STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE

IN RE: Hearings by Department of Agriculture, Concerning Milk Pricing	:
	:Hearing Dates: November 19, 2009, :December 17, 2009, January 28 & 29, 2010 :and February 22, 2010

<u>BRIEF OF GREATER NORTHEAST MILK MARKETING AGENCY ("GNEMMA")</u>

These proceedings were conducted by the Director, Division of Marketing and Development, New Jersey Department of Agriculture, pursuant to N.J.S.A. 4:12A-23 to consider "the current condition of the dairy industry" in New Jersey. More specifically, the hearing notices were to consider "whether action should be taken by the director to impose an overorder premium for dairy producers in connection with the continuation or modification of variable cost pricing of milk and milk products regulated by the New Jersey Department of Agriculture within the State of New Jersey in accordance with provisions of N.J.S.A. 4:12A-21-23."

Hearings were held on five (5) days: November 19, 2009, December 17, 2009, January 28, 29, 2010 and February 22, 2010 at varying locations in the State of New Jersey. More than 20 witnesses testified at the hearings, resulting in just over 1,000 pages of hearing transcript.

The primary issues at the hearing were, as stated in the notice, (1) whether the department should take actions to generate overorder premium revenues for dairy farmers in New Jersey and supplying New Jersey and (2) whether in connection with overorder premiums or separate therefrom, New Jersey's current system of "variable cost pricing" of milk and milk products should be revised.

This brief is filed on behalf of the Greater Northeast Milk Marketing Agency (GNEMMA) a common marketing agency of dairy farmer cooperatives. GNEMMA cooperatives are responsible for marketing the majority of milk produced by New Jersey dairy farmers. The cooperative members of GNEMMA marketing raw milk for dairy farmers in New Jersey include: Dairylea Cooperative Inc., Dairy Farmers of America, Inc., Land O'Lakes, Inc. and Dairy Marketing Services LLC.

In this brief, GNEMMA will discuss the following issues: first, the state of New Jersey's dairy industry at the producer level; second, the state of New Jersey's dairy industry with respect to market conditions for wholesale and retail sales of fluid milk products; third, options to address both producer price and dairy product price issues; and finally, some preliminary comments on the objections and oppositions raised at the hearing with respect to regulatory relief for either dairy farmers or dairy product marketers.

II. THE STATE OF NEW JERSEY'S DAIRY INDUSTRY ON THE FARM.

Milk production on New Jersey dairy farms has steadily fallen between 2000 and 2008. Hearing Exh. 4-1 (GNEMMA Exh. 1) graphically depicts the decline from 225.5 million pounds of annual production in 2000 to 2008's 150.5 million pounds. During the 2000 -- 2008 period producer numbers dropped from 160 dairy farmers to 101. This decline in milk production continued into 2009. Exh. 4-1 (GNEMMA Exh. 2), compiled by the Order 1 Market Administrator, graphically compares 2008 and 2009 milk production from New Jersey farms on a month-to-month basis and shows a continuing decline in production on the state's farms. In late 2009, NJDA counted 93 dairy farmers residing in the state. While there have been bad and good years for New Jersey's dairy farmers, 2009 was especially painful. (Hearing Exh 4-1)(TR

(11/19/09) pp. 47-59).

The decline in dairy farms and milk production in New Jersey is the product of a severe cost-price squeeze on the state's dairy farms. There is no published New Jersey--only data on cost of milk production. However, the experts testifying (Schad and Samuelson) provided regional data and data for adjoining states which, together with the data and testimony provided by individual New Jersey producers provides the Department with a stark picture of dairy farm economics in the state. On the cost side, the ERS of USDA publishes data for New York and Pennsylvania. ERS reported that operating costs plus hired labor and taxes and insurance for a dairy farm in New York in 2008 was $19.40 per cwt. Similarly, a Pennsylvania dairy farm had an ERS cost of production at $21.56 per cwt. (http://www.ers.usda.gov/Data/CostsAndReturns/data/monthly/PA.xls). While providing useful benchmarks, ERS data are derived from indexed updates of 2005 data.

A more current estimate of a nearby state's cost of production is provided by the Pennsylvania Milk Marketing Board (PMMB). The Board's staff and the Pennsylvania Farm Bureau's MSC Business Services Division have worked on a joint project to estimate the average cost of milk production within Pennsylvania. That survey can be found on the Board's website at: http://www.mmb.state.pa.us/mmb/lib/mmb/other/producer_cost_of_production_sep_09.xls. For the year 2008, the PMMB estimated that the average Pennsylvania dairy farmer earned $2.88 per cwt from his dairy enterprise. A major factor in that year's profitability was the price of milk. During that year, the Commonwealth's NASS-reported all-milk price averaged $20.00 per cwt. Staff also estimated the average level of expenses, before depreciation, that year was $18.88 per cwt. Using the same data series for New Jersey, NASS estimated the New Jersey All-Milk price for 2008 at $18.50 per cwt, which was $1.50 less than the PA price. If the Pennsylvania cost of production is representative of costs for New Jersey's dairy farmers, then it would follow that the average state dairy farmer made $1.38 per cwt in 2008. (Hearing Exh. 4-1)

The PMMB staff has also estimated the cost of production during September 2009 using an index-updating procedure that is explained and documented on the Board's website. Comparing the annual 2008 estimate and September 2009 update, dairy cost inputs decreased by an average of $1.24 per cwt. However, between 2008 and September 2009, the Pennsylvania All-Milk price decreased by $5.80 to $14.20 per cwt. The effect of decreasing milk income and a lesser value of decreasing dairy expenses erased all dairy profitability and left the average dairy farmer with a $1.76 per cwt loss in September of 2009. (Hearing Exh. 4-1 (GNEMMA attached Exibit 3)) NASS only estimates a New Jersey All-Milk price on an annual basis, so a monthly comparison is not possible. However, one could easily conclude that the New Jersey dairy farmers' fortunes were no better, and most likely much worse, than the average Pennsylvania dairy farmers' losses in September 2009. (Hearing Exh. 4-1)

Farm Credit East testimony and data submitted as Hearing Exhs. 29-1 and 29-2 summarizes data of the cost of producing milk on dairy farms throughout the northeast, including New Jersey, for the years, 2004–2008. The Farm Credit summary is a longstanding publication of milk production costs in the northeast. It is recognized in the industry as the best privately generated data on the subject. (TR. (2/22/10) pp. 125-126) It documents costs of producing milk which exceed $20.00 per cwt in portions of the region, before taking into account the expense of depreciation and before any allowance for farm family living expenses. This data-set tracks that calculated by the Pennsylvania Milk Marketing Board for Pennsylvania. (Schad Hearing Exh 4-1).

The testimony of New Jersey dairy farmers with respect to their individual operations establishes a dire cost-price squeeze:

Peter Southway of Sussex County has a mixture of Jersey and Holsteins and milks 55 cows. In 2008 his farm was profitable while experiencing cash expenses $20.48 per hundredweight. The income per hundredweight from his herd, because of high solids and butterfat was $22.63 per hundredweight for 2008. In 2009, to November, his revenue had declined 32% to $15.48 per hundredweight. He has reduced expenses by laying off employees and reducing fertilizer used for crops. Nevertheless, Mr. Southway's cash expenses are running $17.16 per hundredweight. This left a cash loss of $1.68 per hundredweight year-to-date at the time of Mr. Southway's testimony in November. (TR. (11/19/09) pp. 15-16).

Margery Eachus of Pilesgrove, New Jersey, is an owner and operator of a 300 cow farm. Ms. Eachus testified to the serious cost price squeeze being experienced at her farm. She pointed out that in 2009 her revenues had declined 41%. The cost of production on Ms. Eachus' farm has been about $18.00 per hundredweight (TR. (11/19/09) pp. 151). That cost has, however, been increasing because of the cost of carrying additional debt taken on with operating losses over the recent months. The cost of production and profitability on the Eachus farm have been adversely affected by the requirement that they cease using rBST in their milk production. This reduced their production per day and increased their cost of production per hundredweight without a commensurate offsetting increase in price. Ms. Eachus estimates that under cost and price conditions at the time of the hearing they were loosing $100 per cow, per month on their farm. (TR. (11/19/09) pp. 156). The detailed data with respect to cost on the Eachus farm were submitted to the Director for the record, in camera.

Christine Salter of Warren County New Jersey operates a 50 cow herd of Holsteins and Jerseys, with some cross breeds. Their farm is an intensive grazing based farm. In recent years they have made a number of operational changes at their farm in order to attempt to make ends meet. These have included going to the intensive grazing program, decreasing purchases of grain and reducing certain machinery use to save electricity. She summarized “these current economic times have made it extremely difficult for us to maintain a viable operation. And, of course, the outlook for the future is not particularly promising.” (TR. (11/19/09), pp. 168-69).

Ms. Salter pointed out some of the specific conditions which contribute to the high cost of production in New Jersey, these include: high property taxes, lack of local industry support services, and high general business inputs. (Id. at 169). She specifically noted that real property taxes are substantially higher than in Pennsylvania, perhaps as different as $14,000 versus $3,000 on an annual basis for a farm. On the Salter farm, Ms. Salter’s father, who is 65, has indicated this is the worst time he has ever faced economically in farming for his entire life. (Id. at 171.)

Dennis Owen Pool from Gloucester County, a fourth generation dairy farmer, testified on his own behalf and as chairman of the dairy committee of New Jersey Farm Bureau. Mr. Pool indicated that the variable cost of milk production in the northeast is about $17.00 per hundredweight. He said that in order to make a profit and recover any capital lost in recent unprofitable times, dairy farmers need at least $2.50 over their variable cost. (TR. (11/19/09) pp. 195-203).

Robert and Breanna Fulper of Lambertville, New Jersey, come from a farm which just celebrated its 100th year anniversary. Mr. Fulper is the fourth generation and a partner with his brother in the current farm. The fifth generation is "in thewing" and was represented in testimony by Breanna Fulper. The Fulper farm is a very cost efficient farm with cost of production in the $16-17.00 per hundredweight out-of-pocket cost. That does not include fixed overhead expenses. (TR. 12/17/09, pp. 148). In 2009 the income as of December was $12.70 per hundredweight on the Fulper farm. The Fulpers indicated the cost of commodity inputs particularly for grain, fuel and fertilizer have increased dramatically at their farm in recent years without countervailing price returns. Mr. Fulper indicated that given the current state of the dairy economy, they are not able to justify economic decisions which would improve and enhance their farm for additional production for the future. They presently milk 120 cows and farm more than 1,000 acres. (TR. (12/17/09) pp. 156-57).

Breanna Fulper testified to her education in dairy production and business management at Cornell University. She looks at the economics of dairying in New Jersey as someone who would like to continue in the family farm but does not know if that is possible. Ms. Fulper pointed out the higher costs faced by the farms in New Jersey versus adjoining states. These costs include real estate taxes, labor costs, higher feed expenses and, in general, distance from infrastructure. (TR. (12/17/09) pp. 163-164).

In summary, the testimony of record contains more than sufficient evidence to establish that the cost of milk production in New Jersey is higher than that in adjoining states in the region. While there is not an abundance of detailed individual herd operation data for New Jersey, the Department does have individual data submitted by a number of farmers who came and testified.

The detailed information from Pennsylvania and from all of the northeastern states through Farm Credit East provides a baseline for the cost of producing milk in the northeast. Since it is undisputed that New Jersey's costs are higher than those in other states in the region, the farm credit data and the Pennsylvania data can be used as a reference point to establish the minimum New Jersey cost of production.

There is really no dispute in the record evidence that the milk production sector in New Jersey is in financial distress. With fewer than 100 farms, a number declining annually, New Jersey is in jeopardy of losing any meaningful dairy farm sector. Finding a way to provide some relief is an urgent priority on this record.

III. MARKET CONDITIONS IN THE NEW JERSEY DAIRY SECTOR AT THE PROCESSOR/DISTRIBUTOR LEVEL

At the processing and distribution level, the New Jersey dairy industry's concerns are different from those at the farm level. Destructive pricing at the wholesale level is a problem in New Jersey, on the basis of a consensus of processor and distributor testimony, and as represented by complaints to the New Jersey Department of Agriculture. The problem derives from the dependence of the State on supplies of fluid milk products from out-of-state sources, since New Jersey is a milk deficit state in terms of both farm production and processing capacity.

The issues at the wholesale level in the dairy product market in New Jersey are important for two reasons: First, fair competition in sales on the "street"[1] is important to a healthy industry from farm to consumer. The processors and distributors which engage in the sales and

[1] "Street" sales, or sales "on the street" was a colloquial terminology used by various industry witnesses to refer to the wholesale sales of packaged fluid milk products to stores and other users.

distribution of products from plant to store and consumer are an important link in that chain; and the viability of that sector is important. But, second, the ability to deliver any price relief to New Jersey dairy farmers and the ability of New Jersey dairy farmer cooperatives to bargain for better prices from processors is influenced by pricing and competition at the 'street' level of the market.

Processors and distributors testified to destructive conditions in the New Jersey marketplace:

1. Carmen Ross for Cream-O-Lake Dairies, a distributor: "[Y]ou can go into some of these stores and they're selling it at less than the per hundredweight Class I value, which doesn't take into account hauling or packaging or processing. I think you have to stop that, because if you don't, people like the Farmlands are going to be directly hurt, the same as Cream-O-Land and every other dealer in the state." (TR. (2/22/10) p. 62)

2. George Gottberg of Consolidated Daires, a distributor: Milk from out-of-state "undersells the market". This affects farmers adversely. (TR. (1/29/10), pp. 106–07).

3. Steven Weiss of Vespasino Dairy, a distributor: "In recent years, I have seen a lot of out-of-state dairies coming in, milk companies coming in with low pricing, unfair pricing, not following the guidelines of the Division of Dairy, and pricing below my cost, as a dealer, that I can't compete with." (Weiss, (2/22/10), p. 129)

4. Michael Pedersen, CEO of Farmland Dairies, a processor and distributor: With respect to competition on-the-street "There is no question . . . it's not a free-market system that we're dealing with today" because of the advantages of plant sources from other states with administered profit margins to use. (Tr. 2/22/10, pp. 30-31)

The competitive situation at the wholesale level is a particular problem with Pennsylvania

-sourced product. In Pennsylvania, as described by several witnesses, the system of pricing administered by the Pennsylvania Milk Marketing Board provides processors with the ability to sell into New Jersey at prices well-below Pennsylvania minimums, and below fully allocated costs for the selling plants. The New Jersey 'variable cost' price limitations for wholesale product are not an effective deterrent for destructive 'street' pricing.

The ability of Pennsylvania plants to sell for low prices outside Pennsylvania was described by Michael Pedersen of Farmland Dairies on the basis of his personal experience as an executive with a dairy company in Pennsylvania: "[M]y experience in Pennsylvania . . . as a matter of course in Pennsylvania we were able to sell milk at a guaranteed margin to the system that PMMB provided us. That also meant that when we chose to do business out-of-state we were able to work with lower margins because we had already received specific margins on the milk we sold in the state. So that is the experience I had [in Pennsylvania]". This circumstance with Pennsylvania and the predominance of Pennsylvania plants selling in New Jersey means, as far as Mr. Pedersen is concerned, "that the playing field is not level. We are not doing business the same way in New Jersey as they are in Pennsylvania, and I do believe that it does affect our ability to conduct business on an equal playing field." (TR. (2/22/10) p. 37).

The Pennsylvania system also disadvantages New Jersey processors such as Farmland in paying premiums to their dairy farms. In Pennsylvania the PMMB establishes a $0.00 premium on volumes of milk processed in Pennsylvania and sold into New Jersey. Because Pennsylvania dealers do not have a mandated premium cost, but New Jersey dealers pay premiums, Pennsylvania dairies are able to be extra "competitive" on the street in New Jersey. Just as Mr. Pedersen described that the processing margin on sales from Pennsylvania to New Jersey can be impacted by the established margin for Pennsylvania dairies to sell into New Jersey, similarly on the raw milk cost side, where the Pennsylvania dairies (which pay a premium which they recover in their wholesale price (Schad TR. (1/29/10) pp. 65-72)) can pay a lower premium, if any, on volumes acquired from producers for distribution into New Jersey. Thus, the Pennsylvania system allows Pennsylvania plants to leverage margins from Pennsylvania sales (and use reimbursed premiums from Pennsylvania sales) to have lower finished product sales prices in New Jersey.

The wholesale-pricing problem is a concern for producers because it constrains the ability of producers to negotiate, and New Jersey processors to pay, producer premiums for milk for the New Jersey market.

IV. OPTIONS FOR GENERATING ADDITIONAL INCOME FOR NEW JERSEY DAIRY FARMERS

With the consensus that New Jersey dairy farmers need income assistance, there were two basic options[2] presented on the record of the hearing for the Department to consider. The first, presented by GNEMMA through the testimony of Dennis Schad is an assessment at the wholesale product level to be used for dairy farmer incomes and for support for technical assistance to New Jersey dairy farmers.[3] The second, advanced by Mr. Ross for Cream-O-Land, and endorsed by other processor and distributor interests, was establishment of minimum

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[2] We do not consider the half-hearted suggestions of Mr. Krupke and Mr. Herbein that New Jersey subsidize its dairy farmers via direct payments or farm-targeted tax subsidies. These are not within the authority of the Department of Agriculture to adopt. Furthermore, the indications are the availability of New Jersey tax-funded resources is nil in the present political and economic and budgetary environment.

[3] The "Southway" proposal/suggestion by Peter Southway could also be viewed as a variation of this option.

wholesale and retail prices which would enable payment of milk price premiums to dairy farmer suppliers. We will discuss each of these options, paying attention to both the revenue-raising and the revenue-distribution parts of any program.

The GNEMMA proposal would levy an assessment at the wholesale in-to-store point in the distribution chain. The mechanism for the assessment and collection is already in place as the Department requires licensed distributors of fluid milk products in New Jersey to report volumes of distribution monthly and pay a licensing fee based on product volume. Thus, implementing and collecting an assessment at this level should be a relatively simple administrative option. Distribution of the funds would involve administration of a pool somewhat more involved than the present pool relating to the fuel adjuster. GNEMMA believes that the Department is capable of administering such a pool and the costs of administration would come from the assessments collected. Robert Wellington described in detail the operation of the Northeast Interstate Dairy Compact as a model for a New Jersey pool. The pool would have the following key features:

1. Assessment point. Currently, NJDA collects a two cent per hundredweight licensing fee from dealers on wholesale sales of Class I products. As we understand it, this fee is collected on all milk that passes through the retail channel in New Jersey. The GNEMMA proposal is to simply impose an additional assessment at that level and earmark the incremental proceeds into a New Jersey Producers' Fund. A $.10/gallon assessment, for example, would generate about $1.15 per cwt of Class I volume. Further, an assessment on dealer to retail transactions would guarantee a level playing field for New Jersey Class I plants because, like the current licensing fee system, it would impose equal fees on dealer sales from in-state and out-of-

state dealers.

2. <u>Distribution for administration and extension programs</u>. The GNEMMA proposal would look to the model of distribution used in the Northeast Interstate Dairy Compact, with some modifications. Bob Wellington of Agri-Mark cooperative described the Compact program. (TR. (12/17/09) pp. 64-145) The GNEMMA proposal differs from the Compact in a few respects. First, the GNEMMA proposes that the Fund provide monies for Extension or other programs designed to increase the profitability of New Jersey farmers.[4] Additionally, like the Compact, the Cooperatives believe that the Fund should provide the finances for the administration of the fund and the New Jersey pool.

3. <u>Distribution to dairy farmers</u>. Concerning the distribution to dairy farmers, the Compact again provides an example of an effective and efficient governmental over-order pricing and premium distribution agency and a partial template for New Jersey. Conceptually, the Compact included three classes of dairy farmers who participated in the Compact pool. Like the Compact which included all dairy farmers residing in the states included in the Compact states, the Cooperatives propose that all New Jersey dairy farmers be included in the New Jersey pool.

Second, and again similar to the Compact, out-of-state processors (serving distributors in New Jersey) should be extended a credit on the retail assessment at the rate of the blended pool premium. The out-of-state dealer would be required to pay, pro-rata based on milk volume, the amount of this credit to the dairy farmers and cooperatives delivering milk to the out-of-state

[4] We would let the proportioning of revenues between education and distribution to the wisdom of the Department. A small percentage of the fund should provide a substantial educational and technical fund.

plant.[5]

The third class of dairy farmers participating in the New Jersey Pool would be the out-of-state dairy farmers and cooperatives which directly ship into New Jersey plants. We propose that only the milk physically received from an out-of-state dairy farmer at the five New Jersey plants which are obligated to pay the New Jersey fuel adjuster be included in the New Jersey Pool.[6] The Cooperatives' proposal limits participation of out-of-state dairy farmers to the New Jersey Pool to milk volumes actually utilized as fluid milk in New Jersey.

4. Summary. The Cooperatives propose that programs, whose goals are the enhanced profitability of New Jersey dairy farmers, be financed from the Fund. The Cooperatives further recommend that these programs address the issues of milk price volatility by offering New Jersey dairy farmers educational and pilot cost-sharing opportunities in dairy risk management. Additionally, allocations for the costs of collection, distribution and auditing the monies should be made from the fund. Finally, after program and administration costs are paid, the residual of the Fund should be distributed to dairy farmers through the New Jersey Pool. The distribution from the New Jersey Pool should be made on all milk of New Jersey dairy

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[5] Mr. Schad described how this worked during the Compact period when Land O' Lakes received a check for a small amount from Readington Farms. Since the accountants didn't bill the customer for this payment, they did not know where to post the transaction. On investigation, it was learned that Readington, a New Jersey plant, had Class I sales in the Compact area, that the dairy received a credit on their obligation to the Compact at the level of the blended Compact premium and that Readington distributed that premium to the dairy farmers and cooperatives that delivered milk into their plant.

[6] In this respect the Cooperatives' proposal for the New Jersey pool differs from the Compact. Dairy farmers residing outside of the Compact area and delivering more than half their monthly production to Compact had all of their milk participating in the Compact pool. In addition, qualifying deliveries into the Compact area included deliveries to Class II, III and IV plants. As noted above, the GNEMMA proposal for New Jersey is more restrictive.

farmers and on the milk of out-of-state dairy farmers, based on the utilization of their milk in New Jersey.

The second option to enhance dairy farmer income is the generation of funds from premium pricing of Class I milk which prices would be built into minimum wholesale and retail prices – a "PMMB-like system" as described in short-hand by several witnesses. Weiss (TR. (2/22/10), pp. 146, 149; Pedersen, pp. 30-31; Ross, p. 53, et. seq). This system would enable and require processors to pay a premium for milk for Class I use in New Jersey. Mr. Ross[7] described the key aspects and advantages of the system:

> So I think if you take a program like a PMMB, and you have to really do -- I think take it three places, but tailor it to New Jersey. I think you have to establish a farm price. You have to establish a price to the store. And you have to establish a price out of the store. On a farm price, you can do that through a premium like they do in Pennsylvania. They have a PMMB premium that's paid to producers of Pennsylvania who stay in Pennsylvania plants where there's Class I sales. I think you should pay, and I would recommend -- suggest that in your program all dairy farmers delivering to plants in New Jersey be paid that premium, whatever it would be. They all be paid it, whether they're in state or out of state. You need them to supply your market. . . . . let's establish a premium of a dollar a hundredweight, or a dollar fifty a hundredweight, whatever, and you solve that part of the problem, as I see it.
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> I see the problem in New Jersey is not only the farm problem, but you have the problem of the processor to be able to sustain and make a living and make a profit and distributors, like a Cream-O-Land and other dealers who

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[7] Mr. Ross has a distinguished background and career in milk marketing: 31 years in federal milk marketing administration, including 19 as Chief Auditor; and general manager of the Regional Cooperative Marketing Agency; and Regulations Administrator for the Northeast Interstate Dairy Compact.

> deliver. . . . . [the processors] have to be able to be a way to recapture the increased costs that they have. That's why I'm saying that you have to establish a price to the stores, a wholesale price. And it has to be reflective enough to allow them to recapture the cost of their milk, their cost, their margins, and along that line. And I think that price to the store should be enforced on all sales of milk in New Jersey, no matter the source. If it's from New Jersey, it's obvious. You have to say: Raw milk that comes in from out of state has to be subject to the same regulations or you're going to put the New Jersey processors -- you're going to put the New Jersey processors at a competitive disadvantage. As I say here on my notes, the price should be on all milk to the stores, no matter the source. And I think the price established -- the wholesale price established should be the same for in-state dealers, out-of-state dealers, in-state deliverers, out-of-state, it should be the same. There shouldn't be a discrimination on that. And once you establish that, that allows the processors and the distributors to recapture the increased cost of milk so that the producers can get the benefit of that, and that would be uniformly applied. I also think you have to look at out of state -- out-of-the-store sales. And I'm really looking at -- there are a lot of big box stores in New Jersey. They call them big box, the Wal-Marts, the Jefcos, the Sam's Clubs, and they sell a lot of items, and milk is just one of the items they sell. You can't allow them to sell it at a price that's going to be less than cost. . . . . What you have to maintain is some semblance of sanity in the industry, if you want to put that it way, or a level playing field. I think a healthy industry is healthy not only vitally important from the dairy farmers' side, it's vitally important from the processors in New Jersey, ... But if you put the program in properly, and I believe you can, I know you have the ability to do it, that the cost for in-store sales and out-of-store sales will be established by the Department. And once that's established, you establish the farm price, you establish the premium, you establish the in-store price . . ."

(TR. (2/22/10) pp. 55-58).

There are a number of technical and administrative hurdles which would need to be navigated to implement a Pennsylvania - type system in New Jersey.[8] First, to set cost-based wholesale and retail minimum prices, processor (and store) costs would need to be determined. Fortunately, Pennsylvania not only provides a possible template for this process, it already determines and publishes the costs of processing and distribution of a number of major participants in distribution of fluid milk products in New Jersey. Pennsylvania's Area 1 (Philadelphia) wholesale minimum prices are determined on the basis of the costs of dairies and distributors, all of whom also distribute in New Jersey. (TR. 1/29/10) pp. 65-72) Since Pennsylvania plant costs are determined using a cost accounting system, see 7 Pa. Code 149, which allocates costs pro-rata to all products and areas of distribution, the PMMB costs for Area 1 are the same costs – for processing, packaging, and related expenses, including distribution, as for those products distributed into New Jersey by those processors and distributors. So, New Jersey has both a system and actual costs to utilize in establishing costs for minimum prices in New Jersey. (As Mr. Ross indicated, additional hearings would of course need to be held to establish the specific prices.)

The issue remains how the premium milk prices generated by such a system would be distributed to dairy farmers. One principle is paramount on this issue: Both in-state and out-of-state producers would need to share or the system would not survive the rigors of federal Commerce Clause review. See, e.g., West Lynn Creamery v. Healy, 512 U.S. 186 (1994).

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[8] We see nothing in the 1990 settlement of the case of *Beyer Farms v. Brown*, No. 87-3017 (USDC NJ) which would constrain the Department here.

V. <u>COMMENTS ON TESTIMONY OPPOSING PRODUCER PRICE RELIEF FOR NEW JERSEY DAIRY FARMERS</u>

GNEMMA will briefly comment in their opening brief on the testimony of those who appeared at the hearing to oppose any and all action by the New Jersey Department of Agriculture to obtain additional income for New Jersey dairy farmers. We will note the position of the Pennsylvania Association of Milk Dealers, the Northeast Dairy Foods Association, and the testimony on behalf of Cumberland Dairy and Readington Farms.

We would first note that there was substantial support at the hearing from processor and distributor interests <u>favoring</u> programs that would provide milk price relief to New Jersey dairy farmers. The testimony of Mr. Ross for Cream-O-Land Dairies, and Mr. Pedersen and Mr. Clifford for Farmland Dairies stand out. However, the trade associations of processors representing the largest national processors such as Dean Foods and H.P. Hood, as well as other regional processors, made their opposition known to any action by the New Jersey Department of Agriculture to enhance New Jersey farm milk prices.

The position of the Pennsylvania Association of Milk Dealers is particularly cynical. The Pennsylvania dealers have, as testimony by many witnesses at the hearing noted, a domestic system in Pennsylvania which assures them a margin on sales in Pennsylvania. As Mr. Pedersen testified from his own Pennsylvania processing experience, this allows Pennsylvania dealers to compete on a different basis in sales out-of-state. That is, they can take their administered margins from Pennsylvania sales and use them to sell to out-of-state markets with reduced prices and margins. Without question, that has been occurring in New Jersey. It has enabled Pennsylvania processors to have a very, very, substantial share of the New Jersey marketplace but at prices which put economic pressure on New Jersey operations which are, again as Mr. Pedersen noted, not on the same playing field. The Pennsylvania dealers' position in this hearing is to oppose any price relief which the New Jersey Department of Agriculture is able to provide through its regulatory systems to New Jersey dairy farmers. The suggestion of supporting direct subsidies or new tax credits – programs not on the table of this hearing – is cover for the position opposing relief which can be obtained in this hearing. The position of the Pennsylvania dealers should be viewed just for what it is: an attempt to maintain the competitive advantage which they have in New Jersey at the expense of all others in the industry including New Jersey dairy farmers, other dairy farmers supplying the New Jersey market, and New Jersey processors and distributors.

The testimony of the Northeast Dairy Foods Association is more of the same as the Pennsylvania Association of Milk Dealers. The membership of this organization overlaps with the Pennsylvania dealers (in particular Dean Foods and H.P. Hood (which is the largest member of each)). They simply want to preserve for themselves, at the expense of New Jersey dairy farmers, the existing competitive landscape in New Jersey. Again, the suggestions that other offices of New Jersey state government (which are not participants in this hearing) should provide relief to New Jersey dairy farmers is simply cover for an unpopular (or at least an unsympathetic) position opposing support for New Jersey farmers. The Department should ignore the views of the Northeast Dairy Foods Association.

The comments of Mr. Catalana for Cumberland Dairies are a bit more nuanced than those of the trade associations. Mr. Catalana urges New Jersey dairy farmers to become more efficient in their farm practices. This is not inappropriate. GNEMMA supports this object and recommends that a portion of the revenue stream which GNEMMA suggests be adopted should be devoted to technical support for New Jersey dairy producers through the cooperative extension system at Rutgers University. When he testified, Mr. Catalana did not have the benefit of hearing the testimony from, for instance, Robert Fulper and Breanna Fulper. The Fulpers established that there are very, very efficient, productive, educated New Jersey dairy farmers whose economic viability nevertheless, because of the externalities in the current marketing environment is threatened. Relief is needed for the most efficient dairy farms if they are to remain in operation.

Mr. Merrigan of Readington Farms emphasized the deficiencies in the current federal pricing system. One may agree or not agree with Mr. Merrigan's analysis and recommended solutions. However, none of those options are within the authority of the New Jersey Department of Agriculture.

VI. CONCLUSION

GNEMMA recommends that the New Jersey Department of Agriculture respond to the plight of New Jersey dairy farmers and adopt the assessment program which was detailed by Dennis Schad at the hearing. As a supplement, or alternatively, the Department should revise the current variable cost pricing minimums at wholesale and retail in New Jersey to provide wholesale and retail minimum prices which build-in premiums at the producer level and protect processor and distributor cost of operations with a cost based margin, as described in Mr. Ross of Cream-O-land. The producer premiums generated by either program should be pooled and distributed as described by Dennis Schad for GNEMMA.

Respectfully Submitted,

Date: 04/12/10

By: /S/

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of April, 2010 served a true and correct copy of the Brief of Greater Northeast Milk Marketing Agency (GNEMMA) by electronic mail, to the following persons:

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