



Commonwealth of Pennsylvania
Milk Marketing Board
2301 North Cameron Street
Harrisburg, PA 17110-9408

717/787-4194
717/783-6492

WEB SITE: <http://www.mmb.state.pa.us>

E-mail: RA-PMMB@state.pa.us

Official General
Order No. A-943

Posted: June 6, 2007
Effective: June 13, 2007

OVER-ORDER PRICING

NOW, this 6th day of June 2007, the Commonwealth of Pennsylvania, Milk Marketing Board (Board) adopts and issues this official general order pursuant to the authority conferred by the Milk Marketing Law, 31 P.S. §§ 700j-101 – 700j-1204. This order will become effective at 12:01 a.m. on June 13, 2007.

SECTION I

The attached findings of fact and conclusions of law are incorporated herein by this reference as though fully set forth in this order.

SECTION II

(a) The Board will consider establishing an over-order price for milk produced in Pennsylvania, processed in Pennsylvania, and utilized as a Class I product in a state with a mandated Class I over-order producer price. Whether the Board establishes such an over-order price shall be based on evidence presented at a public hearing.

(b) The Board will not establish an over-order price for milk produced in Pennsylvania and processed outside Pennsylvania.

PENNSYLVANIA MILK MARKETING BOARD

Boyd E. Wolff, Chairman

Luke F. Brubaker, Member

Barbara A. Grumbine, Consumer Member

Date: June 6, 2007

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OVER-ORDER PRICING HEARING
OCTOBER 31, 2006
NOVEMBER 1, 2006
NOVEMBER 2, 2006
NOVEMBER 8, 2006
NOVEMBER 28, 2006
NOVEMBER 29, 2006
NOVEMBER 30, 2006

FINDINGS OF FACT

1. On October 31, 2006, the Pennsylvania Milk Marketing Board (Board) convened a hearing for all milk marketing areas to receive testimony and evidence concerning whether an over-order producer price should be established for Pennsylvania produced milk that is not also processed and sold as a Class I product in Pennsylvania. The hearing continued on November 1, 2, 8, 28, 29, and 30, 2006.
2. Notice of the hearing was published at 36 Pennsylvania Bulletin 5851 on September 16, 2006, and was mailed to those who have requested mailed notice of Board hearings by means of Bulletin No. 1403, dated September 6, 2006.
3. Pennsylvania Secretary of Agriculture Dennis Wolff testified on behalf of the Governor. Secretary Wolff was a dairy farmer from 1969 until becoming Secretary of Agriculture and continues to own farms and cattle. Secretary Wolff testified that the Governor's petition was prompted by the fiscal crisis facing Pennsylvania's dairy farmers. Secretary Wolff testified that both he and the Governor had spoken to dairy farmers in person and had received correspondence from dairy farmers expressing high levels of fiscal and mental stress. He testified that the basic objective of the Governor's petition was to expand the proportion of Pennsylvania dairy farm production receiving a mandated-over-order premium.
4. Secretary Wolff testified that dairy farmers were facing higher costs of production. He further testified that "agriculture is the backbone of the rural economy" with the dairy industry representing over 40 percent of the gross revenues in Pennsylvania for agriculture. Secretary Wolff testified that depressed milk prices had led to the loss of "many farms," causing a "huge impact" on the rural economy in Pennsylvania. He also testified that the then current level of low milk prices affected all types and sizes of dairy farms.
5. Nelson Habecker began dairy farming in 1971, currently had 88 cows, raises crops to feed his herd, and ships to Land O' Lakes. Mr. Habecker has a rolling herd average of 24,000 pounds (Pennsylvania's average production per cow in 2005 was 18,722 pounds). Mr. Habecker testified that in 2005 he used 94 percent of his milk check to purchase all necessary inputs and that through the first six months of 2006 he spent 113

percent of his milk income purchasing inputs. He testified that 2006 was the most difficult year he had had in business.

6. LeRoy Troester is a dairy farmer in Union County. Mr. Troester and his father have a 500 cow operation. Mr. Troester ships to Mt. Joy Farmers Cooperative. He testified that costs to operate his farm have increased. Mr. Troester testified that some of his milk was being shipped to a Class I processor outside Pennsylvania. He also testified that he was receiving \$0.13 per hundredweight for the Pennsylvania over-order premium and \$0.50 to \$0.60 per hundredweight total in premiums. At the time of his testimony Mr. Troester was receiving \$12.80 per hundredweight for his milk, which was not a “fair price for what [his] costs [had] been.”
7. Jim VanBlarcom is a dairy farmer in Bradford County with 32 years experience. He partners with his son-in-law in a 157 cow operation and partners with his brother in a 150 cow operation. His annual production per cow is 23,000 pounds, with his field crops used entirely to feed his own cows. Mr. VanBlarcom’s operations also purchase feed. Mr. VanBlarcom testified that for the nine months he had been in business with his son-in-law, their cost to produce a hundredweight of milk was about \$17.20 and that they had been paid net around \$15.13 per hundredweight for that milk. It was Mr. VanBlarcom’s opinion that the dairy industry was critical to the local economies and that in western Bradford County two-thirds of local business was engaged with either farmers or those with dairy industry-related roles, such as veterinarians and equipment dealers.
8. Glenn Gorrell is a dairy farmer in Bradford County with 26 years experience. Mr. Gorrell and his wife milk 570 cows, have 440 heifers, and crop 1,350 acres of corn and hay. All of the crops are used to feed the animals and Mr. Gorrell purchases additional grain. In 2005 his herd averaged over 23,500 pounds of milk per cow. Mr. Gorrell testified that from January 1, 2006, to October 30, 2006, his gross income was down \$224,000.00 from the same period in 2005 while his expenses had increased \$44,500.00. Mr. Gorrell testified that milk is picked up from his farm every day, with a trailer load being shipped to an ultra high temperature plant in Virginia every other day, less than a full load being shipped to a Class I plant in Lansdale every other day, and weekend loads often being shipped to a nearby cheese plant. Mr. Gorrell testified that his total premiums were in the \$0.90 per hundredweight range. Mr. Gorrell also testified that the current situation was worse economically than the first year he started farming. He further testified that his average cost of production was approximately \$15.00 per hundredweight and that he had received around \$12.80 per hundredweight for his milk for September 2006. Mr. Gorrell essentially agreed with Mr. VanBlarcom’s opinion regarding the importance of the dairy industry to Bradford County, testifying that Bradford County “operates off the dairy industry for the most part.” Mr. Gorrell testified that dairy farmers’ economic difficulties had an adverse effect on the infrastructure that serves dairy farms.
9. Kenneth Teel is an independent dairy farmer with 44 years experience on his own farm. He also sells seed to dairy farmers. He milks 102 cows with a herd average of

approximately 21,000 pounds. He grows crops, virtually all of which are fed to his animals, on approximately 438 acres. Mr. Teel testified that 2006 was one of the toughest years he had had since 1962. He testified that for the first nine months of 2006, his expenses had increased about \$14,000.00 over the same period in 2005 while his milk income had decreased about \$28,000.00. Mr. Teel also testified that for October 2006 his milk check was \$15.15 per hundredweight before deductions for hauling and advertising and that that income enabled him to barely meet his monthly expenses. Mr. Teel testified that he ships his milk to Readington Farms in New Jersey and that he receives a \$1.00 per hundredweight premium.

10. Charles Seidel is a dairy farmer in Berks County. He milks 50 cows and sells 2,500 pounds of milk per day to Rosenberger's Dairies in Hatfield, Pennsylvania. Mr. Seidel testified that during times of low milk prices there was an economic need to develop additional sources of revenue through premiums that would apply to more of the milk produced in Pennsylvania.
11. June Mengel is a dairy farmer in Lancaster County. She started her dairy farm in 2004 and has 43 cows and a total of 82 cattle, most of them Jersey, on a total of 50 acres. For 2006 through the time of the hearing, Ms. Mengel had averaged \$14.85 per hundredweight for the milk produced by her cows. She testified that it was "probably not viable to continue on with prices as they are." Ms. Mengel's husband is a custom operator. She testified that most of his clientele is dairy farmers, so he also feels the impact of dairy prices in his business.
12. Michael Hosterman is a dairy lending specialist for AgChoice Farm Credit. He grew up on a dairy farm and has been involved with lending to dairy farms for 16 years with Farm Credit. He directly covers York, Adams, Franklin, Fulton, Cumberland, and Perry Counties and provides support for the 52 counties in Pennsylvania served by AgChoice. Mr. Hosterman services a loan portfolio worth approximately \$60 million, primarily to dairy farmers and he testified that AgChoice is the largest agricultural lender in Pennsylvania. Mr. Hosterman testified that 2002 and 2003 were low milk price years and that during that time AgChoice saw credit quality decrease from 92 percent acceptable volume on December 31, 2001, to 89 percent acceptable volume on December 31, 2003; he attributed the majority of that decline to the dairy industry because approximately 36 percent of AgChoice's volume at that time was dairy farmers and it was one of the only industries AgChoice was involved with at the time that was experiencing a down cycle. Mr. Hosterman also testified that during 2002 and 2003 capital expenditures and major repairs were cut. When prices increased in 2004 and 2005 AgChoice's borrowers started to accelerate capital expenditures and repairs, but cash reserves were not being replenished, which Mr. Hosterman attributed to an increase in the cost of production. Mr. Hosterman testified that for 2006 year-to-date AgChoice projected that dairy farmers would have to receive \$14.50 - \$15.50 per hundredweight to cover their cost of production.
13. Mr. Hosterman testified that dairy suppliers are also experiencing significantly increased receivables when compared to 2003 and 2004. One of Mr. Hosterman's

clients is a custom operator whose receivables have increased \$100,000.00, 99 percent of which is from dairy farmers in the six county area Mr. Hosterman covers. Mr. Hosterman testified that that custom operator is trying to determine how he will collect that money and stay in business himself.

14. Tim Horn is a co-owner of Pennfield Corporation. Pennfield manufactures dairy cattle feed and nutrition supplements at four plants in Pennsylvania. Ninety percent of the feed it manufactures is sold in Pennsylvania; it has a customer base of approximately 2,000 farms. Mr. Horn testified that since March 2006 Pennfield had experienced a decrease in the volume of cattle feed sales which had not been limited to any particular geographic area and had generally been equal for all sizes of farms. The decrease in dairy feed sales for March 2006 through September 2006 was approximately \$2 million. Mr. Horn testified that the decrease in sales led to reduced income for Pennfield's commissioned sales employees, reduced hours for hourly workers, and reduced employee numbers generally.
15. Dennis Schad testified on behalf of the Cooperatives as an expert in agricultural economics and milk marketing. Mr. Schad testified that the Board-mandated over-order premium for Class I milk produced in Pennsylvania, processed in Pennsylvania, and sold in Pennsylvania had been a great benefit to the state's dairy farmers. Mr. Schad noted that since 1998 the Pennsylvania all-milk price had averaged 10 percent above the national average, which he attributed to Pennsylvania's higher than average Class I minimum prices and utilizations and the efforts of the Board. Nevertheless, Mr. Schad testified that Pennsylvania's dairy industry was declining, leading to the Cooperatives' request that a premium be mandated for Pennsylvania-produced milk distributed in other states with state-regulated over-order premiums.
16. Mr. Schad testified that while Pennsylvania dairy farmers enjoy higher milk prices than the national average, they also incur higher costs than the national average. From January 1998 through July 2006, the Pennsylvania-specific milk-feed ratio was consistently lower than the national milk-feed ratio. Mr. Schad testified that a milk-feed ratio of 3.0 is considered the threshold for dairy producers to expand or constrict milk production. Mr. Schad further testified that between January 1998 and August 2006 the Pennsylvania milk-feed ratio exceeded the expansion threshold 21 percent of the time, while the national milk feed ratio exceeded the expansion threshold 56 percent of the time. Mr. Schad also testified that common daily dairy input costs such as feed, veterinary, fuels, and marketing are increasing.
17. Mr. Schad testified that high costs and inadequate milk returns have had an adverse impact on Pennsylvania's dairy farmers. He testified that in the last seven years, 1,300 Pennsylvania dairy farmers have left the business. Mr. Schad also testified that Pennsylvania cow numbers and milk production decreased between 1998 and 2006.
18. Mr. Schad acknowledged that implementation of the Cooperatives' request could cause Pennsylvania processors to have higher raw milk costs than processors in other states when competing for the same accounts. Mr. Schad also testified that cooperatives and

marketing agencies in common utilize sales point pricing, mitigating to an extent the potential adverse competitive impact. He also acknowledged that out-of-state processors that source their milk from independent supplies could still have lower raw milk costs. However, Mr. Schad also testified that the Maryland, Delaware, and Washington, D.C., area is a raw milk deficit region, with no local supplies of milk for processors that would want to increase sales into New Jersey or Pennsylvania to displace Pennsylvania processors. Mr. Schad testified that the Cooperatives' petition would "close loopholes and level the playing field," particularly for Pennsylvania-produced milk that is processed out-of-state and then sold back into Pennsylvania.

19. Edward Gallagher testified on behalf of the Cooperatives as an expert in agricultural economics and milk marketing. Mr. Gallagher testified that the Cooperatives were seeking a change in the Board's pricing programs "to help capture additional income for dairy farmers during this terrible milk pricing and profitability environment, to reduce the variability in milk prices and to recognize state mandated premiums in other states." Mr. Gallagher testified that dairy is the largest portion of Pennsylvania's agricultural sector and financial crises that affect Pennsylvania's dairy farmers have far reaching effects beyond the farm, impacting agricultural lenders, feed dealers, implement dealers, and numerous other types of input suppliers. Mr. Gallagher further testified that as farmers and input dealers have less money to spend at local supermarkets, department stores, and other "Main Street" businesses, an agricultural financial crisis undermines the entire economic and social fabric that makes up rural Pennsylvania. Mr. Gallagher testified that Pennsylvania dairy farmers were in the midst of a "very severe financial struggle," caused by national and international market forces combined with significant increases in input prices. Mr. Gallagher further testified that the resulting cost-price squeeze made most Pennsylvania dairy farms unprofitable.
20. Mr. Gallagher testified that one aspect of the Cooperatives' request was for the Board to administer the over-order premium regulation on milk transactions occurring in Pennsylvania. This would capture milk processed in an out-of-state plant but purchased in Pennsylvania. Mr. Gallagher acknowledged that out-of-state plants will typically choose to have all purchases occur out-of-state, but nonetheless believed that such enforcement would "lead to additional income for Pennsylvania producers, a level playing field for Pennsylvania Class I plants, and will support efforts by other states to assist their dairy farmers in a manner similar to the manner" the Board supports Pennsylvania dairy farmers.
21. Mr. Gallagher did not believe that the program changes requested by the Cooperatives would adversely impact the viability of his processor-customers in Pennsylvania. Mr. Gallagher believed it would "bring [his] customers up to a level playing field so that everybody's paying the same Class I premium structure." He emphasized in particular the case of utilization in Pennsylvania by out-of-state processors purchasing Pennsylvania milk. Mr. Gallagher also testified that he did not believe that there was a competitive threat from Ohio processors for Pennsylvania processors selling in New Jersey, based on transportation costs and raw milk costs; however, he acknowledged that he had "been told" that there is packaged milk being sold in New Jersey from Ohio.

22. Joel Rotz testified on behalf of Pennsylvania Farm Bureau as an expert in dairy economics. Mr. Rotz supported the proposal that state-mandated premiums in surrounding states be paid to Pennsylvania producers who sell Class I milk in those states. Mr. Rotz testified that the average Pennsylvania dairy farmer continues to be faced with negative profit margins year after year, leading to a continual decline in dairy farm numbers in Pennsylvania; Mr. Rotz projected that the average dairy farmer in Pennsylvania would experience “historical levels” of negative profit margin in 2006. Mr. Rotz also testified that, relying on ring test numbers from the Pennsylvania Department of Agriculture Bureau of Animal Health and Diagnostic Services, commercial dairy herds in Pennsylvania had declined by 27 percent from 8,856 to 6,489 between July 1, 2001, and July 1, 2006.
23. David DeSantis testified on behalf of the Governor as an expert in the Pennsylvania Milk Marketing Law and Regulations and implementation and enforcement of the Pennsylvania Milk Marketing Law, Regulations, and Board orders. Mr. DeSantis explained that the current Board-mandated over-order premium applies to milk produced in Pennsylvania, processed in Pennsylvania, and utilized in Pennsylvania. He further explained that the Governor’s petition requested that a mandated over-order premium be applied to all Pennsylvania-produced milk that is purchased in Pennsylvania and then utilized as Class I in a state with mandated over-order pricing.
24. Mr. DeSantis testified that, in 2005, Pennsylvania-located Class I milk dealers purchased 85.3 percent of their milk from Pennsylvania producers, with 44.4 percent Pennsylvania Class I utilization and 33.3 percent out-of-state Class I utilization. Mr. DeSantis further testified that, in 2005, 14.85 percent of all Pennsylvania-produced milk was subject to the current Board-mandated over-order premium. Mr. DeSantis estimated that if Pennsylvania-produced milk that was processed out-of-state and then utilized as Class I in Pennsylvania were subject to the Board-mandated over-order premium, 16 percent of Pennsylvania-produced milk would be subject to a Board-mandated premium. Mr. DeSantis also testified that if Pennsylvania-located Class I dealers paid a mandated over-order price on Pennsylvania-produced milk utilized as Class I in New York and New Jersey, an additional 6.43 percent of Pennsylvania-produced milk would be subject to a mandated over-order price. Mr. DeSantis was unable to calculate the amount of Pennsylvania-produced milk that would be subject to a Board-mandated over-order price if Pennsylvania-produced and purchased milk was processed out-of-state and utilized as Class I out-of-state because of a lack of data.
25. Mr. DeSantis testified that voluntary or negotiated premiums are paid by processors located outside Pennsylvania. However, Mr. DeSantis opined that implementing the Governor’s petition would be beneficial in that premiums would be mandated, rather than voluntary and would be more uniform. In addition, Mr. DeSantis testified that implementation of the petition would result in uniform pricing to Pennsylvania producers for sales into any given geographic area, thus leveling the playing field for processors and causing them to compete “based on quality of product, level of service,

things processors should be competing on, not based on a bargain price that they were able to get their producers to accept.”

26. Mr. DeSantis testified regarding Board Staff’s position regarding where title to producer milk transfers. Mr. DeSantis testified that Board Staff considers title to independent producer milk to transfer at the farm from the producer to the purchaser. However, Mr. DeSantis also testified that where title transfers for cooperative milk would be a matter of agreements or contracts between the cooperative and the purchaser. The Board finds that regardless of the Board Staff’s position, the location of transfer of title to producer milk is a question of law for the Board to decide. We have been unable to locate any instance of the issue of the location of title transfer being raised before the Board for the past ten years.
27. Carl Herbein testified on behalf of the Pennsylvania Association of Milk Dealers as an expert in cost accounting, milk cost accounting, plant competitiveness, milk procurement, competitive dislocation, and milk marketing. Mr. Herbein testified that the proposals would adversely affect some Pennsylvania dealers and not affect other Pennsylvania dealers. Mr. Herbein did not study every member of the Pennsylvania Association of Milk Dealers, but of those he studied he testified that those that would be adversely affected were involved in interstate commerce and those that would not be adversely affected were not involved in interstate commerce. Mr. Herbein also testified that the dealers who would be adversely affected were those that had “a substantial number of independent producers supplying” their plants. He also testified that larger companies would be adversely affected, rather than the smaller companies.
28. Mr. Herbein testified that the potential adverse affects were attributable to the plant blend concept being altered by the proposals. He explained that the plant blend concept allows Pennsylvania processors to compete with out-of-state competitors. Mr. Herbein testified that dealers use the plant blend tools to arrive at and pay a market premium. The plant blend tools that dealers are utilizing include making out-of-state sales that are not subject to the Pennsylvania-mandated premium, being only partially regulated by the Federal Orders, and using bulk milk transfers. Mr. Herbein testified that the proposals would remove at least one of the tools and could have an effect on the other two.
29. Mr. Herbein testified that the inability to use the plant blend tools could make the dealers uncompetitive with processors in states that do not have mandated over-order prices, leading to the loss of customers. He further testified that for some Pennsylvania dealers the potential customer losses could be so significant as to threaten the financial viability of their businesses. Mr. Herbein testified that if dealers suffer economic harm and lose business, they will reduce raw milk purchases. Reduced raw milk purchases would cause the dairy farmers serving those dealers to be displaced. Mr. Herbein testified that the displaced producers would then have three options: find a more distant Class I outlet, potentially at a lower price; ship to a non-Class I facility; or join a marketing cooperative. Mr. Herbein testified that his analysis assumed that the mandated premium would be higher than the market premium.

30. Thomas Mullery is employed by Clover Farms Dairy in sales and marketing. Mr. Mullery began working in the milk business in 1963 and has held various positions with various Class I processors through the years. Mr. Mullery testified that 150 independent dairy farmers ship milk to Clover. Mr. Mullery testified that over one-half of Clover's business is selling to independent distributors in New York and New Jersey and that a mandated premium on those out-of-state sales would prevent Clover from offering competitive pricing to those customers. Mr. Mullery further testified that Clover's competition from other states that did not have a mandated premium would be able to outprice Clover; he specifically noted that competitors from Ohio, Maryland, Delaware, and Virginia would be able to out compete Clover. Mr. Mullery also testified that Costco receives dairy products for distribution in eastern Pennsylvania and New Jersey from a plant in Ohio and that the Philadelphia School District receives approximately two-thirds of its milk from a dairy in Maryland. Mr. Mullery did not know what level of premium was paid to the producers selling milk to Clover.
31. Donald Duncan is an independent milk shipper, shipping to Clover Farms Dairy. Mr. Duncan testified that, as an independent milk shipper, it is his responsibility to monitor and control to the best of his ability the premiums he receives for the milk he ships to Clover. Mr. Duncan testified that if he believes his premiums are not competitive with other processors he discusses the issue with Clover. Mr. Duncan further testified that at times this negotiation had led to increased premium payments. Mr. Duncan believed that if Clover were mandated to pay a producer premium for sales in markets outside Pennsylvania, it would make Clover less competitive with processors who were not paying a mandated premium, potentially leading to a loss of business for Clover which could then lead to producers being dropped and dire financial consequences for Clover.
32. Mary Ledman testified on behalf of the Pennsylvania Association of Milk Dealers as an expert in agricultural economics, dairy economics, and milk marketing. Ms. Ledman testified that dairy farmers do not rely solely on milk prices as their source of revenue, citing sales of bull calves, heifers, bred heifers, and cull cows, along with the federal Milk Income Loss Contract program as additional sources of income. Ms. Ledman also testified that when comparing historical milk prices an important consideration was that total milk production had increased 31% between 1982 and 2005; she testified that there are very few commodities that are able to increase supply significantly and maintain or enhance their sales prices.
33. Ms. Ledman testified that the proposals appeared to result in more money coming to Pennsylvania dairy producers, but that the practical effect would be to cause Pennsylvania dairy producers to lose markets both in-state and out-of-state. Ms. Ledman testified that Pennsylvania processors compete against processors from the southeastern United States, Ohio, and New York on sales of packaged products in New Jersey. Ms. Ledman testified that packaged milk can travel great distances. Ms. Ledman concluded that if Pennsylvania-produced milk becomes more expensive and hence less competitive versus other sources of milk, Pennsylvania will lose Class I market share. Ms. Ledman testified that the proposals would encourage Pennsylvania

processors to obtain raw milk supplies from out-of-state producers; she particularly noted Ohio as offering the greatest volume of milk.

34. Ms. Ledman compared Pennsylvania producer mailbox prices, Pennsylvania Statistical Average Minimum Prices, and Northeast Federal Order Statistical Uniform Blend Prices for January 2006 through July 2006. She testified that her analysis of the mailbox prices indicated that Pennsylvania producers received less than the Pennsylvania minimum price during that period. However, Mr. DeSantis testified that the mailbox price is the weighted average net pay price received by dairy farmers for milk, and includes all payments received for milk sold and all costs associated with marketing the milk, while the Statistical Average Minimum Price did not provide for the various deductions and assessments that the mailbox price does provide for. Mr. DeSantis also explained that the Statistical Average Minimum Price, which is published by the Board Staff, was based on the prior year's state utilization as a whole and essentially bore no meaningful relationship to the current prices being received by Pennsylvania producers. The Board finds Mr. DeSantis's testimony regarding the relationship between mailbox prices and the Pennsylvania Statistical Average Minimum Price to be persuasive and credible and further finds that no relevant comparison can be made between the two prices.
35. Mr. Schad testified that it is not appropriate to compare mailbox prices received by farmers to Statistical Uniform Blend Prices paid by handlers, noting that the mailbox price includes premiums and deductions. Mr. Gallagher also testified that a comparison of the mailbox price to the blend price was irrelevant, citing the nature of the data. Taken in conjunction with the persuasive and credible testimony of Mr. DeSantis regarding comparing mailbox prices to the Pennsylvania Statistical Average Minimum Price, the Board finds the testimony of Mr. Schad and Mr. Gallagher persuasive regarding comparing mailbox prices to blend prices and finds that no relevant comparison can be made between the two prices.
36. Laurence Bowes is the president of Balford Farms, a dairy and food distributor located in Burlington, New Jersey. In fall 2002 Balford decided to invest \$7,000,000.00 in a new facility and relocate to Burlington from Bensalem, Pennsylvania. Mr. Bowes testified that the decision to relocate to New Jersey was driven by three factors: the amount of needed land was available at a reasonable price, New Jersey was less regulated than Pennsylvania, and New Jersey milk premiums were such that the savings over Pennsylvania premiums allowed Balford to invest in the new facility and to compete in the marketplace more effectively. Mr. Bowes believed that "attaching [Board] level premiums" to Balford's milk purchases in New Jersey would "significantly impact [Balford's] ability to survive . . ." Mr. Bowes cited the competitiveness of the New Jersey market and the nature of much of Balford's business arrangements as reasons. Mr. Bowes testified that Balford typically receives about 14 trailer loads of milk per day from three Pennsylvania processors and one New Jersey processor, making Balford a "very desirable entity for a processing facility." Mr. Bowes further testified that, because of this volume, Balford could look to processors in Ohio, Maryland, New York, or other states to procure packaged milk, if the costs of

procuring milk from Pennsylvania processors increased due to a mandated premium. Although Mr. Bowes testified that he believed the premium Balford now pays for milk is less than what would be paid if the petitions were granted, he acknowledged that he did not know that for certain and, like many others who testified, did express some confusion over what premium level would be mandated or “ultimately how it would be structured.”

37. Brian Weinzerl is the controller for Galliker Dairy Company. Galliker is supplied raw milk by approximately 130 farms in west central Pennsylvania and also receives about five percent of its milk from cooperatives. Mr. Weinzerl testified that Galliker uses at least two of the three methods of blending down the cost of raw milk referred to by Mr. Herbein. He further testified that Galliker would face higher costs if the petitions were approved, thereby preventing Galliker from blending down the cost of raw milk. Mr. Weinzerl characterized the financial effect as “devastating.” Mr. Weinzerl testified that in reaching his conclusion regarding the effects of the petitions, he applied the Pennsylvania premium to volumes of milk that did not presently have a Pennsylvania premium on them.
38. Jimmy Vona owns, with his brother, Dairy Maid Dairy in Frederick, Maryland. Dairy Maid has approximately 95% Class I sales and purchases all of its raw milk from the three major cooperatives in the area. Dairy Maid milk is distributed in Maryland, West Virginia, northern Virginia, Pennsylvania, New Jersey, New York, and Delaware. Mr. Vona testified that to the extent Dairy Maid buys producer milk from Pennsylvania that is distributed in Pennsylvania and New Jersey, the proposals could adversely impact Dairy Maid. Mr. Vona believed the proposals would reduce Dairy Maid’s ability to achieve a competitive price from the cooperatives. In that case, Dairy Maid would seek to acquire an independent non-Pennsylvania supply of raw milk. Mr. Vona was also concerned that any action by Pennsylvania to change the way producer milk is priced could lead to action in other states to change producer milk pricing.
39. Donald Merrigan is the president and chief operating officer of Readington Farms, Inc, a fluid milk processing and distribution facility located in New Jersey. Readington is part of a vertically integrated system, processing and distributing private label milk products to ShopRite and PriceRite stores in New Jersey, Pennsylvania, Delaware, New York, Connecticut, Massachusetts, and Rhode Island. Mr. Merrigan testified that Readington’s primary source of raw milk is independent dairy farmers located mainly in Pennsylvania, with some in New Jersey, with the remaining requirements being filled by cooperatives and brokers in the Northeast. Mr. Merrigan testified that state-mandated premium programs do not adequately consider the competitive impact on the processor community and that they have a tendency to create competitive mismatches at the edges of their control. Mr. Merrigan explained that processors located outside the area of regulation that obtain raw milk supplies from states without state-mandated premiums would have a major competitive advantage over processors like Readington. Mr. Merrigan testified that in that case, Readington would investigate opportunities to acquire raw milk supplies from states other than Pennsylvania or attempt to make changes to its purchase agreements with its independent producers. Mr. Merrigan

testified that Readington services a convenience store chain outside of the ShopRite and PriceRite system, but that the portion of Readington's total business associated with that customer was "very small." Mr. Merrigan also testified that Readington does not have to bid against outside vendors to service the ShopRite and PriceRite stores, but does have to "be competitive and justify the investment that our parent company has made in the dairy." Mr. Merrigan testified that Readington pays a premium of \$1.00 per hundredweight to its independent producers.

40. Richard McKee testified on behalf of the Pennsylvania Association of Milk Dealers as an expert in milk marketing regulations. Mr. McKee is an independent consultant with over 32 years of experience in dairy regulation at the federal level with the United States Department of Agriculture. From 1994 until his retirement in 2004, Mr. McKee was the Deputy Administrator of Dairy Programs and managed the Federal Milk Order program. Mr. McKee testified that the proposals would "usurp the power of the Federal Milk Order program" and could materially change how milk flows in and around Pennsylvania. Mr. McKee also testified that it would be difficult for Pennsylvania to administer the programs contemplated by the proposals. Mr. McKee did not believe that Pennsylvania could obtain the necessary audited data from out-of-state handlers. Mr. McKee also noted that extending Pennsylvania's sales point pricing concept outside of Pennsylvania would be in conflict with Federal Order program pricing points, adding confusion and potentially creating disorderly milk movements. Mr. McKee also testified that the proposals would cause additional costs to dealers due to having to comply with a new reporting scheme.
41. David Arms testified on behalf of New York State Dairy Foods, Inc., as an expert in agricultural and dairy economics. New York State Dairy Foods is a trade association representing milk processors, dairy product manufacturers, and distributors in the Northeast, with members who own Class I plants in Pennsylvania, New Jersey, and New York. Mr. Arms testified that New York State Dairy Foods was opposed to the proposals for several reasons. First, the interests of producers, processors operating in interstate commerce, and consumers would be best served by changes to the Federal Orders. Second, state-mandated programs designed to regulate pricing of milk moving to out-of-state markets appear to usurp Federal authority to regulate interstate commerce. Third, the enforcement of the proposals by Pennsylvania may require joint regulation with other states, thereby requiring Federal approval. Fourth, imposing a Pennsylvania-mandated over-order price on out-of-state Class I sales without regulated resale prices would leave processors and distributors vulnerable to unfair competition and the inability to recover the extra costs incurred from the marketplace, to reliably pay the imposed premium, or even to stay in business as a partially federally-regulated handler. Fifth, if the competitive disadvantage becomes serious enough, processors may seek full Federal Order status, thus depriving Pennsylvania dairy farmers of the benefit of individual handler pooling or processors may seek unregulated milk from other states. Sixth, point of sale pricing is contrary to Northeast Federal Order provisions, confusing, and adds to competitive vulnerabilities from handlers sourcing milk that is not subject to the Pennsylvania price. Seventh, the proposals would reduce

the Class I use of Pennsylvania-produced milk by dealers able to do so. Mr. Arms also forecast higher producer prices for 2007.

42. James Buelow is employed by Worcester Creameries, Inc. Worcester Creameries is the milk supply company for three fluid milk plants in New York state. Mr. Buelow's responsibilities include supervising the producer supply of milk, purchasing additional supplies of milk as needed, selling surplus supplies of milk as needed, and all Federal Order reporting and payment. Mr. Buelow has 40 years of experience in the dairy industry, including owning and operating a dairy farm for 20 years and working for National Farmers Organization for 15 years. Mr. Buelow testified on behalf of New York State Dairy Foods, Inc. Mr. Buelow testified regarding concerns that New York State Dairy Foods had with the proposals, the primary one being that no advantages or disadvantages be created for specific processing plants. Mr. Buelow testified that the intent of the Federal Order system was to create a level playing field for farmers and processors, but that low milk prices had led to different premiums in different states, causing the playing field to be not level.
43. John Turcinov is employed by Dairy Farmers of America (DFA) Mideast Area Council as Manager of Market Information. The Mideast Area Council includes Michigan, Indiana, Ohio, most of Kentucky, western Pennsylvania, and West Virginia. Mr. Turcinov's responsibilities include preparation and review of customer invoices and price announcements and the preparation of producer pay prices. Mr. Turcinov is also a marketing committee member of the Mideast Milk Marketing Agency ("MEMMA"). Mr. Turcinov testified that he is also in charge of monitoring and evaluating supply and demand conditions in the states of DFA's Mideast Area Council.
44. Mr. Turcinov testified that the milk supply from western Pennsylvania had declined 18% between 1994 and 2005. He also testified that the milk supply in eastern Ohio had declined 10%, while the supply in western Ohio had increased 25% during the same period. Mr. Turcinov further testified that, for all classes of milk, Michigan and western Ohio had supplies greater than demand, but eastern Ohio, western Pennsylvania, and Kentucky all had supplies that were less than demand.
45. Mr. Turcinov testified that MEMMA represents approximately 70% to 75% of the milk in its marketing area. Mr. Turcinov testified that MEMMA charges a point-of-sale over-order price, where the premium is based on where the customer distributes its milk. Mr. Turcinov testified that the MEMMA price for distribution in western Pennsylvania consisted of the Pennsylvania over-order premium, a fuel surcharge, and a MEMMA charge. Mr. Turcinov also testified that plants in Ohio that want to expand sales into Pennsylvania by acquiring additional independent milk would have to pay a premium to the independent producers roughly equivalent to the MEMMA price.
46. The Board finds that Pennsylvania's dairy farmers are subject to volatile price cycles fluctuating between low milk prices and high milk prices. We further find that, at times, Pennsylvania producers have a difficult time recovering from the low price portions of the cycle, leading to financial and even emotional stress and the loss of

Pennsylvania dairy farms. We also find that the loss of Pennsylvania dairy farms damages Pennsylvania's rural economy. In so finding, we find persuasive and credible the testimony of Secretary Wolff, Mr. Habecker, Mr. Troester, Mr. VanBlarcom, Mr. Gorrell, Mr. Teel, Mr. Seidel, Ms. Mengel, Mr. Hosterman, Mr. Horn, Mr. Schad, Mr. Gallagher, and Mr. Rotz to that effect.

47. Because of the adverse impacts caused by volatile price cycles and the difficulties sometimes encountered by Pennsylvania producers in recovering from the low price portions of the cycle, the Board finds that, depending on the circumstances, establishing an over-order price on milk produced in Pennsylvania, processed in Pennsylvania, and utilized as a Class I product in an out-of-state market with a state-mandated Class I over-order producer price may "be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth"

The Board recognizes that when confronted with the opportunity to establish such prices in the past, we declined to do so. Official General Order A-894 Supplemental (effective August 1, 1997). An administrative agency is not bound by the rule of *stare decisis*; however, an administrative agency must render consistent opinions and should either follow, overrule, or distinguish its own precedent. Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Public Utility Commission, 672 A.2d 352 (Pa. Commw. 1995). We believe that there is sufficient evidence on the record and changed circumstances now to overrule that part of OGO A-894 Supplemental that declined to adopt such over-order prices.

In 1997, no neighboring state had a state-mandated over-order producer price, so the proposal was rejected at that time as a nullity. Today New Jersey has a state-mandated Class I over-order price. The Board also noted in OGO A-894 Supplemental that no producer organization supported what was, at the time, Board Staff's recommendation to establish an over-order producer price on Pennsylvania produced and processed milk utilized in another state with a mandated over-order producer price. In contrast, the instant proceeding was initiated by six producer organizations, several of which that were not parties to the 1997 proceeding. Therefore, we find sufficient evidence and changed circumstances to overrule OGO A-894 Supplemental as it applies to establishing an over-order price on milk produced in Pennsylvania, processed in Pennsylvania, and utilized as a Class I product in another state with a state-mandated Class I over-order producer price.

The Board believes that title transfer issues should not be an insurmountable issue in establishing over-order prices for Pennsylvania produced and processed milk. Title transfer issues are determined by 13 Pa. C.S.A. § 2401. Where the parties to a transaction explicitly agree on where title transfers, that agreement controls. Where the parties have not explicitly agreed on where title transfers, "title passes to the buyer at the time and place at which seller completes his performance with reference to the physical delivery of the goods . . . if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title

passes to the buyer at the time and place of shipment; but if the contract requires delivery at destination, title passes on tender there”. In the case of Pennsylvania produced and processed milk (in the absence of an explicit agreement regarding title transfer) title is either going to transfer at the farm in Pennsylvania “at the time and place of shipment,” or title is going to transfer upon acceptable tender at the processing plant in Pennsylvania. Therefore, the purchase of the producer milk (in the absence of an explicit agreement to the contrary) will occur in Pennsylvania. There has been no apparent major problem regarding title transfer and/or purchase issues between the producer and the processing plant under the current over-order premium program (produced, processed, and sold in Pennsylvania) and the Board sees no reason that there should be a problem with an over-order pricing program for milk produced and processed in Pennsylvania and utilized outside Pennsylvania.

The Board finds, however, that if the circumstances surrounding a particular transaction warrant, we will hold a hearing to determine where title transfers for milk that is produced and processed in Pennsylvania.

48. The Board finds that while Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939), generally gives the Board authority to establish prices for producer milk purchased in Pennsylvania and ultimately shipped out-of-state, such authority is not without limitation. According to the Eisenberg Court “[t]he question is whether the prescription of prices to be paid producers in the effort to accomplish these ends [to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania] constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment.” The circumstances in the late 1930’s were such that the Supreme Court concluded that the effect of the law on interstate commerce was incidental.
49. Obviously, times and the dairy industry in Pennsylvania have changed since the late 1930’s. Therefore, the Board finds that establishing a specific over-order price for milk produced and processed in Pennsylvania and utilized as a Class I product in a state with a mandated over-order Class I producer price requires a public hearing. “[A]ll conditions affecting the milk industry . . .” must be examined. The Board must also determine, based on the specific circumstances, “whether the prescription of prices in the effort to ‘be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth’ constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible”

The Board finds that such a hearing will allow all parties and segments of the dairy industry to provide evidence regarding the specific effects related to the specific circumstances of establishing such over-order pricing. We are cognizant of the concerns regarding competitive issues testified to by Mr. Herbein, Mr. Mullery, Mr. Duncan, Mr. Bowes, and Mr. Weinzerl, as well as the plant-blend issues testified to by Mr. Herbein, but due to the nature of the instant proceeding, much of the testimony was somewhat general in nature. We are also sensitive to the concerns raised by Mr.

McKee, Mr. Arms, Mr. Merrigan, Mr. Vona, and Mr. Buelow, to the extent they apply to our ultimate decision. The Board believes that we will be better able to analyze and evaluate all such issues and concerns in the course of a hearing dealing with a more specific proposal regarding the level of over-order pricing proposed to be mandated and the level of voluntary or negotiated premiums already present in the marketplace.

The Board will consider holding a hearing regarding specific over-order pricing for milk produced in Pennsylvania, processed in Pennsylvania, and utilized as a Class I product in a state with a mandated over-order Class I producer price if we are petitioned to do so.

50. The Board finds that no over-order price should be established for milk that is processed outside Pennsylvania. The extensive testimony of Mr. DeSantis regarding Board Staff's position on title transfers, as well as the discussion of determining where title transfers in the Governor's brief, make clear that, absent a specific contract provision regarding title transfer, each producer-out-of-state processor transaction would have to be examined by the Board (not Board Staff, since Staff is not qualified to make such legal conclusions) on a case-by-case basis. The Board has previously found such case-by-case determinations to be unacceptable.

In Official General Order A-894 Supplemental (effective August 1, 1997) the Board found that "[l]ack of clarity as to how a regulatory order will be implemented – for example, uncertainty with regard to how the Board will determine the location of a sales transaction – would have a negative impact on business decisions concerning where, under what terms, and at what price to market milk." The Board also noted in the discussion section that making title transfer determinations on a case-by-case basis "implicates the principle that regulated entities must be given reasonable notice of what they are required to do." The concern regarding the uncertainty surrounding case-by-case title transfer determinations was one of the prime reasons the Board rejected over-order producer pricing of milk processed outside Pennsylvania.

As noted above, the Board is not bound by the rule of *stare decisis*, but we must render consistent opinions and should either follow, overrule, or distinguish our own precedent. No party offered any reason why we should now overrule our precedent regarding establishing an over-order price on milk processed out-of-state. We did eventually stop questions regarding the mechanics and minutiae of Board Staff's approach to title transfer, but no party offered any hint that any evidence would be offered regarding any reason the Board should overrule our precedent on this issue.

51. The Dealers argue that pursuant to section 801 of the Law the Board does not have the authority to grant the relief sought by the petitions. According to the Dealers, section 801 requires the Board to "ascertain . . . reasonable milk marketing areas within the Commonwealth" and requires that the Board "base all prices upon all conditions affecting the milk industry in each milk marketing area" Since, the Dealers suggest, the petitions would result in the Board establishing milk marketing areas outside Pennsylvania, and basing prices upon conditions outside Pennsylvania, the

Board may not grant any of the relief requested by the Petitioners. We believe that maintaining prices paid to Pennsylvania producers for their milk that is processed in a Pennsylvania plant will not require the Board to establish milk marketing areas outside Pennsylvania. Nor do we believe that we are prohibited from basing prices upon conditions outside Pennsylvania, if those conditions “affect[] the milk industry in [a Pennsylvania] milk marketing area”

Section 801 requires the Board to “maintain . . . prices paid to producers, to dealers and to stores for milk in the respective milk marketing areas [established within the Commonwealth].” That is precisely what we would do if we establish an over-order producer price on milk produced in Pennsylvania and processed in Pennsylvania. What we would not do is establish any milk marketing area outside of Pennsylvania or maintain any price that would be paid to producers, dealers, or stores outside of Pennsylvania. The only transaction that could possibly be priced by the Board would be the transaction between the Pennsylvania-located producer and the Pennsylvania-located processor. So the Board would maintain a price paid to producers in a Pennsylvania milk marketing area.

Nor would the Board abdicate its authority to set prices to another state. We will hold a hearing and take evidence regarding what, if any, over-order price should be established in Pennsylvania based upon “all conditions affecting the milk industry in each milk marketing area” So the Board will examine all conditions affecting the milk industry. One of those conditions may be the fact that another state has a state-mandated over-order Class I price. That fact alone, however, would not necessarily be sufficient to prove that an identical over-order Class I price should attach to Pennsylvania produced and processed milk utilized in such other state.

We also believe that if the legislature intended the Board to only examine conditions within Pennsylvania when setting prices, section 801 would have been written differently, perhaps requiring the Board to “base all prices upon all conditions **in each milk marketing area** affecting the milk industry in such area.” As the Law is written now, we believe that we are not precluded from taking into account conditions outside Pennsylvania when setting prices based upon all conditions affecting the milk industry.

52. Section 808 of the Law states “that the prices prescribed by the Board for milk produced in this Commonwealth, and sold or delivered or made available . . . for shipment into and ultimate sale in another state, shall not be destructive of the price structure of producers in such other state.” The Petitioners suggest that granting the relief that they have requested “would recognize and carry out this mandate of the Law.”

We do not believe that the Legislature intends for the Board to affirmatively act every time another state establishes a mandated over-order price. Section 801 of the Law requires the Board to establish prices that “will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth” Reading section

808 together with section 801, we believe that the Legislature intends for the Board, when setting prices, to establish prices that will be most beneficial to the public interest, best protect Pennsylvania's milk industry, and insure a sufficient quantity of pure and wholesome milk to Pennsylvania residents, and in so doing not be destructive of the price structure of producers in other states.

The Board does not believe that section 808 is a mandate to act based on the actions of other states, but rather a proscription on action in the first instance when setting prices. The Board's overwhelmingly primary mission is laid out in section 801 to establish prices that "will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth" In other words, in our view section 808 does not require the Board to react, but rather is a prohibition on taking certain action in the first place. We do not believe that our mission is to support the efforts of other states, nor is it our mission or duty to support the efforts of industry participants in other states.

CONCLUSIONS OF LAW

1. The hearing that commenced on October 31, 2006, was held pursuant to the authority granted to the Board in sections 801 and 803 of the Milk Marketing Law (Law), 31 P.S. §§ 700j-801 and 700j-803.
2. The hearing was held following adequate notice and all interested parties were given a reasonable opportunity to be heard.
3. In adopting this order, the Board considered the entire record and concludes that the order is supported by a preponderance of credible evidence and is reasonable and appropriate under sections 801 and 803 of the Law.
4. The attached order may be amended pursuant to the procedures set out in section 801 of the Law.

PENNSYLVANIA MILK MARKETING BOARD

Boyd E. Wolff, Chairman

Luke F. Brubaker, Member

Barbara A. Grumbine, Consumer Member

Date: June 6, 2007

IF YOU WISH TO RECEIVE THIS INFORMATION IN AN ALTERNATE FORMAT,
CALL 717-787-4194 OR 1-800-654-5984 (PA RELAY SERVICE FOR TDD USERS.)