April 10, 2008

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

Re: Findings of Fact and Determination from the Dairy Hearing Held on November 27, 28 and 30, 2007 and January 4, and 15 and February 13, 2008 To Consider Whether Action Should Be Taken To Adjust the Order of September 28, 2006, And To Reassess The Impact Of The Fuel Adjustment Add-On, Pursuant to N.J.A.C.2:50-4.2(f).

Dear Secretary of State Wells:

Please accept this document as my findings of fact and conclusions arising from the hearing held on November 27, 28 and 30, 2007 and January 4, 15 and February 13, 2008. This hearing was held to consider whether action should be taken by the Director to adjust the decision issued on September 28, 2006. As a result of that decision, the Department promulgated regulations implementing a fuel adjustment add-on. In addition, pursuant to N.J.A.C.2:50-4.2(f), the hearing was held as part of the ongoing assessment of the impact of the fuel adjustment add-on. The hearing was noticed in accordance with N.J.S.A. 4:12A-23 to serve the dual purpose of review of the adjustments ordered in the September 28, 2006 decision in relation to the dairy industry in New Jersey. These findings and this determination relative to adjustment of the September 28, 2006 decision are filed in your office pursuant to N.J.S.A. 4:12A-23.

For the reasons set forth below, please be advised that I have determined that a primary factor which supported the September 28, 2006 decision, as implemented, is still present. As implemented, the September 28, 2006 decision imposed a fuel adjustment add-on. One primary factor, presented during the 2006 hearing that resulted in the September 28, 2006 decision, was the cost of production. That cost of production is now much higher than it was at the time of the September 28, 2006 decision, notably in the case of the extremely high costs of fuel, as well as feed and fertilizer, which are impacted by rising fuels costs. These three production input costs are not part of the calculation under the federal minimum price system and not able to be recovered by the producers.
These rising costs over the past twelve months since the fuel adjustment add-on has been in place, and the limited period of higher milk prices have prevented the fuel adjustment add-on from offsetting the increased production costs, such that producers could cover their costs of production over this period.

I have also determined that there is evidence on either side of the issue of whether an rBST free premium should be imposed. (An rBST premium was originally part of the September 28, 2006 Order, but was not part of the Order as implemented.) I do not find sufficient support at this time to justify interference in what appears to be a changing market. This market may be testing whether any value is added to milk if it is produced without the use of rBST technology and whether any value can be measured reliably in the regulated milk pricing environment. The matter of a premium for producers in the face of apparent demand bears watching in view of what may be an imbalance of power to negotiate as this market matures, but at present I find that there is not an adequate factual basis to support action in the current milk pricing climate.

Accordingly, I have determined no action should be taken to adjust the decision issued on September 28, 2006.

I. PROCEDURAL BACKGROUND

In August 2006, dairy producers requested that the Department hold a hearing to consider relief from rising production costs and falling milk prices in the form of an over-order premium.[1] A hearing was held on July 24, 2006, resulting in a Determination issued on August 8, 2006. I concluded that the information provided was insufficient. Therefore I determined to continue the hearings to take additional testimony and evidence on August 29 and 31, 2006. The Order of September 28, 2006 was issued following these hearings. As initially issued, the Order called for two adjustments to the price of milk purchased from New Jersey producers which adjustments would be effective October 16, 2006. One adjustment was the "fuel adjustment add-on" for all milk purchased from a New Jersey producer to be paid by anyone required to be licensed pursuant to N.J.S.A. 4:12-2. The second adjustment was the rBST-free premium for rBST-free milk purchased from a New Jersey producer to be paid by anyone required to be licensed pursuant to N.J.S.A. 4:12-2 and 4:12A-28.

The Order was appealed on October 10, 2006 and was automatically stayed pursuant to N.J.S.A. 4:1-35. The Department's motion to vacate the stay was denied and the decision on the accelerated appeal was issued on December 27, 2006. The portion of the Order that imposed a "fuel adjustment add-on" was affirmed and the portion that established a premium for rBST-free milk was reversed, due to inadequate factual support in the record. In re September 28, 2006 Order of Director of Div. Of Marketing and Development, 2006WL 3783503 (N.J.Super). A.D.) (Unpublished opinion.) Thus, the September 28, 2006 Order, as implemented, was limited to the imposition of the fuel adjustment add-on.

Following the decision of the Appellate Division, the Department promulgated an emergency rule on January 29, 2007 to implement the Order, as affirmed by the Court, and concurrently the Department proposed new rules. The Emergency Rules adopted January 29, 2007 were effective for a period of sixty days from February 1, 2007 to March 30, 2007, while the concurrent new rule, Subchapter 4 (Premiums and Other Payments to Producers), was adopted March 30, 2007, after public comment, with changes to become effective on the publication date of the rule in the New Jersey Register on May 7, 2007.

[1] In contrast to the 2006 hearing, requested in writing by the Gloucester County Board of Agriculture, Salem County Board of Agriculture, Sussex County Co-operative Milk Producers Association, and Sussex County Board of Agriculture, to consider imposition of an over-order premium to address the rising production costs and falling milk prices debilitating the New Jersey producer, the Department noticed this hearing as a result of the continuing obligation under the regulation N.J.A.C. 2:50-4.2(f) to assess the fuel adjustment add-on.

Because the rules codified as Title 2, Chapter 50, including the new rules in Subchapter 4, would expire October 27, 2007, in accordance with N.J.S.A. 52:14B-5.1c, the readoption of Chapter 50, including a mandated ongoing assessment of the fuel adjustment add-on program, was proposed on May 21, 2007 at 39 N.J.R. 1843. After receiving public comment, Chapter 50 was readopted October 1, 2007 and filed October 24, 2007. At N.J.A.C. 2:50-4.2(f), these rules also mandated an ongoing assessment of the program beginning in August 2007.

In view of the required assessment, in August 2007 staff undertook an examination of the available types of market and processor data which had provided the basis for the fuel adjustment add-on. The relevant data used in that assessment (hereafter August 2007 Assessment) that was available up to September 26, 2007 was made part of this hearing record and is discussed below in Findings. Any markup to the price of milk which may have been added to the cost that could be directly attributed to the fuel adjustment add-on had not been made available to the Department and therefore was not included in the August 2007 Assessment. I accepted the recommendation following the August 2007 Assessment to continue the fuel adjustment add-on.

To enable the Department to continue its evaluation of updated information, and to enable the continued assessment of the fuel adjustment add-on required under N.J.A.C. 2:50-4.2(f), a public hearing was held, with appropriate public notice,[2] inviting witnesses to address issues related to whether the Order of September 28, 2006 should be adjusted. The notice advised witnesses to be prepared "to address all issues" related to the previous Decision, "as well as those issues that relate to labeling of milk and milk products."

To allow the provision of relevant data, the Notice provided that any individually identifiable, confidential financial information would be reviewed in camera and be used by the Director to make his decision, but any such information used in the decision would be averaged (using no fewer than three sources of information) in order to maintain confidentiality of the producers, processors, dealers and retailers. Such information has been provided and I have considered it in making my decision. To the extent there is reference to financial information, it has been averaged.

The Notice of the hearing included a reference to labeling, expecting that issue to be part of the consideration of the September 28, 2006 Order as it related to milk production using rBST, the relevant volume and premiums. In an unrelated action, regulatory activity concerning labeling restrictions occurred in the neighboring Commonwealth of Pennsylvania very close in time to the publication of this hearing Notice. The coincidental timing of these unrelated actions may have resulted in some misunderstanding concerning the scope of this hearing. A large number of written comments and some limited testimony were provided in opposition to restrictions on labeling and the inclusion of information on labels about what was in the

[2] The initial NOTICE of public hearing, for the hearing days November 27, 28 and 30, 2007, incorrectly referred to the date of the September 28, 2006 decision as December 28, 2006. During the hearing held on November 30, 2007, the public was advised that an additional day of testimony would be held on January 4, 2008 to ensure that any confusion from the notice was remedied and to receive additional testimony not able to be heard on November 30, 2007 due to the lateness of the hour. The notice of the additional day of the hearing correctly gave the date of the Order as September 28, 2006.

substance (milk) and what was not in the substance (milk) or was **not** added to the substance (milk)- antibiotics, growth hormones, and the like - or the way the substance (milk) was produced- Kosher, organic rBST-free, grass-fed and the like - even though no such labeling restrictions were being considered. Labeling protocols were not part of this hearing and testimony concerning labeling protocols is not relevant to the September 28, 2006 Order, which considered a production premium for milk produced without use of the technology involving rBST, not rBST labeling protocols.

The Findings of Fact and Conclusions that accompanied the September 28, 2006 Order identified and considered a number of issues that were not part of the actual Order or the implementation of that Order. The issues in the September 28, 2006 findings were identified as long term and short term action items. In this case, the hearing held in November 2007 and January 2008 was limited to whether the Order of September 28, 2006 should be adjusted. The actual Order of September 28, 2006 was concise –calling for two adjustments to the price of milk purchased from New Jersey producers - and, as implemented, addressing only one.

One adjustment contained in the September 28, 2006 Order was a "fuel adjustment add-on" for all milk purchased from a New Jersey producer to be paid by anyone required to be licensed pursuant to N.J.S.A. 4:12-2. The second adjustment contained in the September 28, 2006 Order was an rBST-free premium for rBST-free milk purchased from a New Jersey producer to be paid by anyone required to be licensed pursuant to N.J.S.A. 4:12-2 and 4:12-28.

As noted above, the Appellate Court affirmed the Order in part and reversed the Order, in part. The consequence of that decision was the implementation of the fuel adjustment add-on. The rBST premium was not implemented. Nearly a year later, after the first assessment of the impact of the fuel adjustment add-on required under N.J.A.C. 2:50-4.2(f), with three months of high milk prices and high costs, this hearing was held to consider whether action should be taken by the Director to adjust the decision of September 28, 2006. The evidence received in this hearing[3] was considered in connection with the fuel adjustment add on, and the matter of an rBST premium. These issues constitute the subject matter of the hearing.

<u>II. STATUTORY AUTHORITY</u>

Pursuant to <u>N.J.S.A</u>. 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. <u>N.J.S.A</u>. 4:12A-20.

[3] Confidential testimony and exhibits were received during this hearing and were entered into the record by reference, pursuant to the Notice, providing for *in camera* review to allow consideration to make my decision while maintaining the confidentiality of individually identifiable, confidential financial information, and to the extent used in this decision, by averaging using no fewer than three sources of information.

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.

Therefore, in accordance with my authorities above, including in N.J.S.A. 4:12A-23 and to supplement the assessment process required by N.J.A.C.2:50-4.2(f), I held a hearing to consider whether the decision of September 28, 2006 should be adjusted. Public notice was provided in accordance with N.J.S.A. 4:12A-23 and testimony was taken addressing whether the September 28, 2006 Order should be adjusted.

III. FINDINGS AND CONCLUSIONS

Findings and conclusions are based on the facts submitted through oral and written testimony, as well as facts entered into the record concerning the state of the dairy industry in New Jersey and in the Northeastern Region. Live testimony given under oath and subject to cross examination was given more weight than was written testimony submitted for the record. Administrative notice was taken of certain published materials including Dairy Market News and similarly reliable source documents whose accuracy cannot reasonably be questioned. The Notice of this hearing identified the subject matter as concerning whether the prior Order should be adjusted.

A. OVERVIEW OF EVIDENCE SUBMITTED

The hearing to determine whether the adjustments in the price of milk contained in the Order of September 28, 2006 should be further adjusted opened on November 27, 2007 in West Trenton, NJ and remained open on November 28, in Allamuchy, NJ; and November 30, 2007, in Woodstown, NJ; on January 4, in Bordentown, NJ; on January 15, in Trenton, NJ and on February 13, 2008 in Trenton, NJ. The hearing record remained open on January 15, 2008 for the limited purpose of receiving into the record written testimony that had been received before the end of the day on January 4, 2008. The hearing record remained open on February 13, 2008 for the limited purpose of entering into the record, through identification of the witness(es), confidential, individually identifiable financial testimony that had been received after January 15, 2008 and would be reviewed *in camera* by the Director to be used in the decision as appropriate, but any such information that would be used would be averaged using no fewer than three sources of information in order to maintain confidentiality of the witness. Testimony was received from twenty-eight (28) live witnesses; was received in the form of forty-two (42) written statements; and was received in the form of two hundred twelve (212) electronic statements. (The electronic statements concerned issues of labeling and, specifically, appeared to have been offered based on an incorrect understanding that limitations on labels were to be the subject of the hearing.) The witnesses included thirty-seven (37) producers, two (2) cooperatives, six (6) processors, two hundred thirteen (213) consumers, one (1) representative of food marketing retailers, three (3) government representatives and seven (7) individuals representing agricultural support industries.

Witnesses submitted one hundred fifty four (154) exhibits. (Fourteen exhibits offered by witnesses were not admitted as they were not relevant or were not competent evidence.) There were seventeen (17) confidential submissions of evidence. Of these, nine (9) were provided voluntarily in response to a request from the Department after confidentiality had been claimed under questioning at the hearing in accordance with the Notice provision for receipt of testimony claimed confidential, one confidential submission was provided under subpoena and the rest of the confidential submissions were voluntarily provided incidental to public testimony.

B. <u>August 2007 Assessment - Impact of the Fuel Adjustment Add-on –</u>

The August 2007 Assessment of the fuel adjustment add-on, following its implementation, was initiated in August 2007, pursuant to N.J.A.C. 2:50-4.2(f). The assessment relied on publicly available information and information available through confidential filings made with the Department.[4] The fuel adjustment add-on is calculated monthly using a specific formula[5] contained in the regulation. The data considered in the August 2007 Assessment (further detailed below) included recent average farm production costs (including fuel, feed and fertilizer); fuel adjustment payments to individual dairy farmers; the average New Jersey sales volume distributed to New Jersey dealers and retailers, as reported by the four in-State Class One processors; the total dollars attributable to the fuel adjustment add-on, averaged over the total New Jersey distributed volume of product; the weekly economic outlook data from USDA Dairy Market News; and dairy assistance programs considered or adopted by other states.
The individual processor Reporting forms, which are confidential and submitted to the Department monthly, provided the information which was then averaged with at least three sets of numbers. The referenced exhibits are these forms which were entered into the hearing record in blank so that they did not reveal any confidential, financial, proprietary individual processor figures.

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[4] During the public hearing, the Department entered into the record exhibits concerning relevant filings made with the Department in connection with the calculation of the fuel adjustment add-on. To the extent the information required to be filed consisted of confidential financial business information, the reporting forms were entered in blank for the purpose of identifying the type of information which was collected. These exhibits are found in the Record of January 15, 2008 at (T5, 65:9-13) and (T5, 66:14).

[5] Payments for a fuel adjustment moves upward or downward based on the formula codified at N.J.A.C.2:50-4.2. This formula ties the base value to the 2002 diesel fuel price for the Central-Atlantic region posted by the U.S Department of Energy Information Administration of the U.S. Department of Energy for the last full month prior to the month of calculation, using the monthly diesel price based on a formula contained in the regulation at N.J.A.C.2:50-4.2(b).

Findings of fact upon which the Division assessment relied were obtained from the public sources and the identified information of the Department which were entered into the hearing record on January 15, 2008. The fuel adjustment add-on is tied to diesel fuel pricing and it is distributed based, in part, on the average Class I utilization. The assessment was performed in the context of these numbers, in part, to determine the impact of the fuel adjustment add-on on the cost of milk per gallon at the processor level. The summary document detailing this August 2007 Assessment, provided to the State Board of Agriculture for information at its September 2007 meeting, was entered into the record as Exhibit GB-1.The following discussion reviews that document[6], identifying the facts and their primary sources.

The August 2007 Assessment was undertaken approximately six months after implementation of the fuel adjustment add-on. The information considered was gathered from a number of sources in the Record. At that time, available data showed that the price of diesel fuel for the Central Atlantic Region had increased from $2.568 in February 2007 to a high of $2.934 in July of 2007. (Exhibit GA-4.)[7] In addition, the statistical uniform price of milk paid to the producer published by the USDA Market Administrator's Office had increased from $15.11 per cwt (hundredweight) in February 2007 to $23.04 per cwt in August 2007. Based on individual class pricing, milk prices had hit record highs while, at the same time, in view of the number of months with prices still low, the average yearly price of milk for 2007 was expected to be below those record levels (of $23.04 per cwt). (Exhibit GA-13.)[8]

The August 2007 Assessment included review of the milk-to-feed ratio – the amount in pounds of milk produced by a cow per pound of feed given to that cow - for the months of July and August which had surpassed the ratio of 3 pounds of milk for 1 pound of feed (hereafter 3 – 1), considered the threshold for the break-even point for dairy producers, but for only the first time in 17 months. (Exhibit GA-14.) At the time of the August 2007 Assessment, the average milk to feed ratio for the first seven months of the 2007 fiscal year had been calculated[9] to be approximately 2.62 - 1, well below the 3 - 1 threshold to stimulate long-term increases. The information available at the close of the hearing record in mid-February 2008 shows the average

[6] During the hearing, there was an objection to the acceptance of this document into the record because it was authored by a member of the panel. My decision is based on a review of all the sources used to compile the document. Argument was heard (T1, 96:22-25, 97:1-22) concerning the facts contained in this document which had been provided to the Board of Agriculture for information. The supporting facts for that document and the method of calculation of the impact of the fuel adjustment add-on referenced in that document are detailed in the main text that follows.

[7] Energy Information Administration (EIA) Central Atlantic region (PADD1B) No. 2 Diesel Retail Sales by all sellers (cents per gallon).

[8] USDA Market Administrator's Office, Northeast Milk Marketing Area, Federal Order One Monthly Uniform Price and Producer Price Differential (released monthly), Statistical Uniform Price, 3.15 Zone New York, NY.

[9] A straight average of the monthly feed-to-milk ratio data for the first seven months of the year as published by US Department of Agriculture Economic Research Service (ERS/USDA).

milk to feed ratio for 2007 to be 2.8[10] and the Statistical Uniform Price of milk (blend price) to be $19.75[11] for Northern New Jersey.[12]

The August 2007 Assessment also incorporated confidential data reported to the Division concerning Class One utilization, the percentage of milk received by processors that is produced in New Jersey, and individual reports containing confidential data concerning the destination of milk. (These reports were averaged by the Division, to protect confidentiality.) The pool – equal to total New Jersey produced milk - had handled 90,783,970 pounds of New Jersey produced milk over the seven month period involved in the first assessment. (Exhibit GA-7.)[13]

The August 2007 Assessment also reviewed how the fuel adjustment add-on is determined each month taking into consideration diesel fuel prices and the amount of milk produced by New Jersey producers and the Class utilization of that milk. The pool of New Jersey produced milk represents 8.072% of the raw milk received at the four Class 1 processing plants in New Jersey. (Exhibit GA-8.)[14] The fuel adjustment add-on has provided an average of $0.2800 per hundred weight payment on all milk produced by New Jersey farms during the seven-month period that the program had been in place. The total pool payments to that point were $254,223.32. The estimated average monthly payment per producer since the implementation of the fuel adjustment add-on program is $324.26.[15]

In addition to specific production costs, the August 2007 Assessment included review of data concerning the health of the dairy industry in New Jersey. The United States Department of

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[10] The average of USDA National Agricultural Statistics Service values through 2007. Exhibit FE-1 (January 1994-June 2007, updated).

[11] The 2007 weighted average Statistical Uniform Price for the 3.15 zone is $19.75 according to calculations based on information provided in exhibit GA-13 Monthly Statistical Report, USDA Market Administrator's Office, Federal Order One. Since the close of the hearing, the Market Administrator's office has calculated the 2007 weighted average as equal to $19.86 in Boston, MA which is $19.76 in the 3.15 zone.

[12] This is a gross price to the producer which does not reflect deductions for charges for hauling, Federal check-off program ($0.15 per cwt), USDA Market Administrator's assessment ($0.05 for independent producers) plus other voluntary deductions such as co-op dues, which would bring the payment down by $1.03 to 1.08 per cwt.

[13] Confidential information, tabulation of all milk procured from New Jersey producers from February 2007 to August 2007 and marketed to in state Class One processing plants as well as milk relocated to other class plants or plants out of state.

[14] This percentage is equal to the total New Jersey produced milk (the pool) divided by the total of all raw milk received at the four Class I processing plants in New Jersey and reported on the confidential "Components by Class" forms submitted monthly to the Department.

[15] Total of the Fuel Adjustment Add-on as reported on the components by class and paid to the Department from February 2007 to August 2007 from the four Class One processors in New Jersey (Exhibit GA-8) divided by the total of pooled milk (see above) procured from New Jersey producers (Exhibit GA-7) equaling the weighted average of $0.2800 per hundred weight.

Agriculture (USDA) data was taken into account. According to USDA production reports, New Jersey continues to suffer decreases in cow numbers and milk production. During the first half of 2007 New Jersey lost 5 million pounds of milk production (10.4% decrease) as well as 1,000 cows, while milk production nation wide has increased 1%. (Exhibit GA-13.)[16]

The August 2007 Assessment review also generated current information concerning the cost impact of the fuel adjustment add-on. Based on reported milk sales from processors involved in the fuel adjustment add-on program, the impact on the price of milk to the processor averaged $0.00466 increase per gallon.[17] The Department has and continues to publish minimum monthly prices, which include the fuel adjustment add-on. This minimum advanced price announcement is also used to determine variable cost of finished milk products sold in New Jersey according to N.J.A.C 2:52-7.[18]

Evaluation of relevant values concerning the dairy industry in New Jersey for the assessment also looked at nearby states in the region. Through the Pennsylvania Milk Marketing Board (PMMB), for example, various premiums have been imposed which contributed to an understanding of the state of the industry at the time of the first assessment. In the May 30, 2007 hearing undertaken by the PMMB, (and the hearing which was close in time to New Jersey's first assessment of the fuel adjustment add-on), the PMMB considered producer premiums. In that hearing, the PMMB upheld an over-order premium of $1.60 on Class One milk, as well as a separate and independent fuel adjustment add-on that was incorporated due to increased costs of production and fuel prices.[19]

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[16] Monthly Statistical Report, USDA Market Administrator's Office, Northeast Marketing Area, Federal Order One (first half of 2007 calculation).

[17] The sources of this figure are in (Exhibit GA-8 – the total money collected from February 2007 to August 2007) divided by (Exhibit GA-3 - the total pounds of fluid milk and milk products sold for consumption in New Jersey from the four Class One plants from February 2007 to August 2007). Calculations converted to a gallon unit; equal the impact per unit.

[18] Monthly USDA Market Administrator's Office, Northeast Marketing Area, Federal Order One Advanced Price Announcement (Exhibit GA-12) plus the Monthly calculated Fuel Adjustment Add-on calculated by the Department; creating the New Jersey Department of Agriculture Class One Advanced Milk Price Announcement (Exhibit GA-6) converted to a per unit price of the raw milk input, pricing based on milk type and container size.

[19] The General Orders are listed on the Pennsylvania Milk Marketing Board web site and show changes (if any) in premiums, as well as the fuel adjustment. The web address is www.mmb.state.pa.us .

The fuel adjustment add-on program was evaluated in the August 2007 Assessment, as required under N.J.A.C. 2:50-4.2(f), in light of projections, as well as the current factors. In that context, the assessment included recognition that, according to Dairy Market News, Volume 74 Report 38, released September 21, 2007, the all milk price was reported as expected to average between $19.20 to $19.40 per cwt in 2007 and decline to between $18.30 and $19.30 in 2008. (Exhibit GA-14.) In the October Class 1 Advanced Price Announcement released on September 21, 2007, the Class One price for the 3.15 zone was $24.94, a decrease of $0.32 per cwt. This was the first time in 12 months that the Class One price had dropped. (Exhibit GA-12.)[20] Also considered was the fact that the price of crude oil was reported as remaining at high levels. The price of crude oil, at the time of the assessment, was $79.93, and was reported likely to result in higher prices for on-farm fuel in the near future.[21]

The August 2007 Assessment was finalized in the context of the long-term effects of the low prices received by dairy producers in 2006; the sustained and elevated costs of inputs to the dairy industry including feed, fuel, energy, chemicals and fertilizer (reported in the USDA Economic Research Service); the uncertainty of the record prices holding for long periods of time; and the minimal impact throughout the market chain of the fuel adjustment add on based on total volume of milk handled by the Class One plants. The August 2007 Assessment recommended that the program should be maintained at its current rate with continued review to allow evaluation of the impact and effectiveness of the program.[22] After review of the facts presented, I accepted that recommendation.

C. New Jersey Dairy Issues[23]

The first step in determining whether to adjust the September 28, 2006 Order is the evaluation of the fuel adjustment add-on. The fuel adjustment add-on program is in place, has been assessed once in August-September 2007 and was found to be necessary to the dairy industry in the current climate. The question, in what is effectively the second assessment pursuant to N.J.A.C. 2:50-4.2(f), is whether the weight of credible facts presented supports continuation of the fuel adjustment add-on or justifies an adjustment to the Order providing the fuel adjustment add on at this time.

The second step in determining whether to adjust the September 28, 2006 Order is the evaluation of an rBST-free premium, recognizing that the appellate court denied the imposition of a premium for rBST-free milk on the basis of the factual record. The question is whether the

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[20] September 2007 Class One Advanced Price compared to the October 2007 Class One Advanced Price Announcement showed the projected decrease on a per cwt basis.

[21] Stock Market Report, September 26, 2007 just prior to 2:00 P.M. that day.

[22] A witness in the hearing testified that the decision to continue the fuel adjustment add-on was made without consideration of the facts related "to the cost of milk paid to farmers." (T3, 103:24-25 - 104:1-2)

[23] Confidential testimony received from New Jersey producers and processors was averaged using no fewer than three sources of information in order to maintain confidentiality of the producers.

weight of credible facts[24] presented justifies the imposition of a new premium in addition to the fuel adjustment add-on that was in place at the start of the hearing.

The evidence has been reviewed and both questions are discussed below.

1.) Milk Prices

Milk prices had been low for years. (T. 4, 77:10-11.) The prices started up from $14.50 per hundred weight in January 2007, steadily rose to a high near $21.75 per cwt in June 2007 and dropped back only slightly by year end. (Exhibit GA-13.) The farmer does not receive all of the Class I price for milk picked up on the farm; he receives a blended value. (T.2, 103:14-19.) This blended value is calculated from the Class utilization information contained in the Monthly Statistical Report released by the Market Administrator's Office. (Exhibit GA-13.)

There was no disagreement that milk prices are currently high. Milk prices are at an "unprecedented high." (WT-33 at 1.) One producer testified that the free market system is working well, noting "the highest raw milk prices" he has ever seen. (T2, 160:8-11.) These are "record milk prices, very high milk prices." (T4, 52:1-6.) One processor, citing to testimony of USDA chief economist Keith Collins before the U.S. House of Representatives Subcommittee on Agriculture, testified that dairy products receipts are setting record highs. (T3, 104:10-17.)

Testimony was received concerning the tight competitive market. A processor witness stated that increasing New Jersey's price will increase out-of-state competitive advantage (T4, 167:9-11), although the federal Order was said to provide some raw milk price advantages to the out-of-state raw milk. (T4, 168:4-5.) It was asserted that the level of required competitiveness is at the one hundredth of a cent ($0.0001) per gallon level, and there is a significant price discrepancy at one half cent per gallon (being attributed, for the sake of context, to the fuel adjustment add-on). (T4, 166:14.)

Testimony concerning the competitive market that was presented by one processor stated that price impacts competitiveness and the fuel adjustment is not needed any more. (T4, 170:8-13.) However, when asked to quantify the increased cost to the customer directly attributable to this one-half cent fuel adjustment, the witness said it depends on the customer but is not likely to be more than half a cent and when asked the impact of the fuel adjustment on reported sales' decline from higher prices, the witness stated he did not know. (T4, 220:4-22.)

Two witnesses, both of them milk dealers, made reference in written testimony to the impact of other states' dairy industries on New Jersey's dairy industry. Both cited what they saw as other states' dairies "dumping" milk into New Jersey at prices below the costs at which a New Jersey dairy could make any level of profit. Both witnesses urged price controls throughout the milk marketing chain to combat the problem.

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[24] The record developed in this proceeding is more complete than the previous record in some areas because it included accommodation of confidentiality concerns at the outset, with protection of individually identifiable confidential financial information through provision of *in camera* review and assurance of averaging of not less than three sources of similar confidential information.

Reflecting the position of both, one witness' written submission (read into the record) stated:

"These processor/dealers from out of this market pay much less for raw milk than farmers in New Jersey receive. We the dealers cannot survive. Effective and strong enforcement is needed yesterday if our New Jersey industry will survive. It's amazing that the large supermarket retailers are making over one to even up to two dollars per gallon, while (b)odegas and small corner grocers are barely making five percent over cost.

"While in a price war, everyone loses, including the consumer in time. It's easy to cut your price below any level of profit to destroy your competitor in a specific store. I respectfully urge the director to implement emergency pricing minimums, perhaps, a system like PMMB (Pennsylvania Milk Marketing Board) that works fine." (T1, 30:13-18, 30-31:23-1.)

The pricing issues identified in these written submissions showed problems in tracking price factors as had been highlighted in the 2006 hearing.

Based on very similar facts to those in New Jersey - record high prices for milk in the latter half of 2007, declining prices into 2008, extremely high feed prices with weather conditions contributing to lower yields - at an over-order premium hearing October 29, 2007, the Pennsylvania Milk Marketing Board adjusted its over order premium and continued its fuel adjuster premium unchanged. (ATA-1 Findings of Fact #7.)

The only evidence from the retail sector was submitted by an association in writing, thereby precluding questions from any of the hearing participants. The written testimony included a copy of a comment that had been previously submitted to the Department in response to the readoption with amendments of N.J.A.C.2:50 and pointed to the United States Department of Agriculture (USDA) May 2007 and June 2007 Dairy Market News publications forecasting higher prices for dairy products and the predicted offset in 2007 and 2008 of higher feed costs. (WT-36 at 1.) The information was not identified as based on New Jersey comparative prices .The written submission opposed the continuation of the fuel adjustment add-on in the face of "record high milk prices" being received by farmers. (T5, 54:17-18.) Continuing steep fuel increases were noted in this testimony in connection with the fuel adjustment add-on that suppliers were said to be passing on to retail outlets. (WT-36, at 4.) No pricing information from suppliers or stores was included.

2.) Production Costs

An assessment of New Jersey dairy producers' cost of production in 2007 was possible based on confidential testimony containing producer financial information which was produced pursuant to the Notice assurance of confidentiality of personally identifiable confidential financial information and the use of averaging using no fewer than three sets of numbers. Cost of production was generated from information provided in confidential exhibits reviewed in camera and marked for identification as confidential. (FE-2, FA-1, FH-1.)

The cost of production was generated as a cash cost basis. The weighted average cost of production in 2007 was $18.98 per cwt for the farms included in this average.[25] All of these farms are above the State Herd average in milk production, with an estimated production in excess of 22,000 pounds per cow of milk sold per cow. Total milk included in the weighted average was 10,425,286 pounds.

As testimony presented at the July 24, 2006 and August 29, 2006 hearings overwhelmingly indicated that producers in New Jersey had experienced significant losses in their dairy operations, so too did testimony presented in this hearing on November 27, 28 and 30, 2007 and January 4 and 15, 2008. The losses in 2006 occurred as a result of high costs of inputs and a correspondingly low payment for milk. Losses experienced in the first half of 2007 were due to higher costs and milk prices that were increasing but were not increasing enough to overcome the lingering debt from 2006 (T3, 73:11-15) and the relentlessly rising costs, particularly those inputs with their costs tied to fuel prices, like fertilizer (nearly triple in price from 2006). (T4, 77:2-4.) With rising prices for milk in the recent past, the record shows that there have been rising fuel, feed and fertilizer costs that seem close to or are outstripping any gains the high prices for milk could have provided during both the period of higher milk prices but also throughout past year - the time that the fuel adjuster has been in place. Producers have not broken even for most of the months in the past year, and have not yet recovered from the months of low milk prices.

One producer's experience is representative of testimony received. He testified:

> Our off road fuel in 2004 ran a $1.75 a gallon. This year it's at $2.69 a gallon. I haven't purchased any recently. We do buy in quantity. It looks like it's up to $3 a gallon, so we are seeing a dramatic rise from 2004 to 2007.
>
> Our feed expenses on per hundred weight, protein supplements, we *sic* in *sic*[26] was $10.97 and that's risen to $15.40 in 2007, and the other large commodity is fertilizer running $3.20 *sic* ($320.00) a ton, and now has increased to $4.50 *sic* ($450.00) per ton[27] and we'll leave the chart with you today. (Exhibit FC-1)

[25] Expert witness testimony concerning reasonable estimated cost of production in 2007 was presented based on updating the Farm Credit number ($16.43) for 2006 by the monthly change between US Department of Agriculture Economic Research Service (ERS) 2006 and 2007. (T4, 88:20-22.) The average increase in cost of production was calculated using the ERS numbers from Exhibits FG-2B and FG-2C. This estimate is equal to $3.17 per cwt increase in cost of production for 2007. When added to the 2006 total ($16.43) the estimated cost of production for 2007 is $19.60 per cwt.

[26] The transcript inaccurately recorded the witness. The exhibit provided contemporaneously by the witness (Exhibit FC -1) lists the prices as noted.

[27] The transcript inaccurately recorded the dollar amounts given in this testimony. The exhibit provided contemporaneously by the witness (Exhibit FC-1) lists the feed, fuel and fertilizer prices with the fertilizer price in 2004 as 320, in 2005 as 338, in 2006 as 380 and in 2007 as 450.

> So when you look at that analysis, I wanted to focus on 2007 as compared to 2006. We see our cost structure on a per hundred weight basis rising 28 percent, and I know that income is up.
>
> Everyone is wondering if dairy farmers are rolling in the money, but it's up by 26 percent, so we see our profit margin squeezed, even in a year that everyone considers it to be a great dairy year, and I think our profit margin will be decreased by $0.80 when the year is completed; that is on per hundred weight basis. (T2, 84:5-25; 85:1.)

Rising milk prices in the current market have not eliminated past negative pricing overnight. Dealing with $10 milk prices "for how many years and losing $6 a hundred (weight) on the price of milk" (T3, 153:24-25, 154:1-2) is why current prices do not offset the losses. Another farmer suffered a significant operating loss in 2006 and although the price of milk increased to over $20 a hundredweight in June 2007 it takes more than a few months to pay down the debt. (T.3, 208:8-14). To be profitable, a milk- feed price ratio must reach 3. (T3 208:18-20.) In 2006 and 2007, there were 17 months the milk-feed ratio was below 3. (T3, 209:1-3.)

A producer's cost of production depends on fuel, feed and fertilizer. Testimony from individual producers was consistent with respect to escalation in prices of production necessities and in every case, these costs have risen substantially. One farm family testified their fuel costs are up 144% in 2007 (since 2004) (T3,144:15-17; T3,150:15-21); fertilizer is up 150% in two years (T3,152:19-21); feed bill went up 75% in three years (T3, 153:11-12); and seed corn is up 75% to 80% in the past few years. (T3, 154:5-7.) The suppliers have suggested an increase of $50 a ton in fertilizer prices for the spring. (T3, 154:15-22.) Producers have broken even or better in a month with higher milk prices but, in the past year, the months with a profit on expenses and revenue for that month, were only September, October and November 2007. (T3, 180:14-17.) An expert witness testified that operating costs are up 27% and fuel costs are up 31%. (T4, 62:1-4.)

Testimony from an animal nutritionist at Rutgers Extension noted that farmers are paying and will be paying high prices for feed. (T4, 50:13-14.) Individual producer testimony showed sharp increases for feed in the past year at 18% for corn, 57% for soy bean meal, 240% for cottonseed, 74% for corn gluten meal, and 60% for wheat. (T3, 209:6-16.) The feed cost in January of 2006 was $4.49 per hundred weight. In June of 2007, it was $7.07 a hundred weight. The feed cost to produce a hundred weight of milk has increased $2.58 a hundred weight or 57%. (T3, 209:19-24.) The costs of feed also rose due to weather – because of the drought in South Jersey, one producer saw the hay crop yield drop from three 850 pound round bales of hay per acre to one 850 pound round bale from five acres. (T3, 210:12-16.)

The business interests involved in dairy issues have very different perspectives. One processor witness pointed to producers who are farming the way their fathers and grandfathers did, and asserted that they have to "find better ways to produce the product less expensively and not expect the state to come in and mandate what prices we're going to pay for it." (T3, 131:3-9.) At the same time, producers stated unequivocally that if they were farming the way their fathers had, they would be out of business. (T3, 131:1-12; T3,157:18-25.)

In response to a question about whether there are times processors are not able to recover their costs the same way producers are not able to recover costs, one producer testified that producers can't raise their prices because the price of milk is regulated by the Market Administrator but "the processor is not regulated to the extent that he can't raise or lower his price when he signs a contract with a retailer." (T4, 31:5-11.) The hauling cost is not a cost that the producer can pass on (T4, 78:20-25); however, processors can pass along hauling cost to the producers, although they may not do so. (T1, 66:14-17). In addition, the costs producers pay to deliver milk from the farm to the processor's plant have increased. (T1, 171:13-17.) One producer testified that he paid $0.81 a hundred weight to haul his milk from the farm to the processor in 2005 and in 2007 that cost is $1.11 a hundred weight – a 37% increase. (T4, 75:11-20.)

One producer's experience is characteristic of testimony received. The higher price of milk, when coupled with the dramatic (and continuing) increases in costs, did not result in a profit for the producer, who sold part of his herd to realize a profit in 2007. (T2, 43:8-15.) The rising cost of fuel directly affects the cost of feeding the herd, fertilizer for crops and trucking costs to bring feed to the farm. In another case, the cost per hundred weight increased 28% in 2007, while the price of milk increased 26%. (T2, 84:16-19.) In fact, despite the increased price of milk in 2007, due to the increasing costs, the profit margin for this producer in 2007 was expected to be less than it had been in 2006. (T2, 91:15-23.)

D. Fuel Adjustment Add on

As noted above, the fuel adjustment add on, unlike a flat subsidy payment, is directly tied to diesel fuel prices at its base (the 2002 diesel fuel price for the Central-Atlantic region) – adding three cents for each ten cent increase over the base price or subtracting three cents for each ten cent reduction in the fuel price. N.J.A.C. 2:50-4.2. Based on the U.S. Dept of Energy calculations, the average on-road cost of diesel fuel increased 36% in nine months (T4, 63:9-13.)

The payment that Producers receive for milk under the federal minimum price system does not include any calculation related to the producer's costs that are attributable to fuel or feed or fertilizer. (T1, 79:20-25.) Moreover, the Producer pays a fuel surcharge on everything that he must purchase so he needs the premium (T4, 34:17-18.) Producers testified that the fuel adjustment helps in the payment of hauling charges. For example, a producer's fuel costs have risen 138% over five years, but suppliers have passed on their fuel cost increases to the farmers through a fuel surcharge or through increased price (T5, 30:13-18), and the cost of hauling milk from the farm to the plant (also paid by the farmer) increased from $0.56 to $0.80 per hundred weight.[28]

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[28] After the hearing record closed, so not considered in the determination, but noted as a matter of interest, notice of a fuel surcharge to transportation costs was circulated on March 7, 2008 by one cooperative.

An expert in the field of Agriculture Economics and marketing testified that the fuel adjustment add-on has been a success (T4, 64:12), providing to the New Jersey dairy farmer an average payment of $0.2864 per hundred weight. (T4, 64:5-7.) As to competition, the expert testified that, while New Jersey's fuel adjustment add-on would slightly raise wholesale and retail prices, out of state competitors have to raise their prices to recoup costs in this energy price environment, as well. (T4, 65:4-9.) In addition, his determination that the cost is reasonable to processors and consumers took into account the fact that the "premium is only applicable on New Jersey produced milk, delivered to the state's four processing plants, and assigned utilization as Class I." (T4, 65:10-15.)

Producers testified in support of continuation of the fuel adjustment add-on throughout the hearing. One producer reports the rising fuel price relative to the fuel adjustment and its relation to the increased cost of fuel. In harvesting months of August and September, 3,237 gallons of diesel fuel was used in August and 4,328 gallons in September. The price of diesel fuel increased 40% or $0.85 per gallon. (T3, 211:18-25.) In August, 2007 this price of fuel increase meant an increase in costs of production of $0.43 per cwt. In September 2007, the increased fuel cost meant an increase in production cost of $0.56 per cwt. The August fuel adjustment add-on was $.44 and the September fuel adjustment add-on was $0.46 a hundred weight. But since the fuel adjustment add-on is based on Class 1 utilization, the producer received 66% of the fuel adjustment or $0.2939 of the fuel adjustment in August and $0.3053 of the fuel adjustment in September. At this rate per hundred weight, the fuel adjustment add-on does not even cover the increased cost of diesel fuel. (T3, 212:1-25.)

Another producer also testified that the fuel adjustment add-on results in an increase in his milk check of between 25 and 31 cents a hundred weight[29] and he considered that to be significant. The cost of off-road diesel on October 2, 2007 was $2.34 a gallon, on December 12, 2007 he paid $2.99 and on January 4, 2008, the price was $3.19. (T4, 20:2-12.)

The cost of the fuel adjustment add-on is considered by one processor to be an increment, an added cost. (T1, 75:2-4.) Given the current price of milk, the processor argues that the fuel adjustment is not necessary. (T1, 76:3-7.) The witness said he would not know of an acceptable increment, other than zero. (T1, 60:11-12.) In addition, another processor witness testified to the ability of the competitive marketplace to provide the necessary adjustments and disagreed that a per gallon level of $0.005 is "insignificant." (T 4, 166:12-16.) (It was not clear where the witness saw that term in connection with the effect of the fuel adjustment add-on.)

One dealer supports the fuel surcharges (T1, 85:1-4) and testified that store sales are up since the fuel adjustment add-on. (T1, 88:1-5.) His estimated price of the fuel adjustment

[29] As previously noted, the fuel adjustment add-on is based on Class 1 milk utilization. For purposes of calculating Class 1 utilization, the milk is in a "pool" and Class 1 utilization depends on the processor and the percentage of Class 1 milk attributable to producers will vary.

add-on is slightly more than one penny per gallon. (T1, 91:1-2.) A processor estimated that the price of the fuel adjustment is 0.53 per hundred weight when milk is priced at $24 per cwt. (T1, 45:11-20.) When further questioned, he estimated the cost per gallon would be increased $.045 (T1, 53:19-25), and acknowledged both that it depends on how much milk comes into New Jersey how much of an impact the fuel adjustment has on the business (T1, 54:5-9), and that the fuel adjustment add-on is not the sole reason for price increases, as some of the factors are the commodities market (powder, cheese) and exports pull up the price.(T1, 52:17-25.)

That processor witness also testified that the fuel adjustment add-on came in response to high energy costs and a low price for milk, but now there are record high prices for milk and they are "likely to remain high". (T1, 39:16-22.) But other evidence presented by an expert witness showed that USDA predicts falling milk prices in 2008, with the estimate to be $20.25 in the first quarter of 2008, $18.40 in the second quarter, and $17.30 in the third quarter. (T4, 71:25, 72:1-3.)

Many producers who testified indicated that their fuel costs have risen significantly during the year. (T2, 41:1-5; T2, 46:6-11; T2, 84:1-9; T3, 211:17-25-212:1; T4, 20:1-12; T4, 76:16-22.) An expert in the field of agriculture economics cited statistics on fuel and feed prices also supported these assertions, reporting that production costs "drastically increased" in 2007 with the costs of fuel and feed up 31% from prices in 2006. (T4, 62:1-4.) One processor opposed the fuel adjustment add-on but did support a direct subsidy because it would not directly affect the price of any Class product. (T4, 282:13-16.)

E. rBST-free Premium

Testimony and exhibits were provided by producers, cooperatives, processors and consumers concerning the use of rBST in the dairy industry. Several producers requested at the hearing that processors be required to pay a premium or pay a higher premium on milk which was certified by the producer as being rBST-free. (T2, 42:6-10; T2, 47:10-12; T2, 86:8-12**).** Testimony was received from both producers and processors that there are premiums being paid for rBST-free raw milk. (T4, 252:9-11; T4, 12:24-25, 13: 1-3; T4. 18:5-7.)

One producer was asked if he receives a $.75 premium and he responded that the premium is smaller. (T2, 48:2-4.) Producers who use rBST on their herd testified that they would lose income and efficiency if they were to discontinue the use of this technology and that these factors support a premium to producers for non-use of rBST. (T3, 148:4-9; T3, 220:25 - 221:1-25.**)** Other producers who do not currently use rBST technology in their production testified in support of a premium for not using that technology to offset the loss of income from the additional milk. (T2, 51:22-25 - 52:1-2: T2, 85:8-12.) In addition, one producer testified that, in New Jersey, consumers are willing to pay for that product (without use of rBST.) (T2, 52:3-5.) Testimony was received that an rBSTfree premium is justified to entice producers of rBST to change their production methods and not use rBST technology. (T4, 68:20-24.)

Evidence was received identifying rBST free milk as a "value added product" and conflicting evidence was given that rBST free milk was not a value added product and did not justify a premium to the producer. One expert witness testified in favor of a premium for rBST free milk. (T2, 67:21-25.) He also characterized it as a value added product. (T2, 68:9-13) but went on to assert that even if not value added in market pricing, the producer has less production without rBST and should be compensated for plant requests for rBST-free milk. (T2, 68:20-25.) There was also testimony elicited from this expert that the federal market program does not provide any specialized price for a Class 1 product – rBST free, all natural, Kosher or organic. (T2, 110:20-22 - 111:1-13.) In addition, he testified that there are different pricing strategies for stores, related to cost with or without premiums. (T2, 127:12-18.) This expert also referred to market surveys which found markups with up to a two dollar difference in price for rBST free milk in some markets. (T2, 123:2 - 124:1-4.)

Another witness, from outside the dairy industry, pointed to a study which found that farmers using rBST are not experiencing a profit from its use. (T3, 25:13-25 - 26:1-11.) This witness viewed pricing to consumers as evidence of free market shifts and supply and demand. (T3, 28:22-25, 29:1-9.)

One farmer tried rBST but no longer uses it because it is a management and handling issue. (T4, 84:1-6.) Using rBST results in increased costs for transportation and logistics. (T4, 69:8-11.) A study addressing cost saving from rBST was both supported and challenged. (T3, 25:25 - 26:1-24.) (T.4, 67:16-19.)

Testimony was received supporting the conclusion that rBST free milk is a value-added product in the market place based on what the witness said consumers will pay for the product. (T2, 68:9-11.) (T4, 98:1-4.) Testimony was also given concerning the negative impact on the dairy industry from negative product differentiation (T1, 42:1-18) because the labels of rBST free "unfairly cast a quality shadow over so-called 'conventional milk.'" (T1, 43:1-5.)

Testimony provided on behalf of dealers asserted that "establishment of a mandated premium for rBST free milk would be a nightmare for enforcement and marketing" because of the absence of any scientific test to validate such a claim and another processor testified that it is not enough to have affidavits concerning rBST-free milk but there need to be tests to verify the milk. (T1, 48:5-11.)

IV. CONCLUSION

Substantial credible evidence was presented detailing the rising costs being experienced across the community related to production, particularly the increased cost of fuel, feed and fertilizer. Limited credible evidence was presented concerning reduction or recovery of production costs and methods to increase production, including use of technology and the limited cost recovery options available to producers in the regulated climate. Credible evidence was presented concerning production costs per hundred weight (cwt) to produce milk, and significant increases in the price received for milk.

The evidence of substantially increasing costs since the September 28, 2006 decision was uncontroverted. Limitations on cost recovery options that are available to processors were mentioned through questioning but there were generally few specific facts. Argument was presented concerning production methodologies to reduce costs and credible evidence was presented, in the context of possible rBST premiums, both favoring and opposing the use of technology to increase production.

Despite repeated questions to numerous witnesses over several days of hearings, none was able to detail for the panel what specific impact the fuel adjustment add-on payments had to the retail price of milk to the consumer. At least one processor witness told the panel that the industry is so highly competitive that keeping pace with the competition often comes down to "one-hundredth of a cent" on wholesale prices. Yet no one in the marketing chain could pinpoint how much of the pennies-per-gallon increase in recent retail prices was attributable to the fuel adjustment add-on payment to producers.

Processor-dealer testimony underscored the need for a system of reporting requirements throughout the milk marketing chain as proposed in the September 28, 2006 Order. Alternative efforts have not been successful and the full implementation of those reporting requirements in order to obtain the cost and pricing information throughout the milk marketing chain now appears both unavoidable and necessary to enable a comprehensive system of milk pricing.

Even the one industry witness who ventured a guess about how much the fuel adjustment add-on payment impacted retail prices – saying it was "not likely more than half a cent" per gallon – said he could not say for sure that *any* of the decline in milk sales seen recently by retailers could be in any way attributed to the impact of the fuel adjustment add-on to the price of a gallon of milk.

This inability to pinpoint the impact of the fuel adjustment add-on payment, in an industry self-described as watching costs and prices down to the "one-hundredth of a cent," once again raises the issue of whether increased reporting requirements of costs and prices throughout the milk marketing chain may be necessary to protect the consumer from arbitrary and capricious increases in retail costs.

In conclusion, I find sufficient credible evidence in support of maintaining the status quo with respect to the fuel adjustment add-on as set forth in the September 28, 2006 Order and as further set forth in the N.J.A.C. 2:50-4.1. et seq. I further find that there is not sufficient credible evidence to support imposition of an rBST premium or equalizing payments to producers who do not use rBST.

Respectfully submitted,

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