August 8, 2006

Nina Mitchell Wells
Secretary of State
Office of the Secretary
PO Box 300
Trenton, NJ 08625-0300

Re: Findings of Fact and Conclusions from the Dairy Hearing Held July 24, 2006

Dear Secretary of State:

Please accept this document as my findings of fact and conclusions as to whether to fix the price of milk in New Jersey in accordance with N.J.S.A. 4:12A-23. Pursuant to that section, I am obligated to file this decision with you within 15 days from the date of the hearing held to set the price of milk. N.J.S.A. 4:12A-23. Such a hearing was held on July 24, 2006.

For the reasons set forth below, please be advised that I have determined insufficient evidence was presented at the hearing to permit me to take action as to this issue at this time. As a result, I intend to hold a second hearing to consider additional factors in establishing a minimum price for the purchase of milk by a New Jersey processor, a New Jersey retailer and by the consumer. In addition, that hearing will also consider evidence as to whether an anti-price gouging regulation is necessary and whether regulations should be promulgated to control the manner in which premium payments are made to New Jersey producers. Finally, the subsequent hearing will seek to elicit information regarding the manner in which hauling charges are assessed to a producer.

I. STATUTORY AUTHORITY

Pursuant to N.J.S.A. 4:12A-19, the Director of Dairy Control is empowered to conduct investigations into "all matters pertaining to the production, distribution, importation, storage, disposal, classification, sale or resale, conditions and terms of sale or resale, [and] costs of production, distribution, sale and resale, processing, [and] sale for manufacture, of milk." The Director is also empowered to promulgate rules, regulations and orders that are necessary to carry out the provisions of the Title 4, Chapter 12A of the New Jersey Statutes. N.J.S.A. 4:12A-20.

Among the many powers of the Director pursuant to Chapter 12A, the Director has the authority to fix the price at which milk is to be purchased or sold in New Jersey. N.J.S.A. 4:12A-22. Prior to fixing such a price, however, the Director is obligated to conduct a hearing in accordance with N.J.S.A. 4:12A-23. Such price-fixing authority includes the authority to set minimum prices charged to consumers for milk in accordance with the requirements of N.J.S.A. 4:12A-22.1. The authority of the Director does not end at fixing prices; rather, the Director is permitted to "regulate the conditions and terms of sale [of milk], establish and require observance of fair trade practices; supervise, regulate and control the entire milk industry of the State of New Jersey, including the production, importation, classification, processing, transportation, disposal, sale or resale, storage or distribution of milk." N.J.S.A. 4:12A-21. Finally, the Director is authorized to control the conditions of sale, and the terms and credit regulations governing sales of milk between processors, dealers and stores. N.J.S.A. 4:12A-26.

On July 6, 7, and 11, 2006, I received four letters from Gloucester County Board of Agriculture, Salem County Board of Agriculture, Sussex County Co-operative Milk Producers Association, and Sussex County Board of Agriculture requesting that a hearing be held to consider imposition of an over-order premium to address the rising production costs and falling milk prices debilitating the New Jersey producer. (AP-3 to AP-6). Therefore in accordance with my authority in N.J.S.A. 4:12A-22, I held a hearing pursuant to N.J.S.A. 4:12A-23. Public notice was provided in accordance with N.J.S.A. 4:12A-23 and testimony was taken addressing both short-term and long-term measures that could be implemented to stabilize and revitalize the New Jersey milk marketing system.

II. THE NEW JERSEY MILK INDUSTRY

New Jersey's milk industry consists of 115 milk producers, both commercial and institutional farming operations, which produce 1.86 million hundredweight of milk annually. (T1, 12:17-18). Approximately 20 million hundredweight of milk is consumed annually by New Jersey's 8.6 million residents. (T1, 12:19-21). Forty-two years ago, New Jersey was home to over 3,500 milk producers. (AP-62). Now, over 98 percent of New Jersey's milk is produced out-of-state (T1, 15:11-12), and if action is not taken to revitalize New Jersey's dairy industry, soon there will be no locally produced milk available to our residents.

Almost 98 percent of the milk received and processed in New Jersey is done through the State's four processing plants. (T1, 15:8-12 and T1, 143:23-25). Of the milk processed in those plants, 75.9 percent is processed for Class 1 utilization, 20.7 percent is processed for Class 2 utilization. (T1, 144:2-5). Most of New Jersey's milk is marketed through Dairy Marketing Service (DMS) who markets all the raw milk produced by DairyLea, Dairy Farmers America Northeast Council, Land O'Lakes, 10 regional cooperatives in the Northeast and over 2,000 independent producers in the northeast area. (T1, 53:12-19). There are also approximately 9,500 licensed retail establishments selling milk in New Jersey.

III.FINDINGS AND CONCLUSIONS

New Jersey is currently part of the Northeast Federal Milk Marketing Order. 7 CFR 1001.2. This system was established by the federal government to equalize milk payments received by dairy producers. However, the Federal milk marketing order system has failed to adequately protect New Jersey producers. (T1, 99:19-23). The federal market minimum is a weighted figure that takes into consideration the prices for Class I and Class II milk, butterfat, nonfat solids, and protein and provides a somatic cell count adjustment. 7 CFR 1000.50. Unfortunately, it fails to take into consideration the variation in cost of production based on location. (T1, 133:13-16). New Jersey has extremely high costs of living, including high labor prices, and high property taxes. (T1, 51:23-24 and T1, 95:19-24). Moreover, the Federal milk marketing order system forces New Jersey producers to deduct approximately $0.91 per hundredweight from their milk checks to go back in the pool for the benefit of out of state producers. (T1, 144:17-22). Although it sets a minimum floor in which milk may be sold, the floor established is flexible and can result in situations where the federal market minimum is below the cost to produce milk. 7 CFR 1001.60.

A. EXISTING PROGRAMS

Currently dairy producers have many programs available to them that can assist in overcoming market instability. Many of these programs are extremely beneficial to the dairy producer when the producer chooses to take advantage of their availability. However, lack of funding, lack of education and other impediments have resulted in less than successful application of the existing State and Federal Programs. Continuation of education and management programs to assist producers are essential for long-term viability of New Jersey milk producers. (T1, 67:13-17 and T1, 68:13-16 and AP-49). Therefore, a comprehensive approach to revitalizing the dairy industry must consider ways of improving existing programs.

1. Federal Programs

The Milk Income Loss Contract (MILC) is a federal subsidy program that pays farmers a subsidy payment when the price of Class I milk drops below $16.94 per hundredweight. 7 CFR 1430.200 et seq. (T1, 38:22-23 and AP-32 & AP-68). Currently, farmers receive payments in the amount of $0.35 per $1.00 when milk prices dip below $16.94 per hundredweight. 7 CFR 1430.208. For example, if the price of milk were $12.94 per hundredweight, a farmer would receive an MILC payment on $4.00, equal to $1.40 per hundredweight sold at that price. Unfortunately, there is a cap on these payments when the producer produces more than 2.4 million pounds of milk per year. (T1, 38:17-18 and AP-32). This results in extreme hardship for producers who produce more milk that the 2.4 million pound cap. (T1, 38:15-21). Moreover, the availability of this program to the producers is entirely dependent upon federal funding and could be discontinued by congress at any time. (AP-68). Such an action was threatened by the federal government at the end of 2005. (AP-68). Because continuation and reform of this program is beyond the control of the Department, the actions that can be taken by the Department to improve this program are extremely limited.

Commodity Credit Corporation (CCC) payments are also available to producers of commodity crops, such as corn, soybeans, wheat, etc. when market prices dip below certain levels for those commodities. 7 CFR 1400.1 et seq. Producers can also take advantage of federal emergency disaster loans or emergency disaster payments through Farm Service Agency. 7 CFR 1437.1 et seq. and 7 CFR 1479.100 et seq. These loans are typically made available following a disaster, typically weather related, and are designed to help producers recover from losses resulting from a disaster. Although recently the program has offered disaster loans, historically, disaster payments have been available when federal funding is available.

2. State Programs

The Dairy Alliance, which is a coalition involving the Department of Agriculture, NJ Farm Bureau and Rutgers Cooperative Extension, offers several programs that can assist farmers in increasing production and productivity and decreasing costs. (T1, 16:2-5). Business management planning is available to producers that provides planning and advice in five critical areas: production, marketing, finance, legal and environmental, and human resource issues. (T1, 16:6-10 and T1, 78:12-16). This program is designed to be a comprehensive approach to business planning. Although this program is extremely beneficial to producers, lack of funding to operate the program as well as lack of producer interest in participating has stifled this program's success. (T1, 129:7-17). Insufficient evidence was presented in the record to properly discuss and evaluate methods of revitalizing this program. However, going forward, the Department will explore funding options to reinvigorate this program so that producers can take full advantage of it benefits. Should funding become available or a stable funding source be identified, the Department will also explore ways to increase producer participation, such as better education as to the benefits of this program or requiring mandatory participation in order to receive certain types of state aid.

A milk quality program also exists, which assists producers in improving herd health and milk quality in their productions. Increased milk quality typically translates into increased milk prices to the producer. (T1, 78:2-8). Unfortunately, improving milk quality takes time and money and the financial benefits of better milk quality are not seen immediately. (T1, 13-15). However, despite the constraints of these programs, programs that offer direct, one-on-one contact between agricultural experts and the producer are extremely effective. (T1, 67:24-68:3). Participation in the milk quality program could also be tied to a regulatory program monitoring or regulating the payment of premiums for high quality milk. However, producers will be unable to reap the benefits of premiums absent improved or sustained production of high quality milk, which should in turn incentivize producer participation in the milk quality program.

As was the impediment of the Dairy Alliance's business management planning program, the milk quality program also suffers from a lack of funding. (T1, 78:6-23). While many New Jersey dairy producers are already producing high quality milk, all could benefit from participation in the milk quality program not only to learn ways of improving milk quality, but also to learn ways to improve upon such production. Alternative funding sources need to be identified and better education to the producer needs to occur to ensure that producers realize the benefits that can be attained by participation in this program.

Promotional programs, such as "Jersey Fresh Milk" have also been created to provide producers an opportunity to have value added to their quality milk products. (T1, 16:10-14). Unfortunately the "Jersey Fresh Milk" promotion program has run into some difficulties, such as refusal of processors to bottle "Jersey Fresh" milk because it would compete with the processor's brand of milk. (T1, 37:7-13). A more detailed evaluation of this Program is discussed below.

3. Other Programs

Other services such as the herd management team meetings are available. (T1, 78:9-11 and AP-56). Herd management team meetings bring together several professionals, including financiers, veterinarians, accountants and other experts in the dairy industry to meet with producers one-on-one to create farm-specific programs to decrease costs and increase productivity. (AP-56). Additionally, an agricultural reengineering program is available through Rutgers Cooperative Extension that provides farmers with financial management tools, such as FINPACK to help increase productivity and decrease costs. (T1, 76:23-77:7 and T1, 77:21-78:1 and AP-57 to AP-58). FINPACK is farm management software that provides producers with tools to create balance sheets, cash flow management plans, and long-range plans to ensure financial viability. (T1, 77:22-25). Both of these programs have helped the producers who have participated. (T1, 129:7-12). Again, both of these programs are plagued with lack of funding. (T1, 78:20-23).

B. SHORT TERM OPTIONS

1. Setting Minimum Price for Milk

Obviously the most expeditious way to improve a producer's bottom line is to ensure that the producer receive a milk price that covers all costs to the producer. Setting a minimum price for milk has been found to be an appropriate exercise of state power. United Dairy Farmers Coop. Assoc. v. Milk Control Comm. of the Commonwealth of PA, 335 F.Supp. 1008 (D.Pa. 1971), aff'd. 404 U.S. 930 (1971). The Director of Milk Control is empowered under N.J.S.A. 4:12A-22 to set a minimum price for milk in New Jersey. National Dairy Products Co. v. Milk Control Board of NJ, 8 Abbotts, 491, 133 N.J.L 491 (1945). "In fixing milk prices, the Director must be concerned with three principal elements: whether to fix prices at all; if so, on what basis and to what extent; and what precise figures should be prescribed." Garden State Farms, Inc. v. Mathis, 61 N.J. 406, 428 (1972). However, when setting a minimum price for the sale of milk, there must be sufficient evidence in the record to support the Director's decision; otherwise, the director's decision will be set aside. Garden State Farms v. Hoffman, 46 N.J. 595 (1966).

For the reasons set forth below, I have determined that there is sufficient evidence that a minimum price needs to be set immediately for the protection of the dairy producers because it appears that many of them are currently operating at a loss. Unfortunately, I also find that there is insufficient evidence presented on the record to properly establish a formula for setting this minimum price and additional testimony and evidence needs to be presented in order to ascertain the exact cost per hundredweight for New Jersey producers, as well as costs figures for retailers and processors, and wholesale prices.

The last "over-order premium" or minimum price occurred in1997, and established a premium payment made directly to the producer. 30 N.J.R. 238 and 30 N.J.R. 1037. No corresponding minimum prices, however, were established for the wholesale or retail price of milk. 30 N.J.R. 238 and 30 N.J.R. 1037. Testimony was provided at the hearing claiming that a flat minimum price for producers only, as was done in the past, does not offer sufficient protection to New Jersey producers. (T1, 118:2-7 and T1, 126:15-19). Allegations were made that if the price of raw milk were to increase, New Jersey processors would simply acquire their milk from other sources outside of New Jersey. (T1, 89:8-17 and T1, 90:8-11). Simply setting a minimum price or an over-order premium for producers, although good in theory, may not be in the best interests of the dairy producer. In fact, some testified at the hearing urging the Department not to "take the detrimental path of legislating artificial price mechanisms that raise the cost of milk in New Jersey." (T1, 90:8-11). As was observed at the hearing, "We've gone through some of these [same] things in years past where there have been state-imposed premium programs. It didn't really work very well. It didn't help the dairy farmer, it didn't help the processor, didn't seem like it really did a whole lot of positive things." (T1, 118:2-7).

This is not to say that setting a minimum price is not appropriate in this instance. Rather, if a minimum price is to be set, it must be set throughout the system so that no single sector bears the brunt of the impact. (T1, 146:11-20 and T1, 147:10-16). If the premium program is merely a premium for the producer, and is not carried through the dairy marketing chain, many processors will seek to buy milk out-of-state to avoid paying the higher premium. (T1, 37:18-23 and T1, 89:8-17). Therefore, minimum prices must be set on the price of raw milk, the wholesale price of milk and the retail price of milk.

When setting the minimum price of milk, the director is obligated to consider "the various grades of milk produced, the varying percentages of butter fat, plant volume, seasonal production and other conditions affecting the cost of production, cost of transportation and marketing, and the amount necessary to yield a reasonable return to the producer and to the milk dealer, processor or subdealer." N.J.S.A. 4:12A-22.

Much information was provided at the hearing as to raw milk prices to producers and retail milk prices. (T1, 13:1-23; T1, 24:9-15; T1, 35:10-18; T1, 34:6-35:6; T1, 35:25; T1, 47:17-48:1; T1, 50:11-14; T1, 80:23-81:2; and T1, 155:4-9 and AP-47; AP-340 to AP-365, AP-381 to AP-384). It was undisputed that New Jersey's raw milk prices for

June 2006 equaled $1.07 a gallon, a 25-year low. (T1, 13:23-25). Evidence presented clearly demonstrated the fact that producers were losing drastic amounts of revenue due to the severe decline in prices. One producer explained that he lost $13,547.49 in revenue between the first six months 2005 to the first six months of 2006. Likewise, another producer presented evidence that he grossed $76,578.95 in the first six months of 2006, whereas he grossed approximately $90,126.44 in the first six months of 2005. (T1, 26:13-16). Still another producer explained that his gross receipts declined 9 percent for the first 6 months of 2006 as compared to 2005 receipts and experienced a decline of 18 percent from 2004's gross receipts, resulting in a net loss of $23,500. (T1, 47:17-48:1). Unfortunately, insufficient evidence was presented to establish wholesale prices for milk. Absent this critical piece of information, minimum prices cannot be established for milk sold by processors.

Low milk prices are only one part of this equation. Production costs for producers appear to have increased significantly in the past year. In 1980, when milk prices were approximately the same as they are today, fuel costs to producers averaged about $0.58 to $0.59 per gallon, whereas fuel costs today have soared to $2.30 a gallon for diesel. (T1, 24:15-17 and T1, 50:15-17). Even between 2005 and 2006, fuel and fertilizer costs have jumped drastically. Fuel costs for one producer equaled $18,159.78 in 2005 but rose to $20,903.35 in 2006. (T1, 26:18-21). Broken down on a monthly basis, one producer explained her fuel costs jumped $4,000 per month. (T1, 37:1-2 and AP-18). Even the smaller producer is being hit hard with high fuel costs, as one producer's costs increased from $3,938 in 2005 to $6,216 for the first six months of 2006. (T1, 48:2-3).

Likewise, feed and fertilizer costs rose dramatically from 2005 to 2006. Fertilizer costs for one producer in 2005 were $10,410.98, but he has spent $13,709.63 in fertilizer costs just in the first six months of 2006. (T1, 26:22-25 and AP-12). Another producer indicated that his feed costs jumped 20 percent in the last year. (T1, 48:1-12). NASS, National Agricultural Statistical Service, estimates that fertilizer prices have risen 8.7 percent, agricultural chemical prices have increased 9.9 percent, farm machinery costs have increased 7 percent and fuel prices have risen drastically by 22 percent. (T1, 66:16-20 and AP-48).

Although sufficient information was presented on the record to suggest that production costs have dramatically increased, insufficient evidence was presented to establish the exact cost of production incurred by the producer. One farmer estimated that he was receiving $3.00 to $4.00 per hundredweight below cost for his milk, but failed to provide information on the total cost of production on his farm. (T1, 52:9-11). Another producer estimated that production costs averaged approximately $15.00 per hundredweight for the New Jersey producer, but based those figures off of a study of Maryland dairy farmers rather than New Jersey producer information. (T1, 36:18-23). In fact, only one producer actually stated his costs to produce milk. (T1, 24:7-8). Production cost figures from only one producer are not sufficient evidence on which to calculate a minimum price applicable to all New Jersey producers as there is no way to verify that it is representative of all 115 dairy producers in this State. As was stated by the Supreme Court in Lampert Dairy Farm, Inc. v. Hoffman, 37 N.J. 598, 605 (1962), "there must be evidence to support the conclusion that the minimums realistically reflect cost factors . . . ." The cost information provided on the record simply does not satisfy this test.

One producer did suggest that the minimum price established be equivalent to the Class 1 price received for milk. (T1, 37:18-23). However, this suggestion fails to adequately consider the costs associated with producing milk, as there is no guarantee that the Class 1 price will cover all production costs. Moreover, the failure of the record to set forth realistic cost figures requires that this matter be left for consideration at the subsequent hearing.

Therefore, a second hearing will be scheduled to obtain more specific information as to the cost of producing milk, costs of processing milk and retail costs for the sale of milk. Likewise, additional testimony and evidence will need to be presented regarding wholesale prices for milk so that a minimum price may be set for all milk purchased in New Jersey, whether from producers, processors, dealers or retailers.

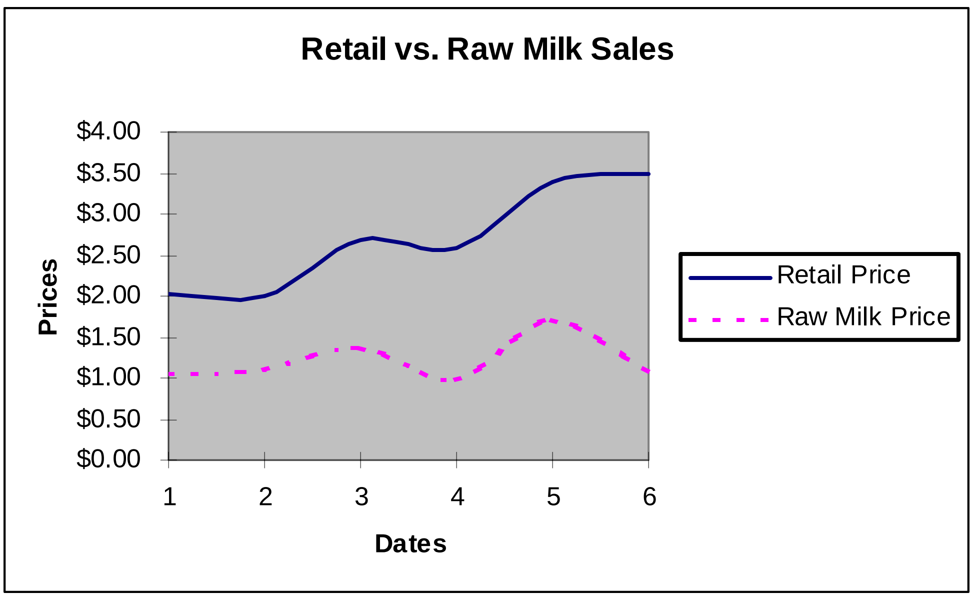
2. Anti-Gouging Regulations

As indicated above, the Director has the authority to "regulate conditions and terms of sale; [and] establish and require observance of fair trade practices." N.J.S.A. 4:12A-21. In Port Murray Dairy Company, 6 N.J. Super 285, (App. Div. 1949), the court found Regulation 15, an anti-price gouging regulation, to be within the statutory scope of powers granted to the Director. Moreover, Abbotts Dairies v. Armstrong, 14 N.J. 319, 329 (1954) determined that N.J.S.A. 4:12A-1 et seq. "must be construed to authorize the Director to set fixed prices which constitute maximum as well as minimum prices."

At the hearing, there were several allegations that certain sectors of the dairy industry were making substantial profits at a time when milk prices to producers were at a 25-year low. Specifically, it was alleged that Dean Foods, who owns a New Jersey processor named Garelick New Jersey, made a net profit in 2005 of $327.5 million and $285.4 million in 2004. (T1, 33:6-9). Allegations were also made regarding the profit margins of Farmland Dairies, another New Jersey processor, claiming, "Farmland's pockets are bulging." (T1, 72:25-73:1). Similarly, it was opined that "Farmland, Mr. Margherio, who is the CEO of Farmland . . . indicated in [an] article that these are the most profitable times in the history of Farmland." (T1, 98:1-6). By contrast, at least one distributor alleged that it had been operating at a deficit for the past five years. (T1, 92:23-93:5). These bare allegations without actual cost information and wholesale price information, is insufficient to determine whether actual price gouging has occurred.

Although clearly the cost of fuel has increased for many processors (T1, 93:9-12), sufficient evidence to determine an accurate cost figure per gallon was unavailable. For example, one processor alleged that his fuel costs increased by $1.00, but no other data as to cost increases or their overall affect on milk processing costs were set forth in testimony. Moreover, one of the exhibits introduced contained extremely detailed breakdowns of processors' costs per gallon in producing milk. (AP-287 to AP-311). Unfortunately the costs figures established in that document were from data provided for 1993 and 1994 and failed to take into account today's cost increases. (AP-217). No evidence was presented on the record regarding wholesale milk prices paid by retailers. Information on the costs to dealers and retailers were equally absent from the record.

(*This paragraph and corresponding chart were changed on 8/9/06 from the original document to correct an inaccuracy*.) However, statistical information regarding the sale price of milk verses the retail price of milk suggests that there may be price gouging occurring in the dairy industry. Typically, when the price of raw milk increases, the retail price increase. Likewise, when raw milk prices decrease, retail prices decrease. For example, in 1980 consumers paid $2.03 for whole milk (T1, 13:8) and farmers received $1.06. In January 2000 consumer price was $2.00 for whole milk (T1, 13:8-9) and the farmer received $1.09 (T1, 13:10). In October 2001, the consumer price was $2.69 for whole milk (T1, 13:12-13:13) and the farmer price was $1.37 (T1, 13:13-13:14). March 2003's consumer price was $2.59 per gallon for whole milk (T1, 13:15-13:16) while the farmer received $0.98 (T1, 13:16 to 13-17). In May 2004, the consumer paid $3.39 for whole milk (T1, 13:1) while farmers received $1.70 per gallon. Finally, consumers are still paying $3.49 per gallon as of June 2006 (T1, 13:23-24 and T1, 35:25) while farmers are receiving $1.07 for whole milk. These figures are represented in the chart below:



Additional detailed price figures for 2000 to 2006 were also presented showing the same trends. (AP-382 to AP-384).

As can be seen in the graph above, after May 2004, there is a great divergence in the retail price of milk and the raw milk price. Since today's milk prices do not appear to follow the same statistical path as they have historically followed, the divergence can only be attributable to two factors: either someone in the production chain is experiencing significant increases in profits or the production costs in all sectors of the dairy industry have increased so dramatically that the statistical analysis no longer applies. (AP-63). Since insufficient cost data was available at the hearing, this question cannot be answered. Moreover, should the Department establish a minimum price for milk, it is possible that the cost to the consumer could rise. Therefore, it may be necessary to establish a maximum sale price to protect the consumers or to create regulations prohibiting price gouging. As a result, a second hearing is necessary to determine the exact cause of the statistical divergence and to ensure that New Jersey consumers are adequately protected from unfair trade practices such as price gouging.

3. Regulating Hauling Costs

Pursuant to N.J.S.A. 4:12A-21, the Director of Milk Control has the authority to regulate the transportation of milk. Costs associated with transporting milk to the processing plant are one of the many cost factors that are increasing and therefore affecting the producer's bottom line. (AP-19). In years past, producers were not charged any hauling costs to transport their milk, as these costs were borne by the processor. (T1, 72:12-14 and T1, 73:24-74:3). Now, hauling is charged directly to the producer. (AP-26). Some producers requested that hauling charges be eliminated altogether. (T1, 73:17-21). However, requiring a processor to assume all hauling charges may put them at a competitive disadvantage over their competitors and could result in the existing processors refusing to haul New Jersey produced milk.

Hauling costs charged to at least one producer rose 19 percent. (T1, 48:8-10). The current system of distributing hauling costs has resulted in New Jersey producers located closest to the processing plant subsidizing hauling costs for the out-of-state producers located much farther away. (T1, 83:17-22). Despite the allegations of unequal or unfair application of hauling charges, no specific information was set forth on the record detailing the exact method in which hauling charges are assessed. Absent such information, it is impossible to determine whether regulation of hauling charges is warranted. Because hauling charges detrimentally impact a producer's bottom line, additional information is needed to determine whether New Jersey producers are bearing an unfair share of the hauling charges properly attributable to other producers. By ensuring that hauling charges are more equitably divided among the milk producers, we can ensure that the producer costs are reduced without affecting the processors' overall ability to recoup their hauling expenses. Such a result could be a win-win for the industry. Therefore, additional testimony and evidence will be elicited at a subsequent hearing to flush out the intricacies of how hauling charges are assessed.

4. No Interest or Low Interest Loans

As has been adduced by the evidence at the hearing, New Jersey producers have experience tremendous losses in income due to the recent low milk prices and high production costs. (T1, 26:13-16; T1, 47:17-48:1; T1, 52:9-11; and T1, 97:5-7). Loan guarantees and no interest or low interest loans can help the producer cover some of their costs of production without the high interest rates or service charges being imposed upon them. (T1, 146:4-10). By providing a producer the opportunity to pay less in interest to repay debts, it thereby reduces the monthly production expense to the producer. Other states, such as Connecticut and Vermont, have offered low interest loans and loan guarantee programs to their producers to help them stay viable during this crisis. (T1, 38:2-5).

While the Department feels that this program may be beneficial to the producers of this State, there was insufficient time to properly evaluate whether there were funding sources available to offer no-interest or low-interest loans to New Jersey producers. Although one producer indicated that she did not need any additional loans (T1, 38:8-9), some producers may benefit from having additional cash flow available. The Department will therefore continue to explore whether this program could be made available in New Jersey. This evaluation, however, will occur separate and apart from any subsequent hearing.

5. Over-Order Premium

An over-order premium was requested by several producers during the hearing. (T1, 24:1-3, and AP-4 to AP-6 and AP-49). This suggested program differs from the establishment of a minimum pricing program in that rather than having direct payments to the producer, a fee or assessment is charged on various segments of the dairy industry and the money is funneled into a fund that is used to make subsidy payments to New Jersey producers. Several funding sources were identified. For example, it was suggested that the licensing fees for stores be raised from $25 to $35 to fund a grant program for New Jersey producers. (T1, 39:3-10 and T1, 147:1-9). Similarly, an increase in the licensing fees to processors was suggested which would in essence increase the fee by a few pennies per gallon sold. (T1, 101:2-12) Another suggestion involved "taxing" milk $0.05 per gallon or $0.02 to $0.03 per gallon and refunding the money collected back to the producer. (T1, 84:6-13 and T1, 126:22-127:4). Charging an "entrance fee" for those selling milk in this state was also suggested, which would be used to fund a program that would act as a subsidy payment to producers similar to the MILC program. (T1, 98:23-99:1).

However, an over-order premium program such as the ones suggested is ill advised. As indicated above, if special assessments were imposed upon New Jersey processors, the State would risk loosing this invaluable sector of New Jersey's dairy industry. (T1, 89:8-17; T1, 90:8-11; T1, 118:2-7 and T1, 126:15-19). Moreover, it is extremely unlikely that the programs suggested above would withstand a court challenge. A similar program that required Massachusetts's dealers to make monthly premium payments into a "Massachusetts Dairy Equalization Fund" was held invalid by the United States Supreme Court in 1994. <u>West Lynn Creamery v. Healy</u>, 512 U.S. 186 (1994). Therefore, I decline to consider these options as viable solutions to the diary industry's concerns.

6. Improving Enforcement of Existing Laws

Allegations were also made at the hearing that the Department has been "too lax" on enforcing the existing laws regarding the purchase and sale of milk. (T1, 105:11-12). "I think the regulatory system in the State has to be reinstated to what it used to be in the '50s where it was hard nose, hard core regulatory. When somebody makes a violation, everybody that's involved in the breaking of the regulations should be dragged in." (T1, 106:10-15).

While the Department has promulgated several regulations which govern various aspects of the dairy industry, (N.J.A.C. 2:48, 2:50, and 2:52 to 2:56), there was insufficient evidence presented as to the Department's approach to enforcement of its existing regulations. However, since this concern was raised, it warrants consideration at the subsequent hearing to determine if enforcement of existing regulations has failed to adequately protect the interests of the diary industry. Therefore, this issue will be discussed at that time.

C. LONG TERM

1. Regulating Premiums Paid to Producers

In addition to market price, an additional mechanism available to increase the price producers receive for milk is through the use of premiums. A premium is an additional payment received by a producer that acts as an incentive to perform at a certain level. Premiums are generally offered to producers with higher quality milk. For example, evidence adduced at the hearing indicated that Dairylea offered at least three premium programs to their producers: a market adjustment premium, a volume premium and a quality premium. (AP-23). However, evidence has also indicated that these premiums have undergone several changes and are likely to undergo additional changes in the future. (AP21). Producers sometimes receive premiums for lowering their somatic cell count and improving the quality of milk. (T1, 129:9-12). In addition, premiums are sometimes available to producers who produce rBST-free milk. (T1, 127:23-24 and AP-42). Many consumers are now demanding rBST free milk. (T1, 75:12-13). This often correlates into higher prices for that quality milk.

Part of the authority of the Director of Milk Control includes regulating the conditions and terms of sale for milk. N.J.S.A. 4:12A-21. Premium payments made as part of the sale of milk would be considered part of the terms and conditions of sale. Allegations were made by producers at the hearing that they have seen drastic cuts in their premiums. As one producer explained, "We sell our milk to DMS. They took over the Farmland production late last summer. . . Since that time, we've seen our premiums cut and our hauling increase." (T1, 49:6-11). Another producer testified that his premiums have been cut 15 percent. (T1, 47:23-24). There were even allegations made by producers that premium payments were not being forwarded on to the diary producer. (T1, 75:12-17 and AP-62).

Obviously, no evidence was presented by any processor regarding his payment or non-payment of premiums to producers. Likewise, the financial records of such processors and DMS were not entered into evidence. In fact, other than the allegations made on record, there was no evidence regarding premium payments presented on the record. However, the allegations made by the producers at the hearing are serious and should be evaluated at the subsequent hearing. It may be necessary for the Department to promulgate rules that regulate how premiums are paid to producers. As a result, additional evidence and testimony will be required at the subsequent hearing to properly evaluate this issue.

2. Industry Task Force or Group meetings

Communication is a critical component of any good relationship, whether personal or professional. When communication breaks down, the relationship fails to function properly. Lack of communication between the various industry sectors has resulted in lack of understanding of the issues affecting the dairy industry and an inability to resolve them. (T1, 115:21-4 and T1, 117:8-13). Several individuals who testified at the hearing indicated that group meetings might be beneficial. (T1, 32:18-20; T1, 57:19-58:1; T1, 117:8-13 and T1, 130:20-25). As one witness explained, "I know as a processor we don't do very well if we don't have a supply of milk coming into a plant. As a dairy farmer I don't think that you do very well if you don't have somebody that's buying your milk. And the same thing happens for the next stage, which is getting the milk to the marketplace and selling it. So all of those components, to me seem to work together. . . ***The fact that we're sitting here at a hearing, to me, says that our industry has failed***." (T1, 115:25-116:11) (emphasis added).

While the Department of Agriculture stands ready to assist in any way possible, many of the issues raised in the hearing can and should be addressed through industry task force groups or routine industry meetings. Representatives of the Department are willing to participate in these industry meetings, but as has been seen in the past, task forces and committees have not been very successful when used exclusively to resolve problems. (T1, 119:8-11). At this critical stage in the game, establishing a task force to resolve this issue, without more, will not provide New Jersey's dairy farmers with the protection and price stability that is desperately needed in their existing financial crises. However, the Department strongly urges the various industry sectors to routinely meet to discuss the various issues affecting the dairy industry in New Jersey. Regular monthly or quarterly meetings will help avoid the necessity for Department intervention in the future. Should the industry need assistance in facilitating these meetings, the Department would be happy to assist. Since there seemed to be sufficient industry interest in establishing industry meeting, now is the time to gather together to reach a workable solution industry wide.

3. Media Campaign to Raise Consumer Awareness and Better Promotion of Milk Industry

Another interesting suggesting put forth at the hearing was the establishment of a media campaign to raise consumer awareness to the plight of the dairy producer in New Jersey. (T1, 39:14-16 and T1, 137:5-12). Significant consideration was given to this suggestion but such a media campaign, by itself, does not appear to be in the best interest of the producers. One of the big impediments to this suggestion is that there is very little New Jersey produced milk available to the consumer. Over 98 percent of the milk consumed in this State is produced elsewhere. (T1, 12:17-23). Should we choose to spend the money to embark on a media campaign to encourage consumers to buy local first, it is unlikely that they would be able to easily locate local milk.

Rather, money would be better spent tying a media campaign to a promotional program such as "Jersey Fresh Milk" and working on ways to increase consumer demand for locally produced products. Promotional programs, such as "Jersey Fresh Milk" have been created to provide producers an opportunity to have value added to their quality milk products. (T1, 16:10-14). Unfortunately the "Jersey Fresh Milk" promotion program has run into some difficulties, such as refusal of processors to bottle "Jersey Fresh" milk because it would compete with the processor's brand of milk. (T1, 37:7-13). This may be something that can be rectified through programs to incentivize the processors to use the "Jersey Fresh" label. Sussex County Milk Producers are working towards promoting the "Jersey Fresh Milk." (T1, 75:8-10). Much work still needs to be done to introduce the product into the market and to increase both consumer awareness and demand for high quality "Jersey Fresh Milk." The Department will continue to explore ways to increase market opportunities and to expand promotion of New Jersey produced milk. This topic, however, is better left addressed through industry task forces or group meetings as addressed above. Such a discussion should occur separate and apart from any subsequent hearing.

Clearly, the issues that generated the hearing on July 24, 2006 and those that arose therefrom are complex and will require that the Department have all the information necessary to ensure that the actions it takes will result in the best possible outcome for the overall health of the dairy industry in New Jersey. Since it is imperative that our ultimate decision be based only on what is in the hearing record, we must take pains to have all such information entered into that record. My office will publish public notice setting forth the date, time and location of the subsequent hearing in the near future.

Respectfully Submitted,

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Division of Marketing and Development