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Official General Order No. A-985

Posted: April 2, 2014
Effective: June 1, 2014

AN ORDER ESTABLISHING WHOLESALE DISCOUNTS

NOW, this 2nd day of April 2014, the Commonwealth of Pennsylvania, Milk Marketing Board (Board) adopts and issues this official general order pursuant to the authority conferred by the Milk Marketing Law, 31 P.S. §§ 700j-101 – 700j-1204. This order will become effective at 12:01 a.m. on June 1, 2014.

SECTION A
SCOPE; INCORPORATION

(a) This official general order governs additional discounts in Milk Marketing Areas 3, 4, 5, and 6.

(b) This official general order supersedes existing dock pick-up discount provisions in Milk Marketing Areas 1 and 2.

(c) All parts of Official General Orders A-951, A-953, A-962, A-963, A-954, A-976, A-956, and A-977 not inconsistent with this order shall continue in effect.

(d) The attached Findings of Fact and Conclusions of Law are incorporated herein by this reference as though fully set forth in this order.

SECTION B
DEFINITIONS

(a) For each Milk Marketing Area and respective Section below, the words and terms have the meanings set forth in the definition section of the applicable Official General Orders for the respective Areas, unless the context clearly indicates otherwise or the words and terms are defined below.

(b) For purposes of this order, "buyer" shall mean only "store," as "store" is defined in section 103 of the Milk Marketing Law.

SECTION C
MILK MARKETING AREA 1

(a) A milk dealer making a wholesale sale of Class I or II price-controlled packaged products may reduce the base wholesale prices by 21% if the buyer takes possession of 4,000 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer, and does so using a refrigerated tractor trailer.

(b) The price reductions set forth in section (a) may be made only if:

1. The selling dealer does not pay consideration of any type to the purchaser for services rendered; and
2. The selling dealer does not provide to the purchaser, directly or indirectly, any labor or other personal service in connection with the transportation for resale of the products purchased. The selling dealer must be independent from the trucking company utilized in the dock pick-up; and
3. The buyer places the order at least two business days before dock pick-up takes place.
4. The Board will use the criteria in OGO A-951, Section F, Provision 1(a) to determine whether a trucking company is independent from the selling dealer.

SECTION D
MILK MARKETING AREA 2

(a) A milk dealer making a wholesale sale of Class I or II price-controlled packaged products may reduce the base wholesale prices by:

1. 21% if the buyer takes possession of 4,000 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer, and does so using a refrigerated tractor trailer.
2. 20% if the buyer takes possession of 2,500 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer.
3. 18% if the buyer takes possession of 800 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer.

(b) The price reductions set forth in section (a) may be made only if:

1. The selling dealer does not pay consideration of any type to the purchaser for services rendered; and
2. The selling dealer does not provide to the purchaser, directly or indirectly, any

labor or other personal service in connection with the transportation for resale of the products purchased. The selling dealer must be independent from the trucking company utilized in the dock pick-up; and

3. The buyer places the order at least two business days before dock pick-up takes place.

4. The Board will use the criteria in OGO A-953, Section E(b) to determine whether a trucking company is independent from the selling dealer.

SECTION E
MILK MARKETING AREA 3

(a) A milk dealer making a wholesale sale of Class I or II price-controlled packaged products may reduce the base wholesale prices by 20.5% if the buyer takes possession of 2,000 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer, and does so using a refrigerated tractor trailer.

(b) The price reductions set forth in section (a) may be made only if:

1. The selling dealer does not pay consideration of any type to the purchaser for services rendered; and

2. The selling dealer does not provide to the purchaser, directly or indirectly, any labor or other personal service in connection with the transportation for resale of the products purchased. The selling dealer must be independent from the trucking company utilized in the dock pick-up; and

3. The buyer places the order at least two business days before dock pick-up takes place.

4. The Board will use the criteria in OGO A-962, Section E(b) to determine whether a trucking company is independent from the selling dealer.

SECTION F
MILK MARKETING AREA 4

PROVISION 1 - DEFINITIONS

In Section F the following words and terms have the meanings set forth in this provision unless the context clearly indicates otherwise:

Multi-Store Group - Three or more stores that satisfy the requirements in Provision 2.

Primary Supplier – A milk dealer making a wholesale sale of Class I or II price-controlled packaged products to a multi-store group for a price that may be discounted based on the volume of sales by that milk dealer to the multi-store group.

Secondary Supplier – A milk dealer making a wholesale sale of Class I or II price-controlled packaged products to one or more stores within a multi-store group for a price that may be discounted based on the volume of sales by the primary supplier to the multi-store group.

PROVISION 2 – MULTI-STORE DISCOUNT: QUALIFICATION; PRIMARY SUPPLIER

(a) Three or more stores may form a multi-store group provided all of the following are satisfied:

1. The stores are owned by the same person or persons, are operated under franchises granted by the same franchiser, or purchase Class I or II price-controlled packaged products through arrangements with a common purchasing agent;
2. All invoices for Class I or II price-controlled packaged products purchased by the stores are received and processed by the common owner, franchiser, or purchasing agent and payment for all Class I or II price-controlled packaged products purchased under a multi-store discount is guaranteed by the common owner, franchiser, or purchasing agent;
3. Each store receives an average of 1,000 quarts of Class I or II price-controlled packaged products per delivery;
4. The primary dealer files with the Board a sworn statement listing the name and address of each store in the multi-store group and the aggregate weekly volume of purchases of Class I or II price-controlled packaged products for all stores in the multi-store group. The multi-store group may file the information required by this paragraph if the primary dealer fails to do so.
5. The primary dealer serving a qualified multi-store group must provide to each member store of the group a letter certifying that the multi-store group qualifies for the discount based upon its stated volume transaction with that same primary supplier.

(b) A milk dealer making a limited service wholesale sale of Class I or II price-controlled packaged products to a multi-store group may reduce the base wholesale prices by $0.1010 per quart if the average number of quarts per delivery for each store within the qualified multi-store group is at least 1,000 quarts.

(c) The average number of quarts per delivery for each store in the multi-store group shall be determined by dividing the total number of quarts of Class I and Class II price-controlled packaged products (net of returns of defective products) delivered to each member store in the multi-store group for resale in the original package by the number of actual deliveries of price-controlled packaged products to that same member store between 12:01 a.m. on Monday to 12:00 midnight on the following Sunday. Based on the average volume, each member store may qualify for the discounts in section (b).

(d) The total volume for the multi-store group as a whole shall be determined by the total number of quarts of Class I and Class II price-controlled packaged products (net of returns of defective product) delivered to all qualified stores within the group, for resale in the original package, between 12:01 a.m. on Monday and 12:00 midnight on the following Sunday. This total shall determine the level of the discount.

(e) Volumes by any other dealer qualifying as a secondary supplier shall not be used to compute either the total volume for the multi-store group or the individual volume for each store within the group.

PROVISION 3 – MULTI-STORE GROUP: SECONDARY SUPPLIER

(a) A secondary supplier making a wholesale sale of Class I or II price-controlled packaged products to a store that is a member of a multi-store group may reduce the wholesale prices by the same amount that the primary supplier is permitted to reduce its prices.

(b) A secondary supplier selling Class I or II price-controlled packaged products to a member of a multi-store group must comply with all of the requirements set forth in this order that apply to the primary supplier except for the volume of sales.

(c) A secondary supplier may be the exclusive supplier for an individual store within a multi-store group provided that all other requirements specified in this order are satisfied.

(d) A secondary supplier must obtain and keep available for inspection and copying by Board personnel a copy of the certification letter provided by the multi-store group's primary dealer as required in the order, to one or more members of the group that the secondary supplier is servicing.

PROVISION 4 – MULTI-STORE GROUP: ADDITIONAL DISCOUNT

(a) A primary supplier or a secondary supplier making a wholesale sale of Class I or II price-controlled packaged products to a multi-store group on a limited service basis may reduce the prices set forth in the order by an additional 1% of the total amount due prior to the application of the discount set forth in the wholesale price schedule if total deliveries to the multi-store group are in excess of 200,000 quarts per week.

(b) The additional discount permitted by this provision may be given to the common owner, franchiser, or purchasing agent only and not to the individual stores members of the multi-store group. A common owner, franchiser, or purchasing agent that accepts the additional discount permitted under this provision guarantees payment to the primary supplier or the secondary supplier or both.

SECTION G
MILK MARKETING AREA 5

(a) A milk dealer making a wholesale sale of Class I or II price-controlled packaged products may reduce the base wholesale prices by:

1. 18% if the buyer takes possession of 4,000 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a

manufacturing dealer, or a location of a non-processing dealer, and does so using a refrigerated tractor trailer.

2. 15% if the buyer takes possession of 1,700 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer.

(b) The price reductions set forth in section (a) may be made only if:

1. The selling dealer does not pay consideration of any type to the purchaser for services rendered; and

2. The selling dealer does not provide to the purchaser, directly or indirectly, any labor or other personal service in connection with the transportation for resale of the products purchased. The selling dealer must be independent from the trucking company utilized in the dock pick-up; and

3. The buyer places the order at least two business days before dock pick-up takes place.

4. The Board will use the criteria in OGO A-954, Section D, Provision 5(b) to determine whether a trucking company is independent from the selling dealer.

SECTION H
MILK MARKETING AREA 6

(a) A milk dealer making a wholesale sale of Class I or II price-controlled packaged products may reduce the base wholesale prices by:

1. 18% if the buyer takes possession of 2,000 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer, and does so using a refrigerated tractor trailer.

2. 15% if the buyer takes possession of 1,000 quarts of price-controlled packaged products at the plant where manufactured, or at a branch owned or controlled by a manufacturing dealer, or a location of a non-processing dealer.

(b) The price reductions set forth in section (a) may be made only if:

1. The selling dealer does not pay consideration of any type to the purchaser for services rendered; and

2. The selling dealer does not provide to the purchaser, directly or indirectly, any labor or other personal service in connection with the transportation for resale of the products purchased. The selling dealer must be independent from the trucking company utilized in the dock pick-up; and

3. The buyer places the order at least two business days before dock pick-up takes place.

4. The Board will use the criteria in OGO A-956, Section D(b) to determine whether a trucking company is independent from the selling dealer.

SECTION D
SEVERABILITY

If any section, provision, subsection, paragraph, or clause of this order is determined to be unconstitutional or otherwise contrary to law, the remainder of the order shall be given effect as though that section, provision, subsection, paragraph, or clause has not been included.

PENNSYLVANIA MILK MARKETING BOARD

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Luke F. Brubaker, Chairman

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Richard Kriebel, Member

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Lynda J. Bowman, Consumer Member

Date: April 2, 2014

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
WHOLESALE DISCOUNTS
NOVEMBER 6, 2013

FINDINGS OF FACT

1. On November 6, 2013, the Pennsylvania Milk Marketing Board ("Board") convened a hearing to receive testimony and exhibits concerning wholesale discounts. The hearing was called in response to petitions from Wal-Mart Stores, Inc. ("Walmart") and Board Staff. Prior to the hearing Walmart withdrew its petition and did not participate in the hearing.

2. Notice of the hearing was published at 43 Pennsylvania Bulletin 4194 on July 20, 2013, and was mailed to those who have requested mailed notice of Board hearings by means of Bulletin No. 1495, dated July 9, 2013.

3. Proposals for wholesale discounts that would be additional to those already existing in each of the milk marketing areas were presented by Board Staff and the Areas 1, 2, 3, 4, 5, and 6 Milk Dealer Associations ("Dealers"). Board Staff and the Pennsylvania Food Merchants Association ("Merchants") supported the Dealers proposal, which was presented by Carl Herbein, testifying as an expert in milk cost accounting and cost accounting.

   The Board finds that the Dealers wholesale discount proposal for each area should be adopted. In so finding, we find significant that the discounts were proposed by the entities that would grant the discounts and supported by the Merchants that would receive the discounts and the Board Staff that would enforce and regulate the discounts. We also note that no party opposed the discounts proposed by the Dealers.

4. Board Staff's proposal involved additional and deeper dock discounts in each of the areas. Dave DeSantis testified on behalf of Board Staff as an expert in milk cost accounting and regulation. Mr. DeSantis testified that the deeper discount should only be available to the very largest customers that provide an economy of scale to a dairy's volume that has a material impact on the efficiency of the company. Therefore, Staff's proposal limited the availability of the deeper discounts to customers purchasing at least 100,000 quarts per week from one company and that the dock pickups be at least 12,000 quarts per load. Staff's proposal also provided a non-variable cents per quart discount rather than a variable percentage discount because, as Mr. DeSantis testified, the discounted prices under Staff's proposal were simply too close to dealer costs to permit the amount of the discount to fluctuate with the milk price and other costs on a monthly basis. Mr. DeSantis also testified that he did not identify with certainty any non-tolling customers that would meet the volume requirement of Staff's proposal.

5. Robert Firely testified on behalf of the Dealers as an expert in financial statement presentation, generally accepted accounting principles, and generally accepted auditing

standards. Mr. Firely provided an overview of the rules governing the reporting of unfunded pension liability and how the rules affect the Dealers' businesses. He opined that the unfunded pension liability is a genuine and significant condition affecting Pennsylvania's dairy industry.

6. Charles Turner, Jr,, testified on behalf of the Dealers and Turner Dairy Farms as an expert in dairy cost accounting and milk dealer management. Mr. Turner is the President of Turner Dairy Farms. In arriving at Staff's proposal, Mr. DeSantis essentially looked at all of the cost center costs borne by Dealers, as shown in the most recent cost replacement hearing, except for delivery costs. Mr. Turner testified that while Mr. DeSantis's analysis was basically arithmetically correct when deleting the delivery costs, it was not correct in terms of accounting or reality. Mr. Turner testified that deletion did not address allocated costs like administrative expenses and noted that if delivery were eliminated human resources costs would go up in the short term. He also testified that delivery assets, like trucks, would remain on the books until disposed of and that dislocated employees would either have to be retrained or incur separation costs. Mr. Turner testified that delivery is interrelated to other departments and costs would be borne adjusting schedules of the other departments. Mr. Turner further testified that significant dock pickup would require investment in infrastructure to support it.

7. Mr. Turner also testified that the level of discount proposed by Board Staff would cause major disruption in the marketplace. In Mr. Turner's opinion it would be a mistake to adopt a discount that would set up such a low price as a target for stores to pursue one way or another, whether through receiving discounts from in-state processors the customers did not qualify for or by seeking the price from out-of-state processors.

8. Mr. Turner supported the Dealers' proposal because it took into account costs that result when an operational change is made, the current state of fluid milk plants, and the reality of the marketplace.

9. Thomas Mullery testified on behalf of Clover Farms Dairy. Clover opposed Board Staff's proposal. Mr. Mullery testified that he was concerned that Staff's proposal would create a target price with the potential to be disruptive to existing accounts. He also testified that Clover Farms Dairy has unfunded pension liability and that there was a risk of business failures as companies are made to start servicing their unfunded pension liabilities. In any event, Mr. Mullery was not aware of any store chains that would meet the volume requirements to receive the discount proposed by Board Staff.

10. John Pierce testified on behalf of the five plants that Dean Foods Company operates in Pennsylvania. Mr. Pierce testified that Board Staff's proposal would be too margin eroding. He reiterated Mr. Turner's and Mr. Mullery's concerns regarding the setting of a new target price that would be disruptive to the marketplace. Mr. Pierce testified that Dean's preference was for no new discounts to be adopted, but the Dealers' proposal was preferable to Staff's.

11. The Board finds that Staff's discount proposal should not be adopted. Mr. DeSantis could not identify with any certainty any customer that would qualify for the discount. We find credible and persuasive the concerns of Mr. Turner, Mr. Mullery, and Mr. Pierce that the deeper discounts proposed by Staff would set new target prices that would be disruptive in the market.

    We also find the absence of any support for Staff's proposal from marketplace participants to be significant. Dealers as an association, as well as individual dealers, presented testimony opposed to Staff's proposal. Merchants opposed Staff's proposal in its brief. While we appreciate Staff's diligence and effort in crafting its proposal, we find persuasive the opposition to it from not only those that would grant the discount, but by those that would receive the deeper discount.

12. The Board also appreciates the testimony regarding unfunded pension liability provided to us by Mr. Herbein, Mr. Firely, Mr. Turner, Mr. Mullery, and Mr. Pierce. While we recognize that the existence and reporting of the unfunded pension liability was considered by Mr. Herbein in arriving at Dealers' proposal, we make no finding regarding the significance of the liability as a condition affecting the milk industry in Pennsylvania.

CONCLUSIONS OF LAW

1. The November 6, 2013, hearing to consider wholesale discounts was held pursuant to authority granted to the Board in section 801 of the Milk Marketing Law (Law), 31 P.S. § 700j-801.

2. The hearing was held following adequate notice, and all interested persons were given a reasonable opportunity to be heard.

3. In establishing the attached order, the Board has considered the entire record and has concluded that the adoption of this order is supported by a preponderance of the evidence and is reasonable and appropriate under section 801 of the Law, subject to any revisions or amendments the Board may make in the manner set forth in the Law.

PENNSYLVANIA MILK MARKETING BOARD

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Luke F. Brubaker, Chairman

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Richard Kriebel, Member

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Lynda J. Bowman, Consumer Member

Date: April 2, 2014

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