

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

IN RE:

**MILK IN THE NORTHEAST AND
OTHER MARKETING AREAS;
Class III/IV MILK PRICING ISSUES**

72 Fed. Reg. 6179 (Feb. 9, 2007)

72 Fed. Reg. 7753 (Feb. 20, 2007)

72 Fed. Reg. 13219 (Mar. 21, 2007)

**Dockets: AO-14-A77
DA-07-02**

Reconvened Hearing,
April 9 – 13, 2007

**MEMORANDUM OF LAW
SUPPORTING RECEIPT IN EVIDENCE OF RELEVANT DOCUMENTS AND
TESTIMONY FROM PRIOR, RELATED, ADMINISTRATIVE HEARING**

This memorandum demonstrates that relevant documents and testimony from a prior administrative milk order hearing are admissible in a subsequent federal milk order hearing, notwithstanding hearsay objections (i.e., inability to cross-examine the witness or exhibit sponsor).¹ Such evidence is admissible, and its exclusion is legal error, because:

- 1) Hearsay evidence is generally allowed in administrative proceedings, *E.g., Bobo v. USDA*, 52 F.3d 1406, 1414 (6th Cir. 1995).
- 2) USDA's rules of practice governing milk order hearings expressly permit the receipt in evidence of "***the record of any previous hearing***," or any portion thereof, produced *as an exhibit or "incorporated by reference"* (7 CFR 900.8(d)(4)) (Attachment "A" hereto);
- 3) The APA authorizes receipt of any oral or documentary evidence, allowing exclusion only of evidence which is "irrelevant, immaterial, or unduly repetitious evidence." 7 USC 556(d) (Attachment "B"), incorporated in 7 CFR 900.8(c)(2)(iii); and
- 4) More stringent Federal Rules of Evidence, approved by Congress for use in federal court civil and criminal proceedings, expressly allow prior recorded testimony (although hearsay) to be received in a later civil or criminal proceeding under circumstances described in Rule 804(b)(1) (Attachment C).

¹ The presiding Administrative Law Judge ruled on two occasions that the record and record excerpts from the prior make allowance hearing (Docket AO-14-A74) would not be admitted as evidence on make allowance issues in this proceeding. See: Ruling of ALJ, April 10, 2007 (Indianapolis), on proposed Exhibits 36 and 37 (limiting evidentiary use of prior written testimony and cost study report of Dr. Mark Stephenson); and Hearing Tr. Mar. 2, 2007 (Strongsville), pp. 1156-59, denying request to incorporate by reference the record of prior make allowance hearing. Based upon examination of governing law, the ALJ's rulings should be reconsidered and the evidence submitted.

It should be unnecessary to inquire beyond the face of USDA's Rules of Practice and Procedure governing Milk Marketing Order Hearings, Rule 8(d)(4), to support the receipt in evidence of testimony or documents from a prior hearing to which reference is made by a witness in a later hearing.² Such evidence is presumptively admissible in the later hearing. The Rules direct the presiding ALJ to determine the best form of such evidence from the prior hearing for use in the later hearing (whether it should "physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference"), and to segregate, "insofar as practicable," irrelevant or immaterial portions thereof.

Hearsay evidence is admissible in administrative proceedings, subject to examination of the reliability, credibility, and bias of its source, as well as the circumstances in which the out-of-court statement was made. E.g., *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C.Cir.1980); *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980). Prior recorded testimony, moreover, has been recognized as a particularly reliable form of hearsay – the type of evidence upon which "responsible persons are accustomed to rely" within the meaning of Sec. 900.8(d)(1)(iii) of USDA's Rules of Practice as well as Rules 804(b) and 807 of Federal Rules of Evidence (conditioning receipt of hearsay evidence upon "circumstantial guarantees of trustworthiness"). See, *United States v. Pizarro*, 717 F.2d 336 (7th Cir. 1983) (citing *Ohio v. Roberts*, 448 U.S. 56, 73 (1980)); *Pacelli v. Nassau City Police Dept.*, 639 F. Supp. 1382 (E.D.N.Y. 1986) (prior testimony is considered more reliable than other hearsay because it is "given under oath and is usually preserved in writing as part of a trial transcript.").

Rule 804(b), Federal Rules of Evidence, allows receipt of prior recorded testimony if the witness is unavailable and "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Of course, the hearsay evidence from prior testimony must also be relevant to an issue of fact in the subsequent proceeding. The stringent standards and conditions of FRE 804(b) have been articulated and applied by federal courts as follows:

1. Witness unavailability: In federal court proceedings, a witness is unavailable if he is beyond the subpoena power of the court, he refuses to testify, or his presence cannot be procured by reasonable effort. A witness is unavailable if beyond the court's subpoena power. *Moss v. Ole South Real Estate Inc.*, 933 F.2d 1300 (5th Cir. 1991); *In re Screws Antitrust Litigation*, 526 F. Supp. 1316 (D.Mass. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D.Pa. 1980) (a witness in a prior case located outside of the subpoena power of the subsequent court is unavailable "even if the proponent of the former testimony has made no effort to take their depositions or to request their voluntary attendance at trial."). There is, notably, no subpoena power or other compulsory process in federal milk order hearings.

² Robert Wellington's testimony on the first day of hearing in this proceeding requested incorporation in this hearing of the record in the prior make allowance hearing of 2006, consistent with 7 CFR 900.8(d)(4). Tr. Feb. 26, 2007, p. 24. Since then, several witnesses in this proceeding, addressing make allowance issues in proposals 1, 2, and 3, have referred to make allowance evidence from various witnesses and documents received in the course of the 2006 record.

2. Motive and opportunity to examine in the prior case: The important element of this standard is “motive” to examine or cross-examine the witness in the prior proceeding. This means, with respect to the facts relevant to the subsequent case, adverse parties had a motive to question the witness “about the substantive accuracy of his statement.” *Pacelli v. Nassau City Police Dept., supra*
3. Common interest of adversaries in prior case and subsequent case: Rule 804(b)(1) expanded upon the common law requirement of identity of parties and allows the former testimony to be introduced in the second trial if the party in the first proceeding against whom the statement was made shares a "community of interest" with or was a predecessor in interest to the party in the second trial. *Pacelli, supra, quoting Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), *cert. denied*, 439 U.S. 969 (1979); *Azalea Fleet Inc. v. Dreyfus Supply & Machinery Corp.*, 782 F.2d 1455 (8th Cir. 1986); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Cir. 1983) (allowing, in a US antitrust case, prior recorded testimony of some witnesses presented before a Japanese administrative agency – the Japanese Fair Trade Commission.); *Mainland Industries Inc. v. Standal's Patents, Ltd.*, 799 F.2d 746 (Fed. Cir.1986).

While USDA's Rule 900.8(d)(4) does not contain the prerequisites of FRE 804(b) for receipt of prior testimony, the prior record testimony proffered by AgriMark, et al. in this hearing substantially conforms to the additional, more stringent, requirements of the Federal Rules. The prior record to which Mr. Wellington referred should therefore be incorporated into this record, as expressly provided by USDA Rule 900.8(d)(4), subject only to exclusion of irrelevant evidence, as may be “practicable,” or subject to possible use limitation of such prior record to the proposals in this hearing (Proposals 1, 2, and 3) that relate to make allowance rates.

Respectfully submitted,

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April 12, 2007

(submitted in-hand to Presiding Administrative Law Judge,
and distributed to interested parties and counsel).

ATTACHMENT A

Title 7: Agriculture

PART 900—GENERAL REGULATIONS

Subpart—Rules of Practice and Procedure Governing Proceedings To Formulate Marketing Agreements and Marketing Orders

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§ 900.8 Conduct of the hearing.

(a) *Time and place.* The hearing shall be held at the time and place fixed in the notice of hearing, unless the judge shall have changed the time or place, in which event the judge shall file with the hearing clerk a notice of such change, which notice shall be given in the same manner as provided in §900.4 (relating to the giving of notice of the hearing): *Provided, That*, if the change in time or place of hearing is made less than 5 days prior to the date previously fixed for the hearing, the judge, either in addition to or in lieu of causing the notice of the change to be given, shall announce, or cause to be announced, the change at the time and place previously fixed for the hearing.

(b) *Appearances* —(1) *Right to appear.* At the hearing, any interested person shall be given an opportunity to appear, either in person or through his authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding. Any interested person who desires to be heard in person at any hearing under these rules shall, before proceeding to testify, state his name, address, and occupation. If any such person is appearing through a counsel or representative, such person or such counsel or representative shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names and addresses and occupations of such person and such counsel or representative. Any such person or such counsel or representative shall give such other information respecting his appearance as the judge may request.

(2) *Debarment of counsel or representative.* Wherever, while a proceeding is pending before him, the judge finds that a person, acting as counsel or representative for any person participating in the proceeding, is guilty of unethical or unprofessional conduct, the judge may order that such person be precluded from further acting as counsel or representative in such proceeding. An appeal to the Secretary may be taken from any such order, but the proceeding shall not be delayed or suspended pending disposition of the appeal: *Provided, That* the judge may suspend the proceeding for a reasonable time for the purpose of enabling the client to obtain other counsel or other representative. In case the judge has ordered that a person be precluded from further acting as counsel or representative in the proceeding, the presiding officer, within a reasonable time thereafter shall submit to the Secretary a report of the facts and circumstances surrounding such order and shall recommend what action the Secretary should take respecting the appearance of such person as counsel or representative in other proceedings before the Secretary. Thereafter the Secretary may, after notice and an opportunity for hearing, issue such order, respecting the appearance of such person as counsel or representative in proceedings before the Secretary, as the Secretary finds to be appropriate.

(3) *Failure to appear.* If any interested person fails to appear at the hearing, he shall be deemed to have waived the right to be heard in the proceeding.

(c) *Order of procedure.* (1) The judge shall, at the opening of the hearing prior to the taking of testimony, have noted as part of the record the notice of hearing as filed with the Office of the Federal Register and the affidavit or certificate of the giving of notice or the determination provided for in §900.4(c).

(2) Evidence shall then be received with respect to the matters specified in the notice of the hearing in such order as the judge shall announce.

(d) *Evidence* —(1) *In general.* The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.

(i) Every witness shall, before proceeding to testify, be sworn or make affirmation. Cross-examination shall be permitted to the extent required for a full and true disclosure of the facts.

(ii) When necessary, in order to prevent undue prolongation of the hearing, the judge may limit the number of times any witness may testify to the same matter or the amount of corroborative or cumulative evidence.

(iii) The judge shall, insofar as practicable, exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to any other ruling of the judge during the hearing, he shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the judge. The transcript shall not include argument or debate thereon except as ordered by the judge. The ruling of the judge on any objection shall be a part of the transcript. Only objections made before the judge may subsequently be relied upon in the proceeding.

(3) *Proof and authentication of official records or documents.* An official record or document, when admissible for any purpose, shall be admissible as evidence without the production of the person who made or prepared the same. Such record or document shall, in the discretion of the judge, be evidenced by an official publication thereof or by a copy attested by the person having legal custody thereof and accompanied by a certificate that such person has the custody.

(4) *Exhibits.* All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon satisfactory showing of the authenticity, relevancy, and materiality of the contents thereof, be numbered as exhibits and received in evidence and made a part of the record. Such exhibits shall be submitted in quadruplicate and in documentary form. In case the required number of copies is not made available, the judge shall exercise his discretion as to whether said exhibits shall, when practicable, be read in evidence or whether additional copies shall be required to be submitted within a time to be specified by the judge. ***If the testimony of a witness refers to a statute, or to a report or document (including the record of any previous hearing) the judge, after inquiry relating to the identification of such statute, report, or document, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. If relevant and material matter offered in evidence is embraced in a report or document (including the record of any previous hearing) containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the presiding officer.***

(5) *Official notice.* Official notice may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific or commercial fact of established character: *Provided,* That interested persons shall be given adequate notice, at the hearing or subsequent thereto, of matters so noticed and shall be given adequate opportunity to show that such facts are inaccurate or are erroneously noticed.

(6) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Secretary decides that the judge's ruling in excluding the evidence was erroneous. The judge shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if the Secretary decides that the judge erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

[25 FR 5907, June 28, 1960, as amended at 37 FR 1103, Jan. 25, 1972]

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ADMINISTRATIVE PROCEDURE ACT, TITLE 5 US CODE

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
- (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
- (9) dispose of procedural requests or similar matters;
- (10) make or recommend decisions in accordance with section 557 of this title; and
- (11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. ***Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.*** A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a

decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. ***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.*** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant-

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) ***Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.***

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other

evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.