

Docket: 23-J-0067

March 7, 2024

Via Email and US Mail

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The Honorable Jill S. Clifton  
Administrative Law Judge  
The Honorable Thomas J. Vilsack  
Secretary, U.S. Department of Agriculture  
200A Whitten Building  
1400 Independence Avenue, SW  
Washington, D.C. 20250-0225

**Re: Procedural Objection to AFBF's and NFU's Request for Emergency Return to  
"Higher-of" Class I Mover**

The Milk Innovation Group (MIG) reiterates its objections to American Farm Bureau Federations' (AFBF's) and National Farmer's Union's (NFU's) attempt to circumvent both the established regulations and the hearing process in its request for emergency consideration of the change to the base Class I skim formula.

First, AFBF's February 22 post-hearing letter is neither a brief, nor a request for conclusions of fact, making it an impermissible ex parte communication. *See* 7 C.F.R. §900.16. USDA's regulations permit the filing of "proposed findings and conclusions, and written arguments or briefs, based upon the evidence received at the hearing..."; "[f]actual material other than that adduced at the hearing ... shall not be alluded to therein, and, in any case, shall not be considered..." 7 C.F.R. §900.9(b).<sup>1</sup> AFBF's letter is clearly the latter. For example, AFBF alleges that there were, "... about \$55 million in Class I losses related to the current Class I formula in January 2024 alone..." but the hearing closed on January 30, 2024, meaning this fact was not and could not have been introduced into the record.

USDA should reject the letter entirely. Otherwise, other participants will be left to conclude they must not only submit the proper formal briefs, but also advocate for new requests during the post-hearing period of the rulemaking process. The briefing stage should remain an organized filing process, not a chaotic letter writing campaign.

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<sup>1</sup> MIG intentionally limits this response to the procedural shortcomings of AFBF's request. The merits will be addressed in the proper form of a post-hearing brief and conclusions of fact.

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Second, AFBF's request for emergency status is procedurally deficient. Such a request must be made at the outset of any hearing process. *See* 7 C.F.R. §900.4 (aply entitled, "Institution of proceeding"). Pursuant to 7 C.F.R. §900.4(a), a hearing can proceed on an expedited schedule only if the Administrator determines "than an emergency exists which requires a shorter period of notice." A request for emergency would have required a shorter notice period, and such emergency status would need to be included in that notice. Without such, other interested parties do not have due process notice of the fact that the proceeding is taking place under expedited rules.


Third, USDA has just concluded the 49-day on the record rulemaking proceeding that expressly includes this issue. Pursuant to the AMAA (7 U.S.C. § 608c16(C)(iii)) and implementing regulations, as well as the announcement by the Administrative Law Judge who presides over the hearing, April 1 is the established briefing deadline for the parties to address the Proposals that were the subject of the hearing, including the various proposals relating to the base Class I skim formula. The AFBF letter ignores that deadline and does not seek a modification of that briefing schedule. The rules of practice expressly provide that any recommended decision must be prepared *after* the period allowed for the filing of briefs. 7 C.F.R. § 900.12(a). The Secretary would violate the parties' due process rights if he were to act inconsistent with that schedule and before all interested parties were able to file their briefs, especially since the Secretary has not provided in the Notice of Hearing or otherwise advance notice of such a deviation. *See generally*, 5 U.S.C. § 556.


Finally, to be clear, MIG expects that various parties, including AFBF, will be submitting post-hearing briefs and conclusions of fact that may address some of the positions contained in AFBF's letter. MIG clearly makes no objection to that advocacy, but rather requests affirmation of the Department's commitment to proper due process by not considering AFBF's February 22 letter. The volume of evidence and complexity of issues at the hearing, coupled with the diverse views of the various participants, counsels that the full hearing process must be followed in this matter.

We have been authorized by the International Dairy Foods Association to state that it joins in the positions stated in this letter.

Respectfully submitted,

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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 PROCEDURAL OBJECTION TO AFBF'S AND NFU'S REQUEST FOR EMERGENCY RETURN TO "HIGHER-OF" CLASS I MOVER has been furnished and was served upon the following parties by electronic mail on March 11, 2024 by the following:

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Respectfully Submitted,

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