THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

In re:	Doc. No. 23-J-0023; AMS-DA-23-0031
Milk in the Northeast and Other Marketing Areas	

NATIONAL MILK PRODUCERS FEDERATION'S RESPONSE TO THE OBJECTIONS OF MILK INNOVATION GROUP AND NATIONAL ALL-JERSEY

Proponents Milk Innovation Group ("MIG") and National All-Jersey ("NAJ") (collectively, "Objectors") seek to retroactively add proposals already determined by the Administrator ("Administrator") of the Agricultural Marketing Service ("AMS") of the United States Department of Agriculture ("USDA") to be outside of the scope of this hearing. 88 Fed. Reg. 47,396. Disgruntled some of their proposals were (properly) excluded, the Objectors ignore rulemaking procedure and utilize post hoc rationalizations to assert the Secretary of the USDA ("Secretary") acted beyond the bounds of his authority. Because the Administrator had unequivocal authority to set the scope of this hearing and did so without acting arbitrarily and capriciously, the objections should be overruled.

I. The Notice of Hearing Set the Scope of This Hearing.

Without citation to authority, MIG implicitly claims USDA's[1] invitation for additional proposals and an Action Plan somehow set the scope of this hearing such that exclusion of its Proposals 5 and 6 was arbitrary and capricious. (*See* Ex. MIG – 1 at 2.) Likewise, NAJ asserts that because USDA did not respond to its July 13, 2023 letter to the AMS Deputy Administrator

[1] For this Response only, "USDA" is used interchangeably with "AMS" unless otherwise noted. For convenience, the language of this Response attempts to track the language of the Objections.

advocating for NAJ Proposals 2 and 3, the Secretary acted arbitrarily and capriciously in refusing to hear those proposals.[2] The hearing record and the rulemaking regulations demonstrate Objectors' arguments lack merit.

On May 2, 2023, USDA received a request for hearing from National Milk Producers Federation ("NMPF"). NMPF summarized its request:

> These realities, and others, necessitate a ***pricing formula review*** that incorporates the Class I mover, Class I differentials, manufacturing allowance credits and other factors in the Class price formulas. The constituent parts of those formulas, including the products used, the make allowances, and the yield factors in the component formulas, the assumed composition of producer milk, as well as the Class I differentials, have become increasingly outdated, even when previously updated, to the extent that the effective administration of the federal order program has become increasingly difficult. [¶] NMPF has engaged in a more than year-long comprehensive study of needed updates to all the Federal Order ***pricing formula provisions.***[1]
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> [1] *See* 7 C.F.R. §§ 1000.50-.52.

(NMPF, Request for a national hearing to amend the uniform pricing provisions of all federal milk marketing orders, at 3 (May 2, 2023) (emphasis added), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions.)

On June 1, 2023, USDA invited addition proposals "***for [c]onsideration*** in a [r]ulemaking [p]roceeding that ***may be*** [i]nitiated…." (USDA, Invitation to Submit Proposals for Consideration in a Rulemaking Proceeding that may be Initiated to Amend all Federal Milk Marketing Orders ("USDA Invitation"), at 1 (June 1, 2023) (emphasis added), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions); *see also* USDA, Action Plan on Proposed Amendments to the Pricing Provisions of all Federal Milk Marketing Orders (June 1, 2023), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions (noting USDA was "considering

[2] The Administrator issued the Notice of Hearing, not the Secretary. 88 Fed. Reg. 47,396.

initiation of a rulemaking").) Within that invitation, USDA made clear NMPF's proposals had not been accepted, that USDA had not made a decision on whether a hearing would occur, and that the scope of any potential hearing had not been set.

> The National Milk Producers Federation (NMPF) has ***requested*** the Department of Agriculture (USDA) ***begin a rulemaking proceeding*** to consider proposals to amend the pricing provisions in all Federal Milk Marketing Orders (FMMOs).
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> The proposal ***has not yet been approved for inclusion in a Notice of Hearing***. ***Before deciding whether a hearing will be held***, USDA is providing the opportunity for interested parties to submit additional proposals regarding ***potential amendments*** to the current pricing provisions applicable to all FMMOs.
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> ***If USDA determines a hearing will be held***, all known interested parties will be provided a copy of the Notice of Hearing. Anyone who desires to present evidence on proposals included in the Notice of Hearing will have an opportunity to do so at the hearing.

(USDA Invitation at 1-2 (emphasis added).)

In response, MIG proposed six amendments that it described as "changes to Class I FMMO ***price formulas***." (MIG, Petition for a Hearing to Amend Federal Milk Marketing Orders, at 15 (June 14, 2023) (emphasis added), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions.)[3] As relevant here, MIG Proposal 5 sought to increase the amount of allowable shrinkage for a sub-category of pool plants producing extended shelf-life products, and MIG Proposal 6 sought to change definitions to exempt organic milk from FMMOs. (*Id*. at

[3] In addition to apparently misunderstanding when a hearing scope is set, MIG premises its objection on a distinction between "price formulas" and "price provisions," claiming in essence that USDA impermissible changed the rules. This claimed change is, however, beside the point because the Notice of Hearing sets the scope of the hearing, not USDA's pre-notice invitation for additional proposals. *See infra* at Section II. But even if MIG's semantic argument had merit, MIG's initial petition notably used the term "price formula," not "price provisions." MIG's claim that it submitted proposals relying on USDA's use of the term "price provisions" is a disingenuous post hoc rationalization.

Exs. E (proposing changes to 7 C.F.R. § 1000.43), F (proposing changes to 7 C.F.R. §§ 1000.14-.16, .50).)

In response to USDA's invitation, NAJ "offer[ed] three proposals for consideration." (NAJ, Additional Proposals, at 3 (June 20, 2023), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions.) As relevant here, Proposal 2 sought to amend four FMMOs to use multiple component pricing to price Classes II, III, and IV; Proposal 3 sought to value Class I based on actual components, which presupposed adoption of Proposal 2. (*Id*. at 9-26 (proposing changes to § 1000.70 and §§ __.71, ___.72, ___.76, and __.77 of each federal order).)

The Objectors submitted proposals they believed would be within the scope of the hearing, but the scope of the hearing had not been set at the time the Objectors submitted their proposals. Rather, as the applicable regulations clearly state, "The proceeding shall be ***instituted*** by filing the Notice of Hearing with the hearing clerk. The Notice of Hearing…***shall define the scope of the hearing***...." 7 C.F.R. § 900.4(a) (emphasis added); *see also* 7 U.S.C. § 608c(17)(B)(i) (mandating the Secretary promulgate supplemental rules of practices "to define guidelines and timeframes for the rulemaking process relating to amendments to orders"). On July 24, 2023, the Administrator published a Notice of Hearing ***setting the scope*** of this hearing: "A national public hearing is being held to consider and take evidence on proposals to amend the pricing formulas in the 11 Federal Milk Marketing Orders (FMMOs)." 84 Fed. Reg. 47,396. The Administrator chose a hearing scope limited to amendments directly impacting the uniform pricing formulas used in FMMOs. *Id*.; 7 C.F.R. §§ 1000.50-.52.

After setting the scope of this hearing, the Administrator (appropriately) determined the scope did not permit consideration of MIG Proposals 5 and 6:

> The Secretary has determined the hearing will be limited in scope to amendments directly impacting the uniform pricing formulas used in FMMOs.

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> Proposal 5 seeks to increase the amount of allowable extended shelf-life shrinkage and consequently the amount of milk that can be priced at the lowest classified price for the month. As this change does not seek to amend the uniform FMMO pricing formulas, the proposal does not fall within the scope of this hearing and will not be heard at this time.
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> Proposal 6 seeks to exempt organic milk from FMMO pricing and pooling provisions if it is priced above the Class I minimum price. As this change does not seek to amend the uniform FMMO pricing formulas, the proposal does not fall within the scope of this hearing and will not be heard at this time.

(USDA, Letter in Reply to MIG's Proposals, at 1-2 (June 24, 2023), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions.) The Administrator's decision was apt. Neither MIG Proposal 5 nor MIG Proposal 6 addresses uniform pricing formulas. *Compare* 7 C.F.R. §§ 1000.50-.52 (uniform pricing provisions) *with* (Petition of MIG, Exs. E, F (seeking changes to other provisions)). Likewise, as with MIG Proposals 5 and 6, the Administrator appropriately found NAJ Proposals 2 and 3 fell outside the scope of the hearing set in the Notice of Hearing because Proposal 2 did not address uniform FMMO pricing formulas and Proposal 3 was parasitic on Proposal 2. (USDA, Letter in Reply to NAJ Proposals, at 1-2 (June 24, 2023), https://www.ams.usda.gov/rules-regulations/moa/dairy/petitions); *compare* 7 C.F.R. §§ 1000.50-.52 *with* (NAJ, Additional Proposals, at 9-26 (proposing changes to § 1000.70 and §§ __.71, ___.72, ___.76, and __.77 of each federal order)). Because the hearing record demonstrates the Objectors' proposals fall outside the scope of this hearing, their objections should be overruled.

II. The Secretary Did Not Act Arbitrarily and Capriciously by Excluding the Objector's Proposals.

MIG's entire argument hinges on when the USDA set the scope of this hearing. (*See, e.g.,* Ex. MIG – 1 at 8 ("At best, USDA's decision to exclude MIG's proposals suggests a decision to

change the scope of the hearing....” (emphasis added)).) MIG’s argument, that its Proposals 5 and 6 were excluded because USDA “changed” the scope of the hearing, is only coherent if the scope of the hearing was somehow fixed ***before*** the Notice of Hearing. To posit this unfounded position, MIG relies on and overstates the effect of the USDA’s invitation for additional proposals. MIG suggests the scope of the hearing was somehow already defined when USDA invited additional proposals in response to NMPF’s petition for hearing. This ignores the USDA’s pre-notice language and the controlling procedure for rulemaking.

In its pre-notice communications, USDA used contingent and noncommittal language. USDA repeatedly noted that no hearing had been set and the invitation for additional proposals was part of its consideration in deciding whether to hold a hearing. To be clear, formal rulemaking can begin with the Secretary initiating rulemaking whenever the Secretary “has reason to believe that issuance of an order will tend to effectuate the policy of the [Agricultural Marketing Agreement Act].” 7 U.S.C. § 608c(3). Or the AMS Administrator, in response to a proposal such as NMPF’s request for hearing, may issue a Notice of Hearing for the same reasons. 7 C.F.R. § 900.3(b). The Administrator may also deny a hearing on a proposal if it “will not tend to effectuate the declared policy of the act, or…for other proper reasons a hearing should not be held on the proposal....” 7 C.F.R. § 900.3(a). The Secretary and Administrator each have discretion to set the substantive scope of a hearing seeking amendments to FMMOs and do so through issuance of a Notice of Hearing. 7 C.F.R. § 900.4(a) (“The Notice of Hearing…shall define the scope of the hearing….”); *see also Mktg. Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1307 (D.C. Cir. 1977) (“The Secretary has the authority to determine the reasonable scope of a rulemaking proceeding….”). Prior to the Administrator issuing the Notice, this hearing lacked a defined scope.

Thus, the Administrator did not "change" the scope; when the Administrator set the scope, the Objectors' proposals fell outside of it.

The Objectors nearly exclusively rely on *National Farmers Organization, Inc. v. Lyng* ("*NFO*"), 695 F. Supp. 1207 (D.C. Cir. 1988). Their reliance is misplaced. In *NFO*, USDA invited parties to submit proposals for amendments to three marketing orders when considering whether to conduct a rulemaking hearing. *Id*. at 1208-09. Plaintiff submitted a proposal that the Administrator refused to include in the notice of hearing because there was "limited [industry] support for a change." *Id*. at 1209. The court found USDA acted arbitrarily and capriciously for four reasons: (1) the AMAA does not permit denying a proposal for lack of majority support; (2) the evidence did not support the Administrator's decision; (3) if plaintiff's proposal lacked evidence at the hearing, then USDA could have refused to include it in the amended order; and (4) to ascertain industry support, the Administrator over relied on input from handler organizations. *Id*. at 1212-13. In sum, USDA's "reasons for not wishing to have the proposals of the [Plaintiff] openly debated [were] unrelated to the statute and the regulations." *Id*. at 1213.

The Administrator's refusal to include the Objectors' proposals is unlike *NFO* and is not arbitrary and capricious. *See Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir. 1982) ("The 'arbitrary and capricious' standard is narrow and permits a reviewing court merely to consider whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (internal quotation marks and citation omitted)). Foremost, Objectors' proposals were excluded from the Notice of Hearing because they were outside the scope, not because of a perceived lack of industry support. It is not arbitrary for the Administrator to define the scope of the hearing: the Administrator is obligated to do so. 7 C.F.R. § 900.4(a) ("The notice of hearing…shall define the scope of the hearing….). Moreover, none of the court's

reasons for finding the USDA's denial arbitrary and capricious in *NFO* are present here. In *NFO*, the court found anathema that USDA had effectively made a pre-ruling on the merits on plaintiff's proposal by claiming it lacked industry support and relying on interests antagonistic to plaintiff (i.e., handlers) to make that decision.[4] Here, the Administrator stayed within the boundaries of the AMAA and regulations when issuing the Notice of Hearing. The Administrator defined a scope for a hearing, which ***included*** several of the Objectors' proposals. But ***some*** of the Objectors' proposals—along with many other proposals—were outside of that scope and therefore not included in the Notice of Hearing. The Administrator did not act arbitrarily and capriciously.

III. Conclusion

Because the Administrator properly rejected the Objectors' proposals as outside the scope of this hearing, their objections should be overruled.

DATED: August 28, 2023

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[4] Further, in *NFO*, plaintiff's rejected proposal was clearly ***within*** the defined scope of the hearing because "identical" proposals impacting the same order provisions—the frequency of payment to producers—were included in the hearing. *NFO*, 695 F. Supp. at 1213. Here, the Objectors' proposals involved other order provisions not involved with any proposals within the scope of the hearing.