

**STATE OF NEW JERSEY
NEW JERSEY DEPARTMENT OF AGRICULTURE**

In the Matter of:

**Re Dairy Hearing of November 19, 2009;
December 17, 2009; January 28-29, 2010; and
February 22, 2010**

:
:
:
:
:
:
:
:
:

**POST HEARING REPLY BRIEF
OF THE
PENNSYLVANIA ASSOCIATION OF MILK DEALERS**

Submitted by:

**Wendy M. Yoviene
Charles M. English, Jr.
OBER, KALER, GRIMES & SHRIVER
1401 H Street, N.W.
Washington, DC 20005**

The Pennsylvania Association of Milk Dealers files this short reply to address issues raised by the opening brief filed by GNEMMA that were not previously addressed in PAMD's opening brief. Also, as this brief was being finalized, PAMD had the opportunity to receive and review the brief filed by the New Jersey Farm Bureau and thus we comment very briefly on two points raised therein. In general, PAMD's opening brief already addressed the vast majority of issues raised by GNEMMA in its opening brief and by the Farm Bureau in today's filing. Nevertheless, a few additional points merit comment.

First, GNEMMA acknowledges that in order to avoid Commerce Clause problems, any premium that is imposed on all milk sold in New Jersey must be shared by all dairy farmers supplying the market. (GNEMMA Br. 17). PAMD of course explained in its opening brief that the GNEMMA's proposal and the Southway proposal would nevertheless pose Commerce Clause problems because the proposals would result in discrimination and any amount of discrimination is fatal under the Commerce Clause.¹ (PAMD Br. 4-12). Furthermore, it should be noted that to the extent the Department sets a regulation that imposes the forced sharing of premiums with out-of-state dairy farmers, this is tantamount to imposing a price on out-of-state milk equal to the amount of the premium that processors are mandated to pay the out-of-state producer. This, like the regulation in *Baldwin v. Seelig*, 294 US 511, 521 (1935), would prevent out-of-state dairy farmers from freely pricing milk to leverage any competitive price advantage they may have in competition with New Jersey dairy farmers. Accordingly, if New Jersey wishes to adopt a mandated premium it must impose the premium internally only (e.g., New Jersey produced, processed and sold like Pennsylvania does) without effectively pricing out-of-state transactions and discriminating against out-of-state dairy farmers. But, the common refrain at the hearing was that all milk must be priced to "level the playing field."

Accordingly, the Department must recognize that what it is being asked to do is either violate the Commerce Clause in order to "level the playing field" or place the New Jersey dairy industry at a competitive disadvantage. Since neither result is ideal, the Department should look for other options for the New Jersey dairy farmer. It is noteworthy that some New Jersey dairy farmers testified that they believed other options were available including the testimony of Ms. Salter who suggested the Department should assist New Jersey dairy farmers to tap into the value-added aspects of dairy farming such as the niche market for local, sustainable agriculture. (Tr. 170 (11/19/09)). Similarly, it was not half-hearted for PAMD's expert witness or the Northeast Dairy Foods witness to set forth the tax credit and subsidy ideas that were offered. The Department ought to have credibility with the legislature, given its specialized knowledge of the dairy industry, such that if they take a leadership role on these issues after explaining the limits of its authority, some of these suggestions could be implemented.

Second, GNEMMA incorrectly asserts that there is a zero premium on milk produced and processed in Pennsylvania and sold in New Jersey. The Third Circuit affirmed a decision by the District Court for the Middle District of Pennsylvania that accepted the Pennsylvania Milk Marketing Board's assertion that milk is commingled at the Class I facility and the cost of the entire milk supply is spread across all milk pro rata.

¹ PAMD notes that the Farm Bureau has indicated it does not support the GNEMMA proposal. It thus appears that no entity with exclusive roots in New Jersey supports the GNEMMA proposal.

Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board, 462 F.3d 249, 269 and 470, n. 22 (2006) (“the plant blend method of calculating costs is the norm in the industry and comports with generally accepted accounting principles.”).

Moreover, the Pennsylvania Milk Marketing Board regulates the payment of premiums such that all Pennsylvania-produced milk shipped to a Pennsylvania Class I facility that has sales in Pennsylvania receives its pro rata share of the Pennsylvania-mandated over order premium. See Commonwealth of Pennsylvania Milk Marketing Board Official General Order A-893, page 2 (Nov. 1, 1996) available at <<http://www.mmb.state.pa.us/portal/server.pt?>>. Thus, Pennsylvania produced and processed milk sold in New Jersey necessarily carries a regulated premium, not to mention the market-based plant blend premium that has been recognized by the Third Circuit.

This is relevant because it is important for the Department to understand that the problem for which a solution is sought has not been correctly identified. GNEMMA seeks to make Pennsylvania’s system of regulation the problem, but as indicated in PAMD’s opening brief, when asked to be specific, the distributor witnesses indicated that New York was by far the biggest problem facing New Jersey distributors. (PAMD Opening Br. 3; see also (Tr. 113 (1/29/10))). And, New York does not have a system of minimum prices. Moreover, as Mr. Herbein explained, there are a number of reasons why Pennsylvania’s system does not create competitive advantages. For instance, contrary to the testimony of the Farmland witness, Mr. Herbein explained that margins are not guaranteed in Pennsylvania. (Tr. 184 (12/18/09)). The minimum price is based on an average. Thus, those operating above the average receive no guarantee. Moreover, it was acknowledged that others in Pennsylvania operate under tolling agreements which provide for no guaranteed margin either. Finally, to the extent some operate at or below the average costs used to establish minimum prices, Mr. Herbein pointed out that Pennsylvania cannot build in significant margins to be used outside of Pennsylvania if Pennsylvania produced, processed and sold milk is to compete with milk from out-of-state. (Tr. 185 (12/18/10)). Moreover, the allegations about Pennsylvania processors having a cushion to work with assume too much; there was no evidence that the processors competing in New Jersey even have sufficient regulated sales in Pennsylvania to support such an argument.

Third, GNEMMA incorrectly suggests that there is a consensus among processors and distributors that destructive pricing is occurring at the wholesale and retail level that necessitates a Pennsylvania-type pricing system. (GNEMMA Br. 8). Of the four major processors, as opposed to distributors who do not process milk, it must be noted that only one – Farmland - testified that the Department needs to address destructive pricing at the wholesale and retail level through a Pennsylvania-style system.

Fourth, it must be noted that the Farm Bureau cost of production data that is updated by the Pennsylvania Milk Marketing Board staff is not an official publication of the Pennsylvania Milk Marketing Board. In Pennsylvania, it is information that is offered into evidence through either the Farm Bureau representative involved in its preparation or the PMMB Board staff and subject to cross examination. None of those witnesses were made available for this proceeding and thus the evidence must be given the limited weight it deserves.

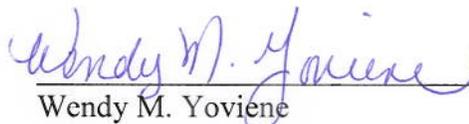
Moreover, the idea that farmer and dealer cost and pricing information from Pennsylvania can be used to ascertain farmer or dealer costs in New Jersey is a non-sequitur since there was testimony that neither farmer nor milk dealer costs would necessarily be the same as between Pennsylvania and New Jersey. (Tr. 33 (1/28/10); GNEMMA Br. 7). Further, as to the requirements for establishing wholesale and retail prices, Mr. Herbein explained that milk dealers in New Jersey would necessarily be situated differently than those in Area 1 in Pennsylvania. (Tr. 33 (1/28/10)). Moreover, milk dealers serving Area 1 in Pennsylvania would not necessarily be reflective of milk dealers serving Northern New Jersey. Accordingly, GNEMMA has oversimplified what it would take to get a three-tiered pricing system up and running. Moreover, it should not be forgotten that Mr. Herbein opined that New Jersey does not have the critical mass of information that would be needed to create such a system and that he was aware that PMMB had problems in the past gaining the cooperation of out-of-state entities for such proceedings. (Tr. 34-35 (1/28/10)). Additionally, if New Jersey costs are higher than the costs at issue in New Jersey, it would not serve to help either New Jersey dairy farmers or New Jersey milk dealers to set prices on lower costs.

Finally, there are at least two problems with the New Jersey Farm Bureau response regarding *Byer Farms v. Brown*. First, from the 1989 - 1990 transcripts, Consent Order, and New Jersey Register, it is abundantly clear that New Jersey expressly adopted the now existing no sales below variable cost regulation in conformance with the Consent Order, expressly approved by the District Court and in order to settle that litigation. The cart is simply before the horse for New Jersey to make any effort to respond to *Byer* before first going to the District Court and asking permission. Second, the NJFB misses the point in that the *Byer* lawsuit sought less not more regulation and the Court nonetheless clearly found New Jersey's system suspect if not legally unsound.

For the reasons stated in PAMD's opening brief and in this brief, PAMD urges the Department to reject the proposals presented at this hearing and to take a leadership role that focuses on creative solutions for New Jersey's dairy farmers, along the lines of those proposed by Ms. Salter, Mr. Herbein or Northeast Dairy Foods.

Date: April 26, 2010

Respectfully submitted,



Wendy M. Yoviene
Charles M. English, Jr.
OBER, KALER, GRIMES & SHRIVER
P.C.
1401 H Street, N.W.
Suite 500
Washington, DC 20005
(202) 326-5027
Attorneys for the Pennsylvania Association
of Milk Dealers