

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

REC'D - USDA/OALJ/HCO
2023 DEC 11 2:45 PM

In re:

Milk in the Northeast and Other
Marketing Areas

Docket No. 23-J-0067; AMS-DA-23-0031

**ORDER DENYING REQUESTS TO CONSIDER
ADDITIONAL PROPOSALS AT HEARING**

Appearances:

On Behalf of the U.S. Department of Agriculture, Agricultural Marketing Service:

Brian Hill, Esq. and Michelle McMurtray, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC 20250

On Behalf of Milk Innovation Group:

Charles M. English, Jr., Esq., Ashley L. Vulin, Esq., and Grace Bulger, Esq., of Davis Wright Tremaine LLP, Seattle, WA 98104

On Behalf of National All-Jersey:

John H. Vetne, Esq., and Wendy M. Yoviene, Esq., of Baker, Donelson, Berman, Caldwell, & Berkowitz PC, Washington, DC 20001

On Behalf of National Milk Producers Federation:

Bradley R. Prowant, Esq., and Nicole C. Hancock, Esq., of Stoel Rives LLP, Boise, ID 83702

Pursuant to Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601–674); the Administrative Procedure Act (5 U.S.C. § 553); the applicable rules of practice and procedure governing amendments to milk marketing agreements and marketing orders (7 CFR part 900); and a notice published in the Federal Register (“Hearing Notice”),¹ a hearing on proposed amendments to the pricing formulas in the 11 Federal Marketing Orders (“FMMOs”)

¹ Milk in the Northeast and Other Marketing Areas; Notice of Hearing on Proposed Amendments to Marketing Agreements and Orders, 88 Fed. Reg. 47396 (July 24, 2023).

has been underway since August 23, 2023 in Carmel, Indiana.² The undersigned presided over the first five weeks of hearing, from August 23, 2023 to September 20, 2023. As of September 25, 2023, Administrative Law Judge Jill S. Clifton is presiding; however, the present issue was raised before the undersigned. As I understand it, the hearing recessed on December 8, 2023 and will resume on January 16, 2024.

In the Hearing Notice, the Secretary of the United States Department of Agriculture (“USDA”), through the Agricultural Marketing Service (“AMS”), set for the above-referenced hearing twenty-two proposals previously submitted to AMS by various entities and identified in the Hearing Notice, or “any appropriate modifications to such proposals.”³

The Hearing Notice does not so state, but AMS excluded from the hearing certain proposals submitted to it, among them certain of the proposals by the Milk Innovation Group (“MIG”) and certain of the proposals of National All-Jersey (“NAJ”). MIG and NAJ object to the exclusion of these proposals from consideration in the current hearing and request that their proposed exhibits pertaining thereto be accepted for such consideration at the hearing, as set out in documents marked and entered into the record at the hearing.⁴ National Milk Producers

² The hearing recessed on October 11, 2023 and reconvened on November 27, 2023 in Carmel, Indiana. *See* Milk in the Northeast and Other Marketing Areas; Notice of Hearing on Proposed Amendments to Marketing Agreements and Orders, 88 Fed. Reg. 76143 (Nov. 16, 2023). From December 4, 2023 through December 8, 2023, the hearing was held in Zionsville, Indiana. *See id.*

³ 88 Fed. Reg. at 47397-99.

⁴ *See* documents marked and appearing in the record at the hearing as Exhibit Nos. 60 (for MIG, designated MIG-1 prior to being marked for identification at the hearing) and 61 (for NAJ, designated NAJ-8 prior to being marked for identification), and available on-line on the AMS web site established for this proceeding (“Hearing Web Site”): <https://www.ams.usda.gov/rules-regulations/moa/dairy/hearings/national-fmmpo-pricing-hearing/exhibits> (last visited Dec. 8, 2023).

Federation (“NMPF”) submitted a response in opposition⁵ to these MIG and NAJ objections and requests. Orally, in argument on these MIG and NAJ requests, AMS also opposed them.⁶

These MIG and NAJ objections were discussed on the record the first day of the hearing, August 23, 2023.⁷ I also heard argument on this matter from representatives of interested hearing participants on August 29, 2023.⁸

I. MIG and NAJ Proposals Excluded from Consideration at the Hearing by AMS

MIG proposed, among other things, to update shrink allowance for extended-life shrinkage products⁹ and to exempt organic milk from FMMO pooling requirements.¹⁰ On July 24, 2023, Dana H. Coale, the AMS Deputy Administrator (“Deputy Administrator”),¹¹ determined that because those proposals “do[] not seek to amend the uniform FMMO pricing formulas,” they “do[] not fall within the scope of this hearing and will not be heard at this

⁵ Exhibit No. 107 in the record, which was previously designated NMPF-96. *See* Hearing Web Site.

⁶ AMS was invited to submit its arguments in writing but did not do so. Tr. at 45-46, 1239-40.

⁷ Tr. at 28-51. In addition to those individuals listed in the above “Appearances” section, who filed the written objections and response discussed herein, the following representatives participated in oral arguments: Steven J. Rosenbaum, Esq., for the International Dairy Foods Association, and Ryan K. Miltner, Esq., for Select Milk Producers, Inc.

⁸ Tr. at 1224-277.

⁹ *See* MIG June 14, 2023 Proposals at 24-25 (“MIG PROPOSAL 5 – Adjust ESL shrinkage.”).

¹⁰ *See* MIG June 14, 2023 Proposals at 25-26 (“MIG PROPOSAL 6 – Organic Milk Exemption”).

¹¹ *See* 7 C.F.R. § 2.79(a)(8)(viii) (delegating to the Administrator, Agricultural Marketing Service, the authority to “[e]xercise the functions of the Secretary of Agriculture contained in the . . . Agricultural Marketing Agreement Act of 1937”); 7 C.F.R. § 900.2(e) (“The term *Administrator* means the Administrator of the Agricultural Marketing Service or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act for the Administrator.”).

time.”¹² MIG objects to the Deputy Administrator’s decision.¹³

NAJ proposed, among other things, “to amend the four remaining FMMOs that utilize skim and fat pricing so that they utilize MCP [multiple-component pricing] for Classes II, III, and IV” milk¹⁴ and to value Class I milk “on the actual pounds of protein, other solids, and nonfat solids pooled.”¹⁵ On July 24, 2023, the Deputy Administrator determined those proposals “will not be heard at this time” because they relate to regional, rather than national, pricing and “do[] not fall within the scope of this hearing.”¹⁶ NAJ objects to the Deputy Administrator’s decision.¹⁷

MIG and NAJ contend that the Deputy Administrator’s determinations to exclude these particular proposals of theirs from consideration at the hearing were arbitrary and capricious and must be reversed.¹⁸ They contend that, contrary to the Deputy Administrator’s determination that they are not, their proposals are within the scope of the hearing as set out in the official Hearing Notice published in the Federal Register.¹⁹ MIG and NAJ contend that earlier pronouncements by AMS are pertinent to interpreting the scope of the hearing.²⁰ They also contend that the Deputy Administrator provided that certain other proposals similar in relevant aspects to theirs were approved for consideration at the hearing, and therefore it was arbitrary and capricious, and

¹² USDA Response to Milk Innovation Group at 2.

¹³ Tr. at 29.

¹⁴ NAJ June 20, 2023 Proposals at 13 (“NAJ Proposal 2”).

¹⁵ NAJ June 20, 2023 Proposals at 19 (“NAJ Proposal 3”).

¹⁶ USDA Response to National All-Jersey at 1-2.

¹⁷ Tr. at 42.

¹⁸ Ex. No. 60 at 6-7; Ex. No. 61 at 2; *see* Tr. at 29-30, 1254, 1257.

¹⁹ Ex. No. 60 at 8; Ex. No. 61 at 2.

²⁰ Ex. No. 60 at 3, 8; Ex. No. 61 at 2-3.

fair to say, unduly discriminatory, to set those proposals for hearing but not the MIG and NAJ proposals.²¹

MIG and NAJ contend, among other things, that the undersigned Administrative Law Judge has the authority to allow consideration of these proposals at the hearing, despite the Deputy Administrator's determination that they should not be.²² They therefore "request a modification of matters open for hearing and/or reversal of the decision to exclude" the instant proposals.²³ Or, apparently, as an alternative, by referencing that under 7 C.F.R. § 900.7(b) I may in my discretion "certify to the Secretary for determination any motion, request, objection, or other question addressed to the judge" suggest or contend that I should so certify the question of whether these MIG and NAJ proposals may be considered at the hearing to the Secretary.²⁴

NAJ's counsel explained in oral argument:²⁵

The rules of practice, your Honor, in 7 CFR, Part 900.7 . . . provides your Honor with two options: Rule on the objection and the motion, which might require reopening the hearing or reissuing the notice by virtue of the self-imposed hand-tying that Dairy Programs has effected; the Judge may also under 900.7 certify the question to the Secretary. . . . Based on prior hearing experience, a ruling on these motions could be made today; it could be made at the end of the hearing. In all likelihood, it would – it may require a reopening of the hearing or an amended notice of hearing, which has been done before by USDA. I think that's probably the solution.

NMPF, which contended to the Deputy Administrator that these MIG and NAJ proposals should not be considered at this hearing because the hearing should be limited to pricing formula

²¹ Ex. No. 60 at 5, 8; *see* Tr. at 30, 34, 37-38, 1238, 1249, 1254, 1257.

²² Ex. No. 60 at 7, 9; Tr. at 1249.

²³ Tr. at 29-30.

²⁴ Tr. at 1249, 1259, 1265-66.

²⁵ Tr. 1259.

matters,²⁶ contends that under the applicable statutes and regulations, the Administrator (or Deputy Administrator) is to determine what is to be considered at a hearing in a formal rulemaking proceeding to consider amendments to Federal Milk Marketing Orders,²⁷ and that the Deputy Administrator's decision to exclude these MIG and NAJ proposals were reasoned and reasonable and not arbitrary and capricious.²⁸ NMPF contends that the Deputy Administrator's determination to set for hearing only "pricing formulas," and not other matters, was appropriate and within the Deputy Administrator's discretion, as was the Deputy Administrator's determination that the MIG and NAJ proposals were beyond the scope of the hearing set by the Deputy Administrator.²⁹

Similarly, AMS contends that it was within the Deputy Administrator's discretion, and reasonable and supported by the circumstances, to establish the scope of the hearing as she did, and to determine that the MIG and NAJ proposals were beyond that scope.³⁰ AMS points out that the 2008 Farm Bill established tight deadlines for the completion of USDA consideration of amendments to FMMOs, and that this supports that the Deputy Administrator was reasonable in limiting the scope of the proceeding in order to complete this process in the time frame required by Congress.³¹

II. Authority of Presiding Administrative Law Judge to Countervail Administrator Determinations

Under the applicable regulations I am to conduct the hearing as established by

²⁶ Ex. No. 107 at 4-5.

²⁷ Ex. No.107 at 4, 6.

²⁸ Ex. No.107 at 7-8.

²⁹ Ex. No. 107 at 5-8; Tr. at 1238.

³⁰ Tr. at 1233-34, 1269-70.

³¹ Tr. at 1225-26, 1228-29, 1234.

Administrator, or Deputy Administrator.³² Among other things, I am to manage the introduction of evidence in the form of witness testimony and documents supported by such testimony.³³ Crucially for present purposes I am to exclude from the record testimony that is beyond the scope of the hearing as established by the Notice of Hearing.³⁴ I am to rule on motions made to me but, as noted above, may, in my discretion, certify questions to the Secretary.³⁵

As to establishing the scope of the proceeding, the Administrator is a delegate of the Secretary and, as such, speaks for the Secretary.³⁶ Under this authority, the Administrator is charged with establishing the scope of the hearing before me.³⁷ I am bound by that scope and specifically required by the rules to exclude evidence not within that scope.³⁸ But as is true for any Administrative Procedure Act Administrative Law Judge in any proceeding, my determinations are to be made consistent with the Administrator/Secretary's determinations, and my determinations are subject to review by the Administrator/Secretary.³⁹ In this instance, the Deputy Administrator specifically determined that the MIG and NAJ proposals are beyond the

³² See 7 C.F.R. § 900.8(c)(2).

³³ See 7 C.F.R. §§ 900.8(d)(1)(d)(4).

³⁴ See 7 C.F.R. §§ 900.8(d)(1)(iii), (d)(3); 7 C.F.R. § 900.6(b)(5).

³⁵ See 7 C.F.R. § 900.7(b) (“The judge may in his discretion submit or certify to the Secretary for decision any motion, request, objection, or other question addressed to the judge.”).

³⁶ See 7 C.F.R. § 2.22(a).

³⁷ See 7 C.F.R. §§ 900.3, 900.4(a); *Nat'l Farmers Org., Inc. v. Lyng*, 695 F. Supp. 1207, 1209 n.12 (D.D.C. 1988) (“By regulation the scope of the hearing is determined by the Administrator of AMS.”).

³⁸ See 7 C.F.R. §§ 900.6(b), 900.8(c), and 900.8(d)(iii). The regulations specify that the Administrative Law Judge shall receive evidence “with respect to the matters *specified in the notice of the hearing*.” 7 C.F.R. § 900.8(c)(2) (emphasis added). They do not authorize the Judge to amend that notice.

³⁹ See 7 C.F.R. § 2.27(a)(1); 7 C.F.R. § 900.6(b). See also *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1103 (D.C. Cir. 2021); *Valkering, U.S.A., Inc. v. U.S. Dep't of Agric.*, 48 F.3d 305, 308-09 (8th Cir. 1995).

scope of the hearing I am charged with conducting.

In other instances, I might be called upon to interpret and apply the scope of the proceeding as determined by the Administrator. But here the Deputy Administrator has already ruled on the specific matter at hand when setting this matter for hearing. I find no basis for me to find that I have authority to make a ruling contrary to the Deputy Administrator's determinations of the scope of this proceeding. Rather it is my duty to enforce those determinations as made by the Administrator, via the Deputy Administrator, under authority delegated by the Secretary.

This is consistent with the role of Administrative Law Judges in general. The Supreme Court has determined that Administrative Law Judges are "inferior officers" under Article II of the United States Constitution.⁴⁰ As inferior officers, Administrative Law Judge determinations are subject to review by principal officers.⁴¹ The Secretary of Agriculture, "sitting in review of an ALJ's initial decision, is authorized by statute 'to substitute its judgment for that of the

⁴⁰ See *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); see also *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1103-04 (D.C. Cir. 2021) (holding that USDA Administrative Law Judges are inferior officers).

⁴¹ See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986-87 (2021) (holding that administrative patent judges qualify as inferior officers if their decisions are subject to review by a principal officer); *United States v. Donziger*, 38 F. 4th 290, 301 (2d Cir. 2022) ("A principal officer 'need not review every decision of the [inferior officer]. What matters is that the [principal officer] have the discretion to review decisions rendered by [the inferior officer].") (quoting *Arthrex*, 141 S. Ct. at 1988)); *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1103 (D.C. Cir. 2021) ("Moreover, the Secretary (a principal officer) has considerable influence over whether an ALJ's decision becomes the final decision of the agency."); *Landry v. FDIC*, 204 F.3d 1125, 1142 (D.C. Cir. 2000) (Randolph, J., concurring) ("The fact that an ALJ cannot render a final decision and is subject to the ultimate supervision of the FDIC shows only that the ALJ shares the common characteristic of an 'inferior Officer.'" (quoting *Edmond v. United States*, 520 U.S. 651, 653 (1997))); see, e.g., *Duenas v. Garland*, No. 18-71987, 2023 WL 5487957, at *3 (9th Cir. Aug. 24, 2023); *In re Palo Alto Networks, Inc.*, 44 F. 4th 1639, 1376-77 (Fed. Cir. 2022).

ALJ.”⁴² I do not find a provision under which I am authorized to substitute my judgment for the clearly expressed judgments of the Secretary’s delegates.

To the extent MIG and NAJ’s requests ask that I, as an alternative, in my discretion, certify their requests to the Secretary under 7 C.F.R. § 900.7(b), for determination, I decline to do so. As noted above, NAJ’s counsel stated at oral argument that “[b]ased on prior hearing experience, a ruling on these motions could be made today; it could be made at the end of the hearing” and that the requested relief “may require a reopening of the hearing or an amended notice of hearing, which has been done before by USDA.”⁴³ The Secretary can take up MIG and NAJs requests when considering the decision in this case, without an interlocutory certified question.

Accordingly, the following Order shall be entered.

ORDER

1. Milk Innovation Group’s request for “modification of the matters open for hearing and/or reversal of the [Deputy Administrator’s] decision to exclude”⁴⁴ the identified MIG proposals is DENIED.
2. National All-Jersey’s motion to include the identified NAJ proposals “and related evidence in this proceeding”⁴⁵ is DENIED.

Copies of this Order shall be served upon the parties by the Hearing Clerk. I request that AMS also post it on the web site established by AMS for this proceeding, and copies will be

⁴² *Farrow v. U.S. Dep’t of Agric.*, 760 F.2d 211, 213 (8th Cir. 1985) (quoting *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983)); *see* 5 U.S.C. § 557(b) (1988).

⁴³ Tr. 1259.


⁴⁴ Exhibit No. 60 at 1.

⁴⁵ Exhibit No. 61 at 1.

made available at the hearing.

Done at Washington, D.C.,
this 11th day of December 2023

**CHANNING
STROTHER**

 Digitally signed by CHANNING
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Date: 2023.12.11 12:43:04 -05'00'

Channing D. Strother
Chief Administrative Law Judge

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CERTIFICATE OF SERVICE

Eleven Federal Milk Marketing Orders

Docket No.: 23-J-0067

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct, and this is to certify that a copy of the ORDER DENYING REQUESTS TO CONSIDER ADDITIONAL PROPOSALS AT HEARING has been furnished and was served upon the following parties on December 12, 2023 by the following:

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Eleven Federal Milk Marketing Orders
Docket No.: 23-J-0067

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