UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:

ARIZONA-LAS VEGAS AND PACIFIC)	**DOCKET NOS. A0-368-832**
NORTHWEST MARKETING AREAS)	**A0-271-837, DA-03-04**

REPLY TO RESPONSE OF OPPONENT PRODUCER-HANDLERS IN OPPOSITION TO MOTION TO STRIKE FILED BY DAIRY FARMERS OF AMERICA

SUBMITTED JOINTLY BY

UNITED DAIRYMEN OF ARIZONA, SHAMROCK FOODS COMPANY, SHAMROCK FARMS AND DEAN FOODS COMPANY

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REPLY OF UNITED DAIRYMEN OF ARIZONA, SHAMROCK FOODS COMPANY, SHAMROCK FARMS AND DEAN FOODS COMPANY TO RESPONSE OF OPPONENT PRODUCER-HANDLERS IN OPPOSITION TO MOTION TO STRIKE FILED BY DAIRY FARMERS OF AMERICA

Although this is an on-the-record rulemaking proceeding, Sarah Farms and others have attempted to submit "new" evidence along with their filed exceptions and comments in an effort to skirt statutory and regulatory requirements that any evidence be presented in a hearing where adverse parties may conduct cross-examination. Therefore, Dairy Farmers of America (DFA) moved to strike the Producer-Handlers' comments and exceptions because submission of new evidence outside the hearing violates the Administrative Procedure Act, 5 U.S.C. § 556, and the Department's Rules of Practice at 7 C.F.R. §§ 900.1-900.7. In counsel's over 20-years experience, no one has ever had the audacity to flout the APA and Department's Rules of Practice in such a manner. Thus, these parties did not earlier join DFA's motion the merits of which are self-evident. However, now that the audacity has reached the level of alleged justification in a challenge to established rules and procedures, a reply is definitely in order.[1]

Contrary to the Producer-Handlers' assertions, the Rules of Practice militate against submission of evidence post-hearing especially without opportunity for cross-examination. The section governing filing of exceptions says nothing about submitting evidence along with those exceptions not because new evidence is permitted, but because it is not. *See* 7 C.F.R. § 900.12. Rather, it allows a party to file suggestions for "appropriate changes in the proposed marketing agreement or marketing order," along with a supporting brief. *Id.* The section provides that the exceptions "shall refer, where practicable, to the related pages of the transcript." *Id.* This language indicates that the exceptions and comments contemplated by 7 C.F.R. § 900.12 involve

[1] Since opponents of reform have analogized to federal court rules and since under those rules parties in support of the original motion may file a ***final*** reply, we certainly trust that opponents who assert their desire to expedite this process will not see fit to burden the record further. The author also apologizes for not having been able to file this Reply earlier having been unavoidably detained by a family emergency.

suggested changes to the Administrator's decision supported by reference to evidence in the actual *hearing transcript*, not evidence newly submitted. Indeed, if the opponents of reform are to be given credence, one must ask why there is a hearing, with a hearing examiner and a court reporter and a transcript if anyone can come along afterwards and simply throw in anything, including the kitchen sink, later. Under the canon of statutory construction, *expressio unius est exclusio alterius*[2], by specifically mentioning what a party *may* include in comments and exceptions, 7 C.F.R. § 900.12 implicitly excludes anything not mentioned.

Of even greater significance is the fact that the Department's Rules of Practice suggest that parties may not submit new evidence outside a hearing. 7 C.F.R. § 900.8 governs the conduct of a hearing. Subsection (d) governs submission of evidence. Since separate sections governing oral and written arguments, recommended decisions, and exceptions and comments never mention the submission of evidence, which is governed by subsection (d), the only rational conclusion is that parties may not introduce evidence outside the hearing. Furthermore, in providing for submission of evidence during the hearing, 7 C.F.R. § 900.8 also gives parties procedures for both validating and challenging evidence. Subsection (d)(3) provides for authentication of official records or documents. Subsection (d)(4) provides for authentication of exhibits. Subsection (d)(2) provides an opposing party with the opportunity to object to admission of evidence, stating "only objections made before the judge may be subsequently relied upon in the proceeding." Most importantly, subsection (d)(1) provides for cross-examination. Other sections of the procedural rules, including 7 C.F.R. § 900.12 governing exceptions, say nothing about evidence and procedures for entering or excluding it from the record.

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[2] BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (stating the definition as "a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative").

If evidence is permitted through this heretofore unknown back door, objections and cross-examination become meaningless. The hearing becomes a farce or a mere formality. Parties would inevitably wait to produce their most important evidence until after the hearing. And then one wonders how proponents could respond. How can the agency manage any kind of an efficient process? Indeed while we will resist an extended discussion of the purported facts submitted on behalf of Sarah Farms in the Comments and Exceptions and Opposition, these parties expressly deny the accuracy of the purported new evidence, by way of example only: (1) Shamrock denies that it caused Sarah Farms to lose cottage cheese business that it never had and that in fact Shamrock was forced to lower its price in a competitive marketplace in order to retain that business; (2) Shamrock made no price concessions to recapture business from Tucson Bashas' stores; and (3) Shamrock has not had any involvement or influence on any decisions by UDA to sell or not sell milk to Shade; Shamrock has provided Shade opportunities to serve as a Shamrock distributor under terms and conditions commonly applied to approximately 20 distributors.[3]

USDA cannot have adopted such elaborate procedural rules for the conduct of a hearing, including rules for submission of evidence, objections, and cross-examination only to intentionally allow parties to submit evidence outside of the hearing, bypassing these procedures. Thus, common sense and basic statutory construction dictate that parties only present evidence during a hearing under the very specific procedural rules of 7 C.F.R. § 900.8.

Thus, the APA and the Department's Rules of Practice afford parties the right to conduct cross-examination regarding evidence submitted during a hearing, a right subverted by the

[3] The absurdity of opponents' position is thus perfect. Without a hearing examiner, we can now all submit our evidence in the form of pleading or affidavit or however one chooses. And of course we now have an after hearing declaration purportedly written and signed by the same witness for Sarah Farms who during the hearing, admitted that he did not write, read or even understand his own testimony. Tr. 2702-2706 (Hettinga). But for the seriousness and necessity for immediate action being taken by USDA in this matter, this farce could be enjoyable.

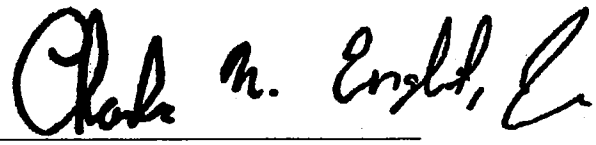
Producer-Handlers' introduction of new evidence after the hearing. Specifically, 7 C.F.R. § 900.8 provides that "cross-examination shall be permitted to the extent required for a full and true disclosure of the facts." The APA, 5 U.S.C. § 556, states, "a party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

We have searched long and hard for support for opponents' bizarre efforts. The scarcity of the case law highlights the absurdity of the effort. However, in the field of social security benefits and hearings before the Department of Health and Human Services (HHS), courts have routinely rejected HHS's attempts to rely on post-hearing reports (as post-hearing evidence) even though HHS asserted that the opportunity to comment on this post-hearing evidence protected the claimant's rights. *Wallace v. Brown*, 869 F.2d 187, 192-193 (3rd Cir. 1989)(and cases cited therein)(holding that a hearing participant was denied his due process rights to cross-examination regarding post-hearing evidence). So too are proponents of reform deprived of their rights by the back door approach. At best we are relegated to contesting (without cross examination) the purported facts through comments or counter-facts. At worst, this endless hearing process is extended and ceases to be a hearing process and instead becomes a notice and comment process without any deadlines and any conclusion.

Thus, the opponents of reform are simply wrong. The Secretary may not consider their purported new evidence at all. In fact for the Secretary to do so, he would engage in improper rulemaking. Since the Secretary cannot reasonably be expected to separate new evidence from evidence that was properly submitted as part of the hearing process, because the Producer-Handlers' filed comments and exceptions have so intermingled the two, we urge the Secretary to

reject these shenanigans and strike the comments and exceptions in their entirety, and to take immediate action to finalize and implement a Final Decision.

Respectfully submitted,



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