

29TH DISTRICT  
JAMES J. RHOADES

PLEASE REPLY TO:



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Senate of Pennsylvania

November 20, 2001

COMMITTEES

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COMMISSIONER, EDUCATION COMMISSION OF  
THE STATES  
SPECIAL COMMITTEE ON  
INTERSCHOLASTIC ATHLETICS, CHAIRMAN

Robert E. Nyce, Executive Director  
Independent Regulatory  
Review Commission  
14<sup>th</sup> Floor, Harristown 2  
333 Market Street  
Harrisburg, PA 17101

Original: 2218

Dear Mr. Nyce:

Enclosed please find a copy of correspondence and related documentation received in my office from Frank Mariello, Vice President & General Manager of Suiza, regarding the Milk Marketing Board's recently published regulation that calls for pooling of the Pennsylvania mandated over-order premium.

As stated in his letter, Mr. Mariello has asked me to relay the strong objections of the Lehigh Valley Dairies and the Pennsylvania Association of Milk Dealers to the Milk Marketing Board's proposed regulation and encourage IRRC to file comments and objections prior to November 23, 2001. Your review of the enclosed comments filed with the Milk Marketing Board during the public comment period and appropriate response would be greatly appreciated.

Thank you in advance for your time and consideration.

Sincerely,

A handwritten signature in cursive script that reads "James J. Rhoades".  
JAMES J. RHOADES  
State Senator

JJR/pk

Enclosures

NOV 21 2001  
11:16:27  
OFFICE OF THE CLERK  
SENATE OF PENNSYLVANIA

NOV 15 2001

RECEIVED  
NOV 15 2001



November 12, 2001

Senator James Rhoades  
32 E. Centre Street  
Mahanoy City, PA 17948

Dear Senator James Rhoades:

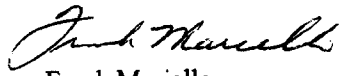
I am General Manager of Lehigh Valley Dairies, a fluid milk processor with plants located in Schuylkill Haven and Lansdale. Lehigh has been processing fluid milk for the Pennsylvania consumer since 1934 and today employs approximately 570 plant and delivery people.

The Pennsylvania Milk Marketing Board ("PMMB") has published a proposed regulation that calls for pooling of the Pennsylvania mandated over-order premium. The proposed regulation would, for the first time, require Lehigh and other fluid milk processors to share the premiums we typically pay directly to our dairy farmer suppliers with other dairy farmers that do not ship to our plants and which do not supply the fluid milk market in Pennsylvania. This will have adverse consequences on Lehigh's business. Most significantly, it will place us at a competitive disadvantage vis-à-vis fluid milk plants located outside of the Commonwealth of Pennsylvania.

Lehigh believes the proposed regulation is wholly contrary to the original intent of the Pennsylvania Milk Marketing Law requiring the PMMB to be concerned with the welfare of every component of the Pennsylvania dairy industry, including the fluid milk processor. To the extent the PMMB fails to assure the profitability of Pennsylvania fluid milk processors, Pennsylvania consumers will face higher milk prices. Without healthy local processing outlets for Pennsylvania produced milk, Pennsylvania farmers risk having to ship their milk longer distances, which would then be returned to Pennsylvania, all at increased costs to dairy farmers and consumers. We filed comments and objections with the PMMB during the public comment period, which ended on October 22, 2001. We enclose a copy of those comments together with comments filed by our trade association, the Pennsylvania Association of Milk Dealers.

We also seek your support on this matter. The Independent Regulatory Review Commission ("IRRC") has until November 23, 2001 to file comments and objections with the PMMB. If the IRRC fails to send comments to the PMMB by November 23, 2001, they will lose the opportunity to challenge the regulation as proposed or as revised by the PMMB thereafter. Accordingly, we respectfully request that you relay our strong opposition to the IRRC and encourage the members of the IRRC to file comments and objections with the PMMB prior to November 23, 2001.

Thank you for your careful consideration of this very important issue for Lehigh and the Pennsylvania milk consumer. Please do not hesitate to contact me with any questions you have.

Sincerely,  
  
Frank Mariello  
Vice President & General Manager



NOV 15 2001  
13/2001

**COMMENTS BY LEHIGH VALLEY DAIRIES  
IN OPPOSITION TO THE POOLING OF THE  
PENNSYLVANIA MANDATED OVER-ORDER PREMIUM**

2001 NOV 21 AM 10:27

REVIEW SUBMISSION

**I. Introduction**

These comments are filed on behalf of Lehigh Valley Dairies ("Lehigh"), a class I processor serving Pennsylvania's fluid milk customers since 1934 from plants located in Lansdale and Schuylkill Haven. Lehigh employs approximately 570 plant and delivery people.

Relying on the Pennsylvania Association of Milk Dealers ("PAMD"), Lehigh was not itself directly involved in the work sessions held by the Pennsylvania Milk Marketing Board (the "Board") to discuss the merits of pooling the Pennsylvania-mandated over-order premium. However, now that the Board has published its proposal to pool the Pennsylvania-mandated over-order premium, Lehigh has identified significant policy and technical concerns. As a result, Lehigh requests the Board's consideration of the following comments in opposition to the Board's proposal to pool said premium. (the "Pooling Regulation").

As a member of the Pennsylvania Association of Milk Dealers, Lehigh believes that the Board does not have the authority to implement the proposed pooling regulation and therefore adopts and incorporates by reference the comments filed by the law firm of Duane, Morris & Heckscher, LLP on PAMD's behalf. In addition, Lehigh believes that pooling the over-order premium is bad policy that will create disorderly marketing conditions and destructive competition endangering the health and viability of the Pennsylvania dairy industry by, among other things, providing Class I processors from other states with a competitive advantage over Pennsylvania Class I processors.

## **II. The Proposed Pooling Regulation Will Create Destructive Competition From Outside Of The Commonwealth**

Lehigh genuinely believes the Board has failed to anticipate the competitive disequilibrium that the Proposed Pooling Regulation will cause. The Proposed Pooling Regulation will place Lehigh Valley and other Pennsylvania Class I processors at a competitive disadvantage vis-à-vis out-of-state Class I processors in their ability to procure raw milk supplies as well as their ability to compete for retail customers within the Commonwealth. Given the Board's recognition in 1993 of the need to maintain competitive equilibrium among Class I processors within the Commonwealth and the applicability of that reasoning to the competitive situation among Pennsylvania and border state Class I processors, Lehigh believes that the following comments compel the Board to reconsider and ultimately reject the Proposed Pooling Regulation.<sup>1</sup>

### **Procurement Disadvantage**

Pooling the over-order premium, at any level, will provide out-of-state Class I dealers with the ability to return to their dairy farmer patrons more money than Pennsylvania's Class I processors will be able to return to their dairy farmer patrons for the same out-of-pocket expense. The ability to return more money to dairy farmers will make out-of-state Class I processors a more attractive alternative for Pennsylvania dairy farmers, even after taking into account transportation costs.<sup>2</sup> Thus, in order to attract milk supplies, Pennsylvania's Class I processors

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<sup>1</sup> On February 23, 1993, the Board adopted Official General Order A-874, which expressly rejected the pooling of the over-order premium in a portion of the Commonwealth. In the Order and in the face of legal challenges before the Commonwealth Court of Pennsylvania, the Board defended the decision arguing that it was concerned that processors that were not required to pool premiums (those with individual handler pools for premiums) would be able to return more to dairy farmers and would therefore have a procurement advantage compared to Class I processors that did not have to pool premiums. *See* Official General Order A-874; *see also Milk Marketing, Inc. v. Pennsylvania Milk Marketing Board*, 635 A.2d 1110, 1111 (Pa. Commw. Ct. 1993).

<sup>2</sup> In testimony before the Senate Agriculture Committee on October 16, 2001, the Board estimated that the Proposed Pooling Regulation would reduce the premium returned to Class I producers by approximately 30%. Lehigh believes that is a low estimate of the income reduction, but assuming a 30% reduction for purposes of this analysis,

will be forced to make up the difference lost to pooling or find themselves unable to expand or service existing customers. In either case, the profitability of Pennsylvania's Class I processors will be adversely impacted, rendering Pennsylvania an unattractive investment for existing and future Class I facilities.

An understanding of the present competitive situation is essential to understanding how the Proposed Pooling Regulation will create competitive disequilibrium by drawing Pennsylvania-produced milk out-of-state.<sup>3</sup> Presently, Pennsylvania's Class I processors face procurement costs that are comparable to the procurement costs facing out-of-state Class I dealers. Thus, when it comes to attracting raw milk supplies (*i.e.*, dairy farmer patrons), both groups are presently on a relatively equal footing (with Pennsylvania dealers having a slight location advantage with respect to Pennsylvania dairy farmers). Both groups pay the federal minimum price.<sup>4</sup> In addition, both groups pay premiums over and above the federal minimum price. According to the testimony of Chairwoman Minor before the Senate Agriculture Committee on October 16, 2001 as well as the testimony of industry participants during the October 3, 2001 over-order premium hearing, due to competitive circumstances, the premiums paid by Pennsylvania Class I processors generally track the premiums paid by out-of-state processors. Transcript of Over-Order Premium Hearing, Before the Pennsylvania Milk Marketing Board at 18-22 and 108-109 (Oct. 3, 2001) (hereafter Tr. at \_\_\_\_). In Pennsylvania the

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out-of-state processors will have a 40 to 50-cent advantage on a per hundredweight basis, which after covering transportation costs, will allow them to pay less than the Pennsylvania premium out-of-pocket, while nonetheless returning more to their dairy farmer patrons.

<sup>3</sup> Out-of-state processors are not required to pay the over-order premium on Pennsylvania produced milk. Thus, the exodus of Class I milk will not only hurt Pennsylvania's Class I processors, but will dilute the size of the over-order premium pool, thereby diminishing the purported benefits for non-Class I dairy farmers.

<sup>4</sup> While all Class I processors located in Pennsylvania pay the federal minimum price because the Pennsylvania Class I minimum price is based on the federal price, some are located in federally unregulated territories and thus enjoy individual handler pools as to the minimum Class I price as well. However, such plants are relatively few and for purposes of this analysis, we believe the comparison of the regulatory treatment of federally unregulated Pennsylvania processors is not critical.

premiums are comprised of the mandated over-order premium plus additional voluntary premiums, while outside of Pennsylvania the premiums are wholly voluntary but generally reflect the aggregate of the mandated and voluntary premiums paid by Pennsylvania Class I processors.

Presently, both groups pay these premiums on an "individual handler pool" basis. This allows both groups to return substantially similar amounts to their dairy farmers. Simply put, under individual handler pooling of premiums each processor directly pays its producers the premium based on the amount of Class I milk purchased. None of the premium is shared with non-Class I producers. Thus, the out-of-pocket payment made by the processor to its dairy farmer patrons is not diluted.

In contrast, under the marketwide pooling concept proposed by the Board, the Pennsylvania Class I processor will have the same out-of-pocket cost (*i.e.*, the premium) as the out-of-state Class I processor, but its producers will receive less than the full amount; the premiums paid will be aggregated and then divided among all eligible Pennsylvania farmers, even those not serving the Class I market. Under this scenario, and in a market where competition for milk supplies has been fierce (*see generally* Tr. at 99), there will be a substantial risk that dairy farmers will choose to ship to out-of-state processors with individual handler pools in order to obtain the full benefit of the Class I premium. In order to retain farmer patronage, therefore, Pennsylvania's Class I processors will have to make up the difference lost to pooling (less transportation costs associated with out-of-state shipments), which will cause Pennsylvania's Class I processors to pay more out-of-pocket than out-of-state Class I processors.

Accordingly, the proposed pooling regulation will give out-of-state Class I processors a procurement advantage over Pennsylvania's Class I processors.<sup>5</sup>

Indeed, it is difficult to imagine that Pennsylvania dairy farmers serving the Class I market will not demand to be made whole in the aftermath of pooling. Class I farmers that service the Class I market incur costs that are not incurred by other farmers. In particular, a portion of premiums paid compensate these farmers for costs associated with balancing functions, which are critical to maintaining an adequate supply of fresh healthful milk. Tr. at 74-76 and 78-80. Such costs simply do not disappear with pooling.

#### **Retail Customer Disadvantage**

Making a bad situation worse, the procurement advantage that will accrue to out-of-state processors will result in competitive disequilibrium at the wholesale level and will necessarily erode the market share of Pennsylvania's Class I processors. Faced with lower procurement costs, out-of-state processors will be equipped to price packaged fluid milk below prices charged by Pennsylvania Class I processors.

Pennsylvania's minimum wholesale prices reflect processor costs in direct and indirect ways. Among other things, the wholesale price increases when the over-order premium increases, and less directly, it increases during the cost-replacement process that takes place on a semi-annual basis to reflect increases in voluntary premiums. Thus, to the extent Pennsylvania's Class I processors face increased procurement costs associated with the Proposed Pooling Regulation, the Pennsylvania wholesale minimum price will reflect that increase. Under Pennsylvania's existing regulations, out-of-state processors can sell packaged product below the

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<sup>5</sup> Since the proposed regulation does not apply to raw milk procured outside of the Commonwealth, it will create an incentive for Pennsylvania Class I processors to procure milk from out-of-state in order to avoid the dilution effect. Encouraging milk to travel in these uneconomic ways is the epitome of disorderly marketing and certainly cannot satisfy the requirements of the Pennsylvania Milk Marketing Law.

wholesale minimum price so long as retailers take title outside of Pennsylvania. Thus, there will be virtually no limit on the ability of out-of-state processors to compete for increasing portions of the Pennsylvania fluid milk market.

**The Proposed Pooling Regulation Is Not Like The Compact**

Contrary to Chairwoman Minor's testimony before the Senate Agriculture Committee on October 16, 2001, the Proposed Pooling Regulation cannot be properly compared to the Northeast Interstate Dairy Compact ("the Compact"). Asserting a congressional exemption, that does not exist for Pennsylvania, from the proscriptions of the negative Commerce Clause in the U.S. Constitution, the Compact Commission adopted regulations that applied to out-of-compact processors. In so doing, the Commission, unlike the Board, was able to prevent out-of-compact processors from achieving the kind of competitive advantage discussed above.

**Significant Detrimental Impact on Pennsylvania's Infrastructure**

As demonstrated above, it is a grave mistake to ask Pennsylvania's Class I processors and dairy farmers serving the Class I market to subsidize the remainder of the Pennsylvania dairy industry in the face of destructive competition from Class I processors outside of the Commonwealth. To do so will mark the demise of the Class I infrastructure in Pennsylvania.

The Proposed Pooling Regulation will place Pennsylvania's Class I processors in a "Catch 22" vis-à-vis competition from out-of-state Class I processors. The choice for Class I processors will be reduced profitability and a compromised investment frontier, or market share erosion. Either scenario paints a bleak picture for a local Class I infrastructure.

In the absence of a local Class I infrastructure, operating manufacturing plants, financed as part of the balancing function for Class I plants, will become less desirable and dairy farmers



will be forced to ship longer distances for manufacturing as well as Class I outlets.<sup>6</sup> Under these circumstances the Board will be hard-pressed, it seems, to accomplish the mandate of the milk marketing law, which has at its core the requirement of locally produced milk in order to assure an adequate supply of healthful fluid milk at reasonable prices.

### **III. The Proposed Pooling Regulation Will Place Pennsylvania Consumers In The Untenable Situation Of Subsidizing Out-Of-State Sales Of Class I Packaged Product By Pennsylvania Class I Processors**

Sections 148.4 and 148.5 of the Proposed Pooling Regulation (with examples) expose the weakness and fallacy of the proposal to create a Pennsylvania Over-Order Premium Pool. Dairy C pays nothing into the Pool, but receives money from the Pool for purposes of compensating its dairy farmers. However, as discussed in the comments filed by the Pennsylvania Association of Milk Dealers, if Dairy C is a cheese plant selling most of its products out-of-state, consumers in Pennsylvania of fluid milk products end up subsidizing the cost of procuring raw milk at cheese plants for cheese sold out-of-state. Taking the example one level farther, if Dairy C is located near a major non-Pennsylvania metropolitan area and procures its milk from Pennsylvania farmers for sale outside the Commonwealth, Pennsylvania consumers will now be paying a portion of their higher milk price for the privilege of Dairy C selling milk outside the Commonwealth. Dairies A and B will be collecting consumer dollars to compensate them for the over-order premium, but those dollars will go to Dairy C for the purpose of permitting it to buy milk from its Pennsylvania farmers at a net lower cost to it than would otherwise be possible. This in turn puts pressure on Dairies A and B because they are both competing with Dairy C for a Pennsylvania milk supply and simultaneously paying a portion of Dairy C's

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<sup>6</sup> Importantly, due to certain constraints dairy farmers shipping outside the Commonwealth will not only incur additional transportation costs, but also will be denied access to the over-order premium.

procurement costs. This result is patently unfair and unacceptable to Dairies A and B, and for this reason alone, should result in rejection of the Pooling proposal.

#### **IV. The Proposed Pooling Regulation Will Substantially Increase Reporting Costs Thus Resulting In Higher Costs To Pennsylvania Consumers**

There are substantial hidden transaction costs associated with the technical elements of the Proposed Pooling Regulation. Section 148.2 of the Proposed Pooling Regulation calls for the filing of forms, the exact nature of which is yet undisclosed, on the ninth of the month. In and of itself Lehigh finds it disturbing that the Proposed Regulation does not indicate what data will be required to be reported on the form discussed in section 148.2, and objects to having to guess about the nature of that reporting requirement for purposes of these comments.

Additionally, Lehigh is concerned that the form that is due on the ninth will require the reporting of data that is not presently compiled and reported to the Pennsylvania Pool Administrator until the twenty-fifth of the month. Lehigh's concern stems from the fact that section 148.6 calls for the Pool Administrator to compile data by the sixteenth of the month that is not presently made available to the Pennsylvania Pool Administrator until the twenty-fifth of the month. In order for the Pool Administrator to satisfy the section 148.6 requirement, it seems necessary therefore, that Pennsylvania Pool Plants will be asked to report that data prior to the sixteenth which suggests section 148.2 will require advanced reporting of such data on the ninth.

Much of the data listed in section 148.6 is not available until after the twelfth and is not compiled in reportable form until the twenty-fifth of the month when the Pennsylvania Form 62 is due.<sup>7</sup> Moreover, the reporting deadline of the ninth will present logistical difficulties for Pennsylvania facilities that are also federally regulated. The federal market administrator's report is already due on the ninth. Absent the hiring of additional personnel, Lehigh will be

unable to file a federal and Pennsylvania report on the same day. The reports call for different data and differing levels of detail. Indeed, Pennsylvania requires greater geographic specificity in reporting.

Lehigh finds the prospect of earlier reporting requirements particularly objectionable since Lehigh just invested substantial sums of money in a new accounting system that is based on existing reporting deadlines. The added cost associated with these burdensome reporting requirements will be passed on to the Pennsylvania consumer through the cost replacement process. Thus, if the Board proposal is adopted without consideration of these hidden technical costs, the proposal will impose yet another cost on the Pennsylvania consumer.

#### V. Conclusion

For the above-mentioned reasons Lehigh Valley Dairies respectfully submit that the Board is compelled to reconsider and ultimately reject the Proposed Pooling Regulation.

Respectfully submitted,



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Charles M. English, Jr.  
Wendy M. Yoviene  
Thelen Reid & Priest, LLP  
701 Pennsylvania Ave, NW, Suite 800  
Washington, DC 20004  
(202) 508-4000

\* Not admitted to practice law in the  
Commonwealth of Pennsylvania

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<sup>7</sup> Pennsylvania Production is not available from our supplier until after the twelfth nor does Lehigh have the Class I utilization data until after the twelfth.

**CERTIFICATE OF SERVICE**

On this 22<sup>nd</sup> day of October, 2001, I Cherie L. Seibert, a secretary in the law office of Thelen, Reid & Priest, L.L.P., hereby certify that I have served this day true and correct copies of the foregoing Comments by Lehigh Valley Dairies In Opposition to the Pooling of the Pennsylvania Mandated Over-Order Premium in the above captioned matter, by facsimile and by depositing same in the United States First Class Mail, postage prepaid, in Washington, D.C., to those persons and addresses indicated below:

Sharon L. Grottola, General Counsel, (*via Federal Express*)  
Pennsylvania Milk Marketing Board  
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Harrisburg, PA 17110

Doug Eberly, Esq.  
Pennsylvania Milk Marketing Board  
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Harrisburg, PA 17110

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Pennsylvania Farm Bureau  
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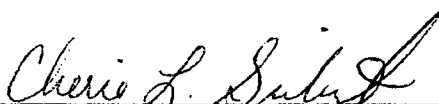
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Cherie L. Seibert

**COMMENTS OF THE PENNSYLVANIA ASSOCIATION  
OF MILK DEALERS  
RE: POOLING**

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RECEIVED SUBMISSION

**I. Introduction**

Presently pending before this Board are regulations which establish a market-wide pooling system for producer payments through which the Board would equalize the distribution of the Pennsylvania mandated over-order premium among producers of all classes of milk. The Pennsylvania Association of Milk Dealers respectfully submits that the Board is without the power to establish a market-wide pool and that, in any case, pooling would be harmful to the majority of farmers in Pennsylvania.

**II. Background<sup>1</sup>**

Raw milk is sold by farmers for four classes of uses – Classes I-IV. “Class I milk” includes milk utilized to produce fluid milk products (whole, skim, 2%, etc). Class II milk includes milk utilized to produce products such as fluid creams, yogurt, ice cream and other frozen deserts. Class III milk includes milk utilized to produce cheese products. Class IV includes milk utilized to produce powder products and butter.

The price paid to farmers for most raw milk is regulated on two levels. First, the federal government sets an absolute minimum price which must be paid to farmers in certain areas of the country (Pennsylvania has some areas which are not within the geographical areas regulated by the Federal Government). That price varies for each class of usage. The price is highest for milk

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<sup>1</sup>It the understanding of the PAMD that these comments will be forwarded to the relevant legislative committees and the Independent Regulatory Review Committee. Accordingly, this memorandum will attempt to provide sufficient background to allow those entities to understand the underlying issues.

sold for Class I usage. However, under the federal system, the money paid for all raw milk is “pooled” in a common fund and distributed to farmers in an amount based on the average price paid for all raw milk in the relevant geographical area, after component adjustments.

PMMB also has the power and duty to set minimum prices for raw milk (and for Class I products sold at wholesale and retail). Obviously, it cannot set a minimum price for raw milk which is lower than that established by the federal regulatory agency. However, it may set a higher price.

With regard to Classes II, III and IV, PMMB has historically set the minimum price at the same level as that established by the federal government. However, the Board has, for the last thirteen years, established a premium (the “over-order premium”) which must be paid for raw “Class I milk” which is produced, processed and sold in Pennsylvania.

Historically, that premium has been paid by the milk processors (dealers) directly to the farmers from whom they purchase their milk. Farmers receive the PMMB over-order premium only if they sell milk for Class I usage. The amount of that premium is based on the extent of the dealer’s Class I usage. For example, if 50% of the milk purchased by a dealer is utilized as Class I milk, that dealer is required to pay all of the Pennsylvania farmers from whom it purchases milk a premium equal to 50% of the amount set by the Board as the over-order premium. Under this system, dealers are able to utilize the premium to ensure that there will be an adequate supply of high quality milk for Class I uses since farmers selling milk for Class I usage receive the largest part of the premium.

The proposed regulations seek to change that. They would require a pooling of a certain percentage of the premiums paid for Class I milk on a state-wide basis among all Pennsylvania

farmers selling raw milk in Pennsylvania. Under this system, dealers (and consumers of fluid milk products) end up paying premiums to all farmers whether or not they supply milk for Class I usage. Stated otherwise, dealers and consumers (to whom the cost of premiums is passed through when minimum retail prices are set) end up subsidizing farmers who have nothing to do with supplying the milk they are processing and drinking.

## **II. The Proposed Market-Wide Pooling System**

The Board has issued as proposed regulations which would establish a system by which all Pennsylvania producers would share in the mandatory over-order premium which has traditionally been paid only for Class I milk. Such a system would require some dealers to pay their producers more than they do under the present system and others to pay less. Those paying less would subsidize those who pay more. In order to accomplish this transfer between dealers, the Board would establish a pooling fund, held by the State Treasurer and managed by the Board, into which some dealers would pay and from which other dealers would receive payments.

Under the proposal, 45% of the total over-order premium would be pooled among all producers selling milk for any purpose in Pennsylvania. The Board would determine a blended raw milk price on a market-wide basis based on market wide pooling of that 45%. Those dealers with Class I utilization would end up paying their producers less than before and would pay that difference into the pooling fund. Those milk handlers with Class II, III and IV utilization would pay their producers the market-wide blend price and receive payments from the fund equal to the difference between the blend price and the lower price they would have paid under the existing system. The effect of such a system would be to require consumers (and makers) of Class I products to subsidize producers whose milk is used to make entirely different products.



Moreover, the dealers with Class I utilization still have to pay the same amount of money to their producers in order to compete with other handlers. Thus, those dealers are doubly penalized.

In order to implement such a system, the Board would have to calculate a market-wide blend price, create a pooling fund and calculate and mandate the payment of funds into and out of the fund. For the reasons set forth below, the Board is without power to take such actions.

### **III. The Milk Marketing Board Is Without Power to Establish a Market-Wide Pool**

It has long been the law of this Commonwealth that "the power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined." Pennsylvania Human Relations Commission v. St. Joe Minerals Corp., 476 Pa. 302, 310, 382 A.2d 731, 735-736 (1978) (quoting Green v. Milk Control Comm'n, 340 Pa. 1, 3, 16 A.2d 9 (1940) ). See also United Artists' Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission, 535 Pa. 370, 389; 635 A.2d 612, 622 (1993); Lookenbill v. Garrett, 490 A.2d 857 (Pa. Super. 1985); Com. v. Tilghman, 531 A.2d 441 (Pa. Super. 1987).

That this principle applies fully to the Milk Marketing Law is also clear. In Green, the Supreme Court held that:

The principle guiding to decision is this: The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined: *Citizens Passenger Ry. Co. v. Public Service Com.*, 271 Pa. 39, 114 A. 642; *Swarthmore Borough v. Public Service Com.*, 277 Pa.472, 121 A. 488; *Blue Mountain Cons. Water Co. v. Public Service Com.*, 125 Pa. Superior Ct. 1, 189 A. 545; *State*

*Board of Milk Control v. Richman Ice Cream Co.*, 117 N.J. Equity 296, 175 A. 796. With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. It speaks of the "purchase" of milk by dealers, its "delivery and sale" to them; it uses the words "buy," "purchase," "prices," "bought or sold," "sell or buy." The words "consign" or "consignment" nowhere appear. We are asked by the Commonwealth to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted. If the legislature desires to change the law, this can shortly be demonstrated by an amendment at the coming session, writing into the Act a provision covering milk sent to dealers on consignment.

340 Pa. at 3. Thus, unless there is language which clearly and unmistakably grants the Board the power to create and administer a system by which producer payments can be blended, pooled or otherwise equalized, the Board lacks the power to mandate market-wide pooling. There is no such language.

Significantly, the Milk Marketing Law does refer to "blending," but only to state the

Legislature's intent:

that no provision contained herein shall be deemed or construed to prevent any cooperative . . . from blending the net proceeds of its sales or consignments or deliveries in all its markets or of its sales or deliveries within any particular market in various classes and whether in fluid form or as manufactured products, both within and without the Commonwealth, and paying its producers such blended price, with such deductions and differentials as may be authorized under contract between such association or corporation, and its producers, and with prior written approval of the board, or from making collective sales of the milk of its members and other producers represented by it, or from making such sales or deliveries at a blended price based upon sales or deliveries thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the Commonwealth, which price is to be paid either directly to the producers or to the cooperative agricultural association or corporation.

31 P.S. § 700j-809 (emphasis added). Thus, the Legislature was certainly aware of both the concept and the practice of blending and consciously chose to grant the cooperatives broad power

to blend their proceeds. Its failure explicitly to grant the Board similar power is, therefore, especially telling and prevents a finding that that power is implied in the Law.

The Board also lacks the power to require dealers to subsidize each other with regard to producer payments. While the Law does authorize the Board to require and regulate payments by dealers to producers for raw milk, it contains no grant of authority to require or regulate payments among dealers (either directly or through a pooling fund) with regard to raw milk purchased from producers. Absent a clear and unmistakable grant of authority to require such payments, the Board is without power to do so and, therefore, has no power to enforce a market-wide pool.

The principle is clear as is its application to the issue of market-wide pooling. Under Greene, the Board cannot implement a system of market-wide pooling without a clear grant of power. There is no such grant of authority in the Milk Marketing Law. Clearly, the Legislature was familiar with the practice of blending and chose not to grant the Board the authority to adopt that practice. Similarly, there is no grant of authority to require the dealers to make payments to each other related to their purchase of raw milk from producers. Accordingly, this Board is without power to implement a system of market-wide pooling of producer payments and should not convene a hearing for the purpose of considering such a system.

**1. Market-Wide Pooling Will Adversely Affect A Significant Number of Pennsylvania Producers**

The proposal for marketwide pooling is an attempt by one large national cooperative, Land O'Lakes, headquartered in Minnesota, to extend the scope of subsidies which independent

family farmers who supply Class I fluid plants will have to make to manufacturing plants which Land O' Lakes owns and operates and which largely ship their products outside of Pennsylvania.

Of the 67 counties in Pennsylvania, 28 are now covered by Federal milk orders which require some form of pooling. What Land O' Lakes wants to do is extend that pooling to cover the other 39 counties, encompassing all of Pennsylvania. In the more than 60 years of milk control in Pennsylvania, we have never had the need for market pooling in the majority of Pennsylvania counties which Land O' Lakes now wants to pool.

The independent Pennsylvania family farm will be profoundly damaged by the extension of pooling across the Commonwealth. Based on data from February of 2001, the pooling proposed by the Board would have the following effects on producers selling milk for Class I utilization.

1. A dealer with 91% Pennsylvania Class I utilization would pay its producers \$.45 per hundredweight less than was actually paid in February of 2001.
2. Another dealer with 80% Pennsylvania Class I utilization would pay its producers \$.374 per hundredweight less. That dealer has 13,000,000 pounds of class I sales.
3. Another dealer with over 21,000,000 pounds and a Pennsylvania Class I utilization rate of 47% will pay its producers \$23.4 less.

In each case, most of the producers affected are, in fact, independent farmers.

On other hand, manufacturers with no Class I utilization, the largest of which belongs to Land O' Lakes, will pay their producers a \$.226 premium. Because Pennsylvania manufacturing plants will export a greater percentage of their product out of state as compared with fluid milk plants, the effect of the proposed regulations with respect to Pennsylvania consumers is that

Pennsylvania consumers will pay more for drinking milk as a subsidy to manufacturing plants who will ship manufactured product for consumption outside of Pennsylvania. This is particularly inequitable when one considers that the vast majority of states to which the manufactured product is going to be delivered have not seen fit to take any steps to protect their family farms.

As a more outrageous inequity of Land O' Lakes proposal, it must be noted that the subsidy which Land O' Lakes seeks from Pennsylvania consumers and the damage that they would visit upon Pennsylvania independent family farms will serve not simply to give them a status of equitable fairness, but will give them a competitive advantage over their manufacturing competitors in other states. This is simply because - if Pennsylvania provides for a pooling subsidy to their manufacturing plants, that subsidy will reduce their costs and will advantage them because their competitors in other states where there is no similar pooling mechanism, will not have such a subsidy. It is not fair, appropriate, or equitable to expect Pennsylvania farmers and Pennsylvania consumers to provide a competitive advantage to Land O' Lakes.

Land O' Lakes is asking this Board to provide to it a double advantage in Pennsylvania which will not exist to the north, to the south, nor to the west of the Commonwealth. It is asking not only for support prices which will not be imposed in those other areas around us, but their asking for a pooling system which will give them an economic subsidy for their manufacturing operations. If there is a fall of prices around Pennsylvania, this will mean that Pennsylvania consumers will be paying prices that are grossly excessive when compared with the prices in surrounding areas and the only beneficiaries of those excessive prices will be the Land O' Lakes. If such happens, Pennsylvania dealers will be driven to source raw milk from out of state;

Pennsylvania consumers along state borders will object to the Board's actions; and Pennsylvania farms will ultimately lose a market for their milk.

Yet another reason why the big co-ops' proposal is inequitable lies in a simple and cursory look at the effects of changing the size of pool milk in eastern Pennsylvania. For example, under Order 1 which encompasses dealers located in PMMB Areas 1 and 4, the current Class I utilization was 43.7% in August of 2001. If we go to a Pennsylvania only pool that utilization rate will drop to 30.5%. This means that whereas previously, consumers in all of Order 1, that is, in New York, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, the District of Columbia and the rest of Pennsylvania (outside Order 1) have been subsidizing manufacturing plants, those plants which are largely located in Pennsylvania, will be subsidized only by Pennsylvania consumers. The result of this is that in order to carry the larger percentage of Pennsylvania manufacturing plants, the consumer may have to pay significantly more for their fluid milk products.

Finally, and perhaps most importantly, there is absolutely no guarantee premiums paid to Land O' Lakes will go to Pennsylvania producers. To the contrary, Land O' Lakes is a national co-op with members all over the country. There is no requirement that it use Pennsylvania premiums solely for the benefit of Pennsylvania farmers. Nor could there be. Rather, Land O' Lakes is entitled to, and presumably does, use all of its revenues to benefit all of its members. There is absolutely no reason that Pennsylvania dealers and consumers should be subsidizing farmers in other states who provide no benefit in return to Pennsylvania.

**V. Pooling Would Impose an Unfair and Undue Burden on Consumers of Class I Products**

The necessary effect of pooling producer proceeds on a market-wide basis would be to cause consumers of Class I products, primarily fluid milk products, to subsidize producers for milk used to produce other products such as cheese and ice cream. This Board has a duty to protect the consumers, as well as the producers and dealers. Requiring consumers of fluid milk products to pay a higher price to subsidize other dairy products is wholly inconsistent with that duty.

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Respectfully submitted,



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**DEALER MEMBERS OF PENNSYLVANIA**  
**ASSOCIATION OF MILK DEALERS**

Bechtel's Dairy & Restaurant  
Lewisburg, PA

Brookwood Farms  
Harrisburg, PA

Clover Farms Dairy  
Reading, PA

Carl Colterayahn Dairy, Inc.  
Pittsburgh, PA

Cream-O-Land Dairy  
Florence, NJ

Dean Dairy Products Co.  
Sharpsville, PA

Dietrich's Milk Products, LLC  
Reading, PA

Fairmont Products - (Division of Dean Dairy Products)  
Belleville, PA

Fike's Dairy, Inc.  
Uniontown, PA

Galliker Dairy Company  
Johnstown, PA

Guers Dairy  
Pottsville, PA 17901

Harrisburg Dairies, Inc.  
Harrisburg, PA

Hershey Foods Corporation  
Hershey, PA



High View, Inc., t/a Vale Wood Farms  
Loretto, PA

Kemps Foods, Inc./Crowley Foods, Inc.  
Lancaster, PA

Longacre's Modern Dairy, Inc.  
Barto, PA

Marburger Farm Dairy, Inc.  
Evans City, PA

Meadow Brook Farms Dairy Co.  
Pottstown, PA 19464

Pocono Mountain Dairies  
Blakeslee, PA

Ritchey's Dairy, Inc.  
Martinsburg, PA

Rosenberger's Dairies, Inc.  
Hatfield, PA

Ruter Bros. Dairy, Inc.  
York, PA

Schneider's Dairy, Inc.  
Pittsburgh, PA

Schneider-Valley Farms, Inc.  
Williamsport, PA

Turkey Hill Dairy  
Conestoga, PA

Turner Dairy Farms, Inc.  
Pittsburgh, PA

Tuscan/Lehigh Dairies, L.P.  
Lansdale, PA

United Dairy, Inc.  
Martins Ferry, OH

University Creamery  
University Park, PA

Upstate Farms Cooperative, Inc.  
LeRoy, NY

Wawa Dairy, Division of Wawa, Inc.  
Wawa, PA

Wengert's Dairy  
Lebanon, PA

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