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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333
March 30, 1979

#79-60

Representative Luman P. Mahany
House Chairman
Agriculture Committee
State House
Augusta, Maine 04333

Re: Decontrol of Milk Pricing

Dear Representative Mahany:

This letter responds to your March 7, 1979 request for an opinion as to the authority of the Maine Milk Commission (the "Commission") to deregulate milk prices for a municipality and the criteria to be applied and the procedures to be followed if there is such authority.

We have concluded that, under the Maine Milk Commission Act, 7 M.R.S.A. §2951, et seq. (the "Act"):

1. The Commission, under limited circumstances, does have the authority to deregulate a controlled market area consisting of or including a municipality or to exclude a municipality from a controlled market area.
2. To take such action, the Commission would have to conclude that the municipality is not a marketing area or part of a marketing area which, in the contemplation of the Act, requires price controls. Our interpretation of the Act is that controlled marketing areas should be established and maintained wherever in the opinion of the Commission conditions exist such that unfair, destructive and uneconomic practices in the milk industry in that market and similar markets could have the effect of disrupting the sale and distribution of milk to the inhabitants of the State of Maine.
3. Any person may petition the Commission to take such action.
4. The Commission may not deregulate a controlled market or re-designate any market to exclude a municipality from a controlled market without conducting a public hearing. However, it is within the discretion of the Commission to decide whether to conduct a public hearing in response to a petition for decontrol.

DISCUSSION

The Act does not require the Commission to regulate milk prices on a statewide basis.^{1/} A number of provisions in the Act make it clear that minimum price schedules apply only to those market areas designated as such by the Commission for purposes of regulation. A "market" (i.e., a controlled market area) is defined by Section 2951-5 of the Act to mean "any city, town or parts thereof of the State . . . designated by the commission as a natural marketing area." [emphasis added]. Section 2954-2 of the Act vests the Commission with the basic power to establish minimum prices which take into consideration the "varying conditions in various marketing areas" in the State. (Also see, Section 2954-5 of the Act.). Subsection 7 of Section 2954 prohibits any person from engaging in any practice destructive of the minimum prices "established under [the Act] for any market. . . ." Under Section 2955 of the Act, dealers must be licensed before they sell milk but only if they sell milk in a designated market. Finally, Section 2956 of the Act imposes record keeping requirements and a fee schedule for "[a]ll dealers in any market designated by the commission." Each licensed dealer is required to pay an annual license fee based on the quantity of milk "purchased or produced in any market area, or purchased or produced in an uncontrolled area and sold in any market area." [emphasis added]

From the foregoing it is readily apparent that in order to establish minimum price schedules within the State in accordance with the statutory scheme, the Commission must first designate various controlled market areas. Pursuant to this authority the Commission by order has established 47 controlled marketing areas consisting of the populated areas of the State. See, Commission Order No. 77-9, effective October 1, 1977. Some of the marketing areas consist of a single town or municipality and others include two or more towns or municipalities. Inherent within this authority is the power to decontrol a market or redesignate a market to exclude a municipality which was formerly included within the market.

When designating market areas for purposes of establishing price controls, the Commission must adhere to criteria derived from the purposes of the Act. The principal purpose of the Act is to "insur[e] . . . an adequate supply of pure and wholesome milk to the inhabitants of the State under varying conditions in various market areas" Section 2954-2 of the Act. Accordingly, the Commission must assess the conditions within any given market, including its size and economic importance and the economics and practices of the milk industry within the market. The market should be designated as controlled if these conditions are such that in the opinion of the Commission, unfair, destructive, or uneconomic practices in that and other similar markets could have the effect of jeopardizing an adequate supply of pure and wholesome milk to the inhabitants of the State. See, Maine Milk Comm'n v. Cumberland Farms Northern, Inc., 160 Me. 366, 380. 205 A.2d 146, 153 (1964). The same criteria applies to a determination

^{1/} This same conclusion was reached in a May 9, 1978 memorandum opinion of Donald G. Alexander to Richard Poulin, Executive Secretary, Maine Milk Commission, a copy of which is attached hereto. It is also supported by the fact that the Legislature has not specifically required statewide regulation in the Act even though, to our knowledge, the Milk Commission has never regulated the entire State in its 44 year history.

of whether conditions within a market have changed sufficiently to justify a decision to decontrol a previously designated market area or redesignate the geographic configurations of such a market.

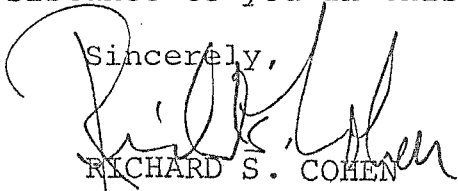
If a municipality is part of a larger designated market area and the Commission finds that conditions have not changed within that market, it appears that the Commission could not exclude a municipality from it. A decision to exclude a municipality from a controlled market under these circumstances appears to be tantamount to creating an exemption from the statutory scheme, where no power to do so is granted in the Act, in addition to being contrary to the requirements of the Act that pricing regulation should be effected by "natural marketing area[s]." In addition, by the inherent nature of the criteria to be applied, it appears unlikely that the Commission could justify a decision to deregulate a designated market area which includes a largely populated municipality.

The Act does not contain any procedure for filing a petition with the Commission for a determination that a municipality should be excluded from a previously designated controlled marketing area. In our opinion, any person, including a consumer or a municipality, may petition the Commission to redesignate a market so as to exclude the municipality from price controls.^{2/} Neither the Act nor the Maine Administrative Procedure Act prescribes any particular form for such a petition and none is required by Commission orders or procedures. Therefore no particular form is required in order to present a petition.

The existing 47 controlled market areas were established pursuant to public hearing and, as noted above, are designated as such in a pricing order of the Commission. With one limited exception not here relevant, the Commission may change a pricing order only after an investigation and public hearing. Section 2954-1 of the Act. In our opinion these requirements apply not only to the fixing of minimum prices but also to a determination of the marketing areas to which the pricing orders apply. While an investigation and public hearing is thus necessary in order to redefine a controlled market area to exclude a municipality, there is no requirement either in the Act or the Maine Administrative Procedure Act requiring the Commission to conduct such an investigation and hold such a hearing upon being presented with a petition requesting that it do so. In our opinion it is within the discretion of the Commission to determine whether it will act upon such a petition.

I hope the foregoing opinion is helpful to you. Please let me know if I can be of any further assistance to you in this matter.

Sincerely,


RICHARD S. COHEN
Attorney General

Enc.
RSC:jg

^{2/} Section 8055-1 of the Maine Administrative Procedure Act provides that "[a]ny person may petition any agency for the adoption or modification of any rule." [emphasis added]

Milk Commission (Maine Milk)
7 M.R.S.A. § 2954

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AUGUSTA, MAINE 04333

May 9, 1978

TO: Richard Poulin, Executive Secretary, Maine Milk Commission
FROM: Donald G. Alexander, Deputy Attorney General
Re: Statewide Control of Milk Pricing

This responds to your request for an opinion, dated April 27, 1978, in which you ask whether the Maine Milk Commission has authority to establish price controls in all areas of the State or only in those areas (markets) which were regulated under a previous statute. You ask further whether the Commission has discretion to establish price controls statewide or only in a certain market and whether a public hearing would be necessary to establish price controls on a state-wide basis as opposed to the current system where price controls are established in specified markets with the unspecified areas of the State remaining unregulated.

We would answer as follows:

1. The Maine Milk Commission has power to regulate the prices of milk sold in all areas of the State. Its powers are not limited to those areas regulated immediately prior to the effectiveness of the 1975 amendments to the Maine Milk Commission laws.
2. The Commission has discretion to regulate prices statewide or only in certain specified marketing areas, it is not required to regulate prices statewide.
3. As the current Maine Milk Commission order specifies the marketing areas in which prices are regulated, a public hearing would be necessary to amend the current order to extend the range of price controls into currently unregulated areas.

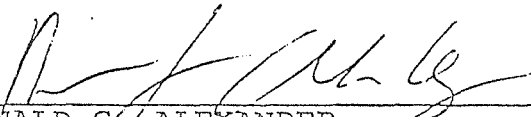
DISCUSSION:

The Maine Milk Commission Law, 7 M.R.S.A. § 2954-2, contemplates that the Commission will establish price regulations which, among other factors, take into consideration "varying conditions in various marketing areas" of the State. Further, § 2954, sub-§ 5 in discussing establishment of minimum prices, talks in terms of establishing minimum prices in any market. Subsection 5 further contemplates that the prices may vary among the several market areas of the State.

Under the law which existed prior to enactment of P.L. 1975, Chapter 517, it was the practice of the Commission to designate certain marketing areas of the State. See 7 M.R.S.A. § 2954, 1973 ed. and 1964 ed. These marketing areas included most of the populated areas of the State. However, as price regulation only extended to these marketing areas, the unlisted areas of the State, primarily rural in nature, were exempt from consumer price regulation. The Commission has carried over the marketing area concept to the new law, continuing as it adopted each order, a listing of the market areas to which price regulation applies and exemption, by implication, of unlisted areas. This practice does not violate the current law which, as indicated above, contemplates that prices may be established for various marketing areas. However, it would also be within the Commission's discretion to designate a marketing area, or several areas which include the entire State. The effect of that change would be to extend milk price regulation to all areas of the State. Such would also be allowed under the present law.

Section 2954-1 specifies that the Commission may only change pricing orders "after investigation and public hearing." Therefore, as the current price order specifies marketing areas and thus makes some areas exempt from regulation, it would be necessary to amend the current price order and thus hold a public hearing to extend milk price regulation statewide without regard to the boundaries of the current marketing areas.

I hope this information is helpful.


DONALD G. ALEXANDER
Deputy Attorney General

DGA:mfe