to farmers in the context of disaster relief, that notice in the form of press releases to those potentially affected by a loan program need not cover every detail of the program (in that case the generous terms available were not disclosed in the press release) when the affected parties are presumed to know the law and that which is published in the Federal Register. *Lyng v. Payne*, 476 US 926, 938 (1986). A similar logic applies here where the OGOs, like the Federal Register, serve as a primary source for communicating the Board’s price setting actions. Anyone wanting more information based on the price sheets will have no shortage of ways to review the OGO and other Board materials if they truly seek more information.

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In addition, we have every reason to believe that the Board intends to be as transparent as it has been over the past year or so. In that effort, the Board will no doubt tout through social media and press release the fact that the Board approved an interim compromise. Thus, the Board will have yet another avenue to inform industry about the new charge. Nothing about the characterization of the new charge in the footnote on the price sheets would interfere with the continuation of the Board's efforts to keep the industry in the loop about the Board's contributions to the welfare of the industry.

The Board Staff makes a point of challenging, or perhaps daring, PADC and PAMD to reiterate the terms of their motion for this interim compromise. The motion speaks for itself. We have attempted in this joint letter brief to explain and justify the proposed terms of the compromise including the language of the price sheets. We stand on that explanation, the reason for it, and the reasons why any changes would create more problems than they would solve and upset the balance of the compromise.

For these reasons, PADC and PAMD respectfully request that the Board approve and adopt the Interim Proposed Compromise as presented.

Respectfully submitted,

JOHNSON, DUFFIE, STEWART & WEIDNER



Marvin Beshore

MB/tls  
cc: Wendy Yoviene, Esquire  
Interested Parties List