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April 8, 2003

DELIVERED BY FAX

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April 8, 2003
Page 2

Dear Sirs/Mesdames:

**APPEALS BY NORTHERN INTERIOR DAIRYMAN'S ASSOCIATION AND
MAINLAND DAIRYMEN'S ASSOCIATION FROM DECISIONS OF THE BC MILK
MARKETING BOARD CONCERNING FREIGHT RATES**

After careful consideration of all the circumstances and after reviewing the submissions received since the adjournment of the proceedings on February 13, 2003, the British Columbia Marketing Board (BCMB) Panel issues the present decision and directions as to the future course of the subject appeals.

Background

On December 5, 2001, Northern Interior Dairyman's Association (NIDA) filed an appeal of the September 2001 decision of the British Columbia Milk Marketing Board (Milk Board) concerning milk freight rates. The appeal challenged the freight rates as a matter of both process and substance. On February 25, 2002, the BCMB issued its preliminary decision dismissing applications brought by the Milk Board to have NIDA's appeal dismissed as out-of-time or, alternatively, as frivolous, vexatious or trivial.

Having dismissed the Milk Board's applications, the BCMB also noted that the process aspect of the NIDA appeal was "fully argued" as part of the hearing of those applications. As such, the BCMB found that "the Milk Board's consultation process, while not perfect, was extensive and thorough". It therefore ruled as follows:

36. Given the Panel's finding that the Milk Board's consultation process was appropriate in the circumstances, should this matter proceed to appeal, the Appellant must focus on the inadequacy of the Milk Board's actual decision as opposed to any defect in the consultation process.

The BCMB noted that NIDA's appeal "challenges the merits of the chosen pooling system and the new freight rates that resulted as a matter of sound marketing policy". The BCMB further noted that hearing the appeal on its merits would be "premature" as "it would benefit NIDA and the industry as a whole to have the opportunity to work these issues out amongst themselves as opposed to having a resolution imposed by the BCMB at this stage". The NIDA appeal was therefore adjourned pending this further review by the industry and the Milk Board.

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Mr. Jim Davidson
Mr. Bill Clarke
April 8, 2003
Page 3

On May 29, 2002, the Milk Board made a new decision regarding provincial freight rates. This new decision was the subject of three new appeals – one by Mainland Dairymen’s Association (MDA), one by Brackenhurst Farm (1978) Ltd. (Brackenhurst) and one by Mikerri Farms Ltd. (Mikerri). NIDA, which supported the rates announced in the new decision, did not withdraw its earlier appeal pending the outcome of the new appeals. Intervenor status in all four appeals was granted to a number of producer associations, including NIDA, who were permitted to attend any hearing, present evidence and cross-examine.

On September 3, 2002, the BCMB conducted a pre-hearing conference, the report from which was agreed to by all parties, identifying each Appellant, its grounds of appeal, the position of the intervenors, and identifying a preliminary issue, raised by the MDA, regarding whether to have its appeal – which, unlike the appeals of the other two Appellants, focused solely on procedural issues – heard prior to any hearing on the merits.

On October 25, 2002, MDA counsel wrote a letter elaborating on its grounds of appeal and proposed remedy. MDA’s three grounds of appeal all pertained to the process that led up to the May 29, 2002 rate decision. Its proposed remedy was to quash the May 29, 2002 decision and remit the matter to a newly constituted Transportation Advisory Committee, for a renewed consultation process under BCMB supervision.

On November 4, 2002, the BCMB Panel issued a decision – whose header referred both to the NIDA appeal and the MDA appeals - in which it stated that:

... particularly given the fact that this matter has previously been referred back to the Milk Board and the industry for review, the BCMB is of the view that all issues on the appeals should be heard at the same time. The issue of whether the Milk Board properly consulted with the industry prior to issuing its May 29, 2002 decision will of course continue to be a relevant issue on these appeals.

The BCMB’s November 4, 2002 letter set a hearing date of December 16-20 for the appeals. In the intervening period, Brackenhurst and Mikerri withdrew their appeals.

On December 4, 2002, the MDA applied to adjourn the hearing. Counsel referred to further settlement discussions, and the unexpected unavailability of key witnesses. On December 10, 2002, the BCMB granted MDA’s application for a one-month adjournment of the appeal, noting as follows:

The Panel supports any effort to reach an industry-level settlement, however, it also notes that any such settlement must be achieved through consultation with all affected producers and be in the best long-term interests of all regions in the province.

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April 8, 2003
Page 4

As events unfolded, the parties were unable to resolve the issues between themselves, and so the hearing proceeded, commencing February 10, 2003.

It became apparent during the hearing that there was confusion regarding the issues on appeal. The confusion appears to have arisen following the withdrawal of the Brackenhurst and Mikerri appeals on the merits (and with the NIDA appeal having continued to be held in abeyance). In that context, the Milk Board and various intervenors appeared to understand that the only remaining issue was MDA's procedural challenge, as expressed Ms. Morellato's October 25, 2002 letter, albeit recognizing that discussion of the merits would be intertwined with the procedural arguments. For its part, MDA proceeded on the basis that both process and the merits of the May 29, 2002 decision were under appeal.

In light of the confusion, the Panel concluded that, particularly given the importance of the issues and the fact the Respondent and intervenors were not represented by counsel, the fair and proper course was to adjourn the proceeding and issue a further procedural decision with directions. In making this point, the BCMB appreciates that, in hindsight, it might have played a more active role following the December 2002 adjournment in order to ensure that there was no doubt regarding what was properly in issue on the appeal.

Decision

It is clear from all the circumstances that the industry remains divided on the issue of freight rates and that settlement discussions have not resulted in a proposal that will satisfy the various competing interests. The interests of certainty, finality and efficiency dictate that any and all existing challenges to the merits of any chosen pooling system, as a matter of sound marketing policy, be dealt with now.

In our view, this includes proceeding with the NIDA appeal at this time as well. We agree with MDA that it is not in anyone's interests for the NIDA appeal to remain "on the shelf". It would only add to industry expense and uncertainty for the BCMB to proceed with the MDA appeal on the merits, only to revive the NIDA appeal covering the same ground at a later time if the MDA appeal is allowed.

We have considered whether to dismiss the NIDA appeal as moot since the rates at issue have given way to the May 29, 2002 rates that are not opposed by NIDA, and since, as noted below, we intend to make a decision about what the proper rates should be. However, we do not think we should dismiss the NIDA appeal as moot. Depending on the decision we make regarding the May 29, 2002 rates, a live issue may arise as to what account, if any, should be taken of the \$4/HL rate in place for NIDA producers between the September 2001 and May 29, 2002 decisions, which could raise remedy issues relevant to the NIDA appeal.

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Mr. Wayne Harris
Mr. Jim Davidson
Mr. Bill Clarke
April 8, 2003
Page 5

In the result, the BCMB formally directs that, unless NIDA advises of its intention to withdraw its appeal, the NIDA and MDA appeals are to be consolidated for the purposes of hearing. The specific issues to be decided, which incorporate the permitted grounds in both appeals, will be as follows:

1. Should the Milk Board's May 29, 2002 decision be reversed or modified as being contrary to sound marketing policy on the merits? This question includes, but is not limited to, the process objections outlined in Ms. Morellato's October 25, 2002 letter. (MDA appeal)
2. If the BCMB decides that the Milk Board's May 29, 2002 decision should be upheld as a matter of sound marketing policy, should the BCMB's decision account in any way for the higher rates that were in place for NIDA members (\$4/HL) between the September 2001 and May 29, 2002 decisions? (MDA appeal/NIDA appeal)
3. If the BCMB decides that the Milk Board's May 29, 2002 decision should be reversed or modified as a matter of sound marketing policy, should the new freight rates for NIDA producers be the September 2001 rates (\$4/HL) or should a rate be set between \$2.50/HL and \$4/HL? In deciding this question, what account, if any, should the BCMB take of rates for NIDA producers set since September 2001? (MDA appeal/NIDA appeal)

Based on the above statement of issues, the Panel makes the following procedural directions:

1. If either of the Appellants or the Milk Board has an objection to the statement of issues as outlined above, that objection is to be received by the BCMB, with reasons in support, no later than April 14, 2003.
2. No later than April 22, 2003, each party is to write to the BCMB, with a copy to all other parties, regarding whether it expects to lead evidence – beyond the evidence already before the BCMB – regarding any of the issues outlined above. If a party expects to lead new evidence, it must provide a written summary of what that evidence will be and a list of witnesses in support of that evidence.
3. No later than April 22, 2003, each party intending to call an expert witness must also give notice of intention to do so, along with the identity of the expert and a summary of the evidence expected from the expert.

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Mr. Jim Davidson
Mr. Bill Clarke
April 8, 2003
Page 6

In view of the extensive evidence already led at the hearing, the Panel does not wish the parties to confuse the above directions with an expectation that they *must* adduce additional evidence. It may well be that a party may wish to rest on its evidence, and instead only advance policy argument on the issues stated above. What the above direction does allow, is for the parties to review the evidence they have tendered in light of the reasons for the adjournment and the issues stated above, and adduce any new evidence they consider necessary, with fair notice to the other parties.

Following the receipt of this correspondence, the BCMB will issue further directions, as necessary, regarding (a) the exchange of any further documents, or of expert evidence, (b) the provision of any written submissions in advance of the continuation of the hearing, (c) the order of evidence and/or submissions at the continuation of the hearing and (d) any necessary pre-hearing conference.

Please note finally, that while the Panel intends to proceed with this matter with all due and fair dispatch, due to the recent illness of one of its members, the Panel will be unable to reconvene for hearing purposes until at least May 2003.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser
Panel Chair