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**BEFORE THE UNITED STATES DEPARTMENT
OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE**

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| IN RE: | : | 7 CFR Parts 1005, 1006, and 1007 |
| | : | |
| Milk in the Appalachian, | : | Docket No. 23-J-0019 |
| Southeast, and Florida | : | |
| Marketing Areas | : | AMS-DA-23-0003 |

# POST-HEARING BRIEF FOR DAIRY COOPERATIVE MARKETING ASSOCIATION ("DCMA")

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## I. INTRODUCTION

This hearing was called on an expedited basis at the request of the Dairy Marketing Cooperative Association, Inc., ("DCMA") to address the urgent need for assistance in providing adequate supplies of fresh fluid milk to distributing plants in the southeastern United States. DCMA is a common marketing agency consisting of nine (9) Capper-Volstead cooperative members. (Exh. 15)[1] The members of DCMA are all recognized by the Department as qualified cooperatives. Each of the nine (9) DCMA cooperatives markets milk as a handler in one or more of the southeastern marketing orders, Federal Orders 5, 6, and 7 (7 C.F.R. §§ 1005, 1006, and 1007) (collectively, the "southeastern orders.") The DCMA members and the order(s) in which each is recognized as a handler are:

| DCMA Cooperative | Order as Coop Handler[2] |
| --- | --- |
| Appalachian Dairy Farmers Cooperative | 5 |
| Cobblestone Milk Cooperative, Inc. | 5, 7 |
| Cooperative Milk Producers Association | 5 |
| Dairy Farmers of America, Inc. (DFA) | 5, 6, 7 |
| Lanco Dairy Farms Co-op | 5, 7 |
| Lone Star Milk Producers, LC | 5, 7 |
| Maryland and Virginia Milk Producers Cooperative Association, Inc. | 5, 7 |
| Select Milk Producers, Inc. | 5, 7 |
| Southeast Milk, Inc. | 5, 6, 7 |

DCMA's cooperatives represent both producers and distributing plants in the Southeast. DCMA's producer members, using October 2021 data, collectively market in excess of 80% of the producer milk in aggregate in the southeastern orders (Exh. 12, p. 2; Hollon, Tr. 94). Of the

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[1] References to the transcript of the hearing will be cited as "[witness name] Tr. [page #]". Exhibits admitted into the hearing record will be referenced as "Exh [number]".

[2] See Market Administrator Exh. 7, page 10, No. 4 (Plant and handler lists)

DCMA member farms pooled on Orders 5, 6, and 7 in October 2021, 1,258 or 48% met the Regulatory Flexibility Act/NAICS definition of a small business dairy farm (Exh. 16). In addition, the DCMA cooperatives are responsible for the processing and distribution of a substantial percentage of the region's Class I fluid milk products through cooperative-owned distributing plants: See https://www.ams.usda.gov/resources/marketing-order-statistics/distributing-and-supply-plants for plants owned by DFA; Maryland and Virginia also owns two distributing plants in these orders (Exh. 81, p.1; Smith, Tr. 381). Consequently, DCMA's proposals are amendments to these southeastern orders advocated by the overwhelming majority of both the producers on the Orders and a substantial portion of the Orders' distributing plants.

The urgent need for the hearing and for expedited implementation of the proposals derives from the substantial and continuing erosion in the local milk supply for the growing population in the southeastern United States and the major increases in the transportation costs to supply milk to the region's distributing plants since those costs were last reviewed and updated in a 2006 hearing. DCMA's five (5) proposals address the costs of supplying milk to Orders 5, 6, and 7 distributing plants both by updating the existing transportation credit balancing funds in Order 5 and 7 to facilitate the provision of milk from outside the marketing areas for the region's needs and implementing a program of inside the marketing area distributing plant delivery credits to promote and support local, in-area milk production.

It is extremely important in considering this hearing record to note that there was only nominal opposition[3] from industry participants in the Southeast to amending the orders to

[3] The nominal opposition of the Milk Innovation Group is noted at part IV below.

provide transportation cost assistance for provision of milk to distributing plants, or for doing so on an expedited basis.

This brief will: (1) initially review the disorderly marketing conditions in the orders, emphasizing the documented need for expedited consideration of the order amendments; (2) detail the proposed amendments put forth by DCMA and the support for them; and (3) review the inadequacies of the alternative proposals put forth by other parties.

DCMA wishes to sincerely thank the Department for its convening of this hearing to consider our proposals.

## II. MARKETING DISORDER IN THE SOUTHEAST AND THE NEED FOR EXPEDITED RELIEF

The hearing record establishes clearly and unequivocally the distressed marketing conditions in the Southeast which need to be addressed on an expedited basis. Those conditions are reflected in three (3) aspects: (1) the drastic losses in in-area production, particularly in contrast with the population trends; (2) the simultaneous reduction in distributing plant numbers and, therefore, marketing outlets for remaining in-area production; and (3) the increased costs of moving milk from location of production to location of processing. We will review the evidence regarding each of these issues in turn.

### A. The loss of producers and milk production in the Southeast

There has been a stark decline in producer numbers and milk production in the Southeast since these orders were promulgated in the federal order reform process in 2000. In-area farms in Order 5 have declined from 2,813 in 2000 to 650 in 2022, a loss of 77% of the farms (Exh. 22). In Order 7, the decline from 2000 to 2022 was even greater, from 3;504 to 489, a loss of 86% of

the farms. In Order 6, dairy farms declined from 194 to 49, a loss of 75% of the farms from 2000 to 2022 (Exh. 22). In just the five-year period from 2017 to 2021, total licensed farms in the 11 states of the Southeast fell from 2,250 to 1,531, a decline of 32% (Exh. 20). The testimony of several individual producers brings home the massive losses in sectors of the Southeast. Marilyn Calvin, proprietor of a small 200 cow dairy business in southern Missouri noted the 69% decline in licensed Missouri farms from 2006 to 2022 (Exh. 56; Calvin, Tr. 203). Glenn Tweed, also the owner of a small 200 cow dairy business in eastern Tennessee, testified to the drastic decline of dairy farms in his area with only 11 dairy farms left in the two counties he farms in and an 80 % decline in the last twenty years (Tweed, Tr. 212).

Production losses in several states has been extreme. In the ten years from 2011 to 2021, production in Alabama declined 72.7%; in Arkansas, 58%; in Mississippi, 48%; 45.7% in Louisiana; and 43% in South Carolina. Georgia is the only state in the region which has had a meaningful increase in production of twenty-four (24%) percent over this time period (Exh. 25). The overall regional loss and the extreme loss in vast geographic portions of the region, coupled with the loss in distributing plants discussed below, have required massive changes in farm-to-plant milk movements, both in distance and direction. Compounding the supply demand situation is an increase in population in the southeastern states as noted in Exhibit 18 (Population Data US Census Bureau) and Exhibit 19 (Milk Sales in 2020 were 16.5 Gallons per capita). In Exhibit 18, Census Bureau data for the South Region shows an increasing population trend and the Milk Revitalization Alliance (Exhibit 19) data shows milk consumption also increasing.[4]

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[4] Some indication of this reversal in trend is also shown in the Order 6 Class I utilization data for 2022 and 2023, noted at Section III.A, *infra*.

### B. **The loss of distributing plants in the Southeast and the impact of that loss**

The reduction in the number of distributing plants in the region is detailed in Exhibit 7, pp. 12-15, prepared and presented by the Southeast Orders' Market Administrator and summarized on Exhibit 33, submitted by DCMA. From 2000 to 2022, there was a 39% reduction in pool distributing plants from 26 to 16 in Order 5. In Order 7, for the same period, the reduction in pool distributing plants was 53%, from 32 to 15 and in Order 6, there was a loss of 33% of plants from 12 to 8 (Exh 33).

### C. **The increase in transportation costs to service distributing plants in the Southeast**

The loss in farms and plants has impacted the number of miles necessary to procure supplemental milk for the market. Increased miles means increased costs. DCMA testimony pointed out that in data presented in the 2006 Transportation Credit Hearing, based on October 2003 transactions, the average distance necessary to procure a load of supplemental milk for the market was 511 miles. For October 2020 based on a DCMA survey detailed in testimony, the average miles to procure a load was 774 miles or a 51% increase. (Exh. 12, pp. 4-5; Hollon Tr. 98)

The reduction in available plants for delivery of fresh fluid milk has also meant greater instances required to get production from farm to plant in the marketing area and many more milk movements which derive no benefit from the Order's north to south Class I price grid. For instance, Jason Smith of DCMA member Maryland and Virginia Milk Producers Cooperative Association described the 51% and 67% increase in mileage to market for Maryland and Virginia farms when a pool distributing plant in Richmond, Virginia closed. (Exh. 80, p. 3; Tr. 384) Another example is eastern Tennessee. Twenty years ago, there were two (2) distributing plants

in eastern Tennessee at Kingsport and Bristol. Both have since closed (Exh. 7, pp. 12-13) and that milk, as Mr. Tweed testified, now goes to Asheville, North Carolina, a distance of 80 miles (Tweed, Tr. 212) about twice as far from his Limestone, Tennessee farm as Bristol or Kingsport. The two (2) plants closest to Matt Johnson's farm in southern Georgia were a distance of 52 and 59 miles. Both have closed. His milk now moves 292 miles to where it is needed. His hauling cost increased 80% from 2021 to 2023. (Exh. 11, p. 2.) This pattern exists throughout the Southeast.

Perhaps even more significant than total miles moving is the necessity for milk to move 'against-the-grain' in the Southeast from supply point to demand point. Exhibit 82, p. 7, and the testimony of Mike Herting of DCMA member, Dairy Farmers of America, clearly depicts these 'against-the-grain' milk movements from supply locations in Georgia to pool distributing plant demand points in the Southeast. The significance of these Georgia milk movements is underscored since Georgia is the only state in the Southeast with any significant increase in production in recent years. Consequently, it is something of a reserve source of in-area milk to areas of demand in all directions, but particularly west and north. Those milk movements either lose order value (the destination having a lower Class I price) or are value neutral over a significant distance.

Additional examples of these now-regular milk movements west and north to distributing plants were described by Calvin Covington of Southeast Milk, Inc. SMI's Order 5 milk previously moved east or south in positive patterns with the Class I price grid. In January 2023, it all moved from the $4.00 zone to the $3.60 zone. In Order 6, 44% of SMI's supply to an Order 6 distributing plant moves from a higher to lower zone; and 14% of SMI's Florida

producer milk serving pool distributing plants moves from the $5.80 zone to the lower $5.40 zone. The present order provisions in essence penalize these needed milk movements to Class I use. (Exh. 81, p. 4; Covington, Tr. p. 413).

The unreimbursed transportation cost in these movements is a classic example of disorderly marketing since the Federal Order Class I price grid is intended to reflect lower prices at supply areas and higher prices at demand points. The loss of farms and plants in the Southeast has turned the region into a marketplace in which the Federal Order provisions are profoundly out-of-sync. The result is an extremely disorderly marketplace.

Overlaying and compounding the market disruptions and disorder created by the loss of production and plants in the Southeast is the increase in the cost of moving milk since 2006 when the current transportation balancing fund reimbursement rates were incorporated in the Order provisions. The base haul rate currently embedded in the Order 5 and 7 regulations is $1.91 per loaded mile (Exh. 17). DCMA took a survey of over-the-road haul rates in September and October of 2020. The survey involved 2,951 observations of hauls ranging from 272 to 1,490 miles. The average cost was $3.67 per loaded mile at a time when the average diesel fuel cost was $2.26 (Exh. 12, p. 27). With Lower Atlantic and Gulf Coast diesel fuel costs averaging $4.478 in January 2023 (Exh. 39, p. 4), the cost per loaded mile for moving milk today is well over twice what it was in 2006. Mr. Smith reported the current range of costs per loaded milk to bring milk from the Northeast to the Order 5 or 7 market to be $4.90 to $5.25 (Exh. 80, p. 2). Mr. Herting testified that the cost to move milk from the west of Order 7 to demand points in the area ranged from $4.85 to $5.10 per loaded mile (Exh. 83A, p. 5).

Producers also testified to major recent increases in hauling costs for their farm production. Ms. Calvin reported a 41% increase from 2021 to 2023 (Exh. 56, p.2). Mr. Tweed testified to a 62% increase from 2021-2023 (Tweed, Tr. 214). Maryland and Virginia member, Rodney Purser experienced a recent 50% increase (Exh. 55, p.2). All of the testimony from DCMA cooperative marketing personnel involved in everyday movement of milk in the region substantiated that transportation costs have escalated beyond any relation to the Orders' compensation rates to the point where actually getting milk to Southeast demand locations is in jeopardy. (See Smith Tr. 378-404; Covington Tr. 405-435; Herting Tr. 436-455; 461--490)

The increased cost of hauling is not due only to the increase in diesel fuel costs. Mr. Hollon noted that costs such as "purchasing and maintaining equipment, labor, benefits, management, and overhead costs are constant in the [MRF reimbursement] formula." (Exh. 12, p. 28; Hollon, Tr.168) Indeed, the increased base hauling rates cited above, nearly tripling from the $1.91 in 2006, embody increased costs in all categories of transport expense. Calvin Covington of SMI testified to some of the multiple elements of the increase in transportation costs as experienced by SMI, in addition to fuel costs. (Exh. 81, pp. 5-6) SMI's milk hauler wage increased from $22.60 to $31.24 from 2018 to 2023, a 38% increase in 5 years. Quotes for new trucks (day cab) have increased 44% just since 2019. 6,200-gallon milk tanker quotes are up 15% in the last two years. While these costs are exemplary, they are not exhaustive. Other expenses which have all increased since 2006 include: employee benefits, insurance premiums, tractor and tanker maintenance and repairs, taxes, permits and highway tolls. (Exh. 81, p. 5).

Additional miles and increased cost per mile for moving milk in the southeastern markets demand regulatory relief as proposed in this hearing.

### D. The need for expedited regulatory relief

The marketing conditions documented in detail in this hearing record cry out for the most urgent regulatory relief. The producers who testified were unanimous and earnest in their appeals for expedited procedures to be used in adopting the proposals put forth in this hearing. Matt Johnson, President of the Board of Directors of DCMA, after providing details of the cost increases incurred and cost-price pressures experienced in his 1,400-cow dairy, made this appeal to the Secretary at the opening of the hearing: "I ask that you make these changes expediently... . Immediate implementation of these proposals will help to buffer some of the stubbornly high hauling costs and moderate some of the cash crunch I will be facing this year." (Exh. 11, p.3; Johnson, Tr. 84) Mr. Tweed, a board member of Appalachian Dairy Farmers Cooperative, testified to the extreme financial pressures caused by milk hauling costs and the risks which it created in his area testified that "It [relief from this hearing] can't come quick enough." (Tweed, Tr. 217) Maryland and Virginia board member Rodney Purser testified: "I believe that expedited procedures would be appropriate, given the pressures that Southeast dairy farmers have from transportation that is contributing to a lower mailbox price, a lower take-home price for all of us." (Purser, Tr. 196-97) Marilyn Calvin, a DFA member, also testified specifically with respect to prompt relief from this hearing: "I would say that with the decline of dairy farms and milk production in my area, it is of immediate importance." (Calvin, Tr. 207)

The need for and the basis for expedited relief was perhaps best summarized by Mr. Herting who, after detailing the challenges and costs of servicing the western portion of the Order 7 marketing area, concluded his testimony as follows: "Just as the supply of supplemental milk from outside the marketing areas is threatened if additional regulated funds

are not made available to encourage its movement, dairy farmers inside the marketing areas will cease to be willing to supply distant plants if their financial return for that needed service, a service of marketwide benefit, fails to compensate them fairly."[5]

DCMA's request for expedited processing of this hearing (sometimes referred to as "emergency" procedures) is a request that the Secretary issue a proposed amended order, subject to producer approval, before soliciting comments on a recommended decision. This procedure is allowed pursuant to 7 C.F.R. § 900.12(d) which authorizes omission of a recommended decision where the Secretary finds "on the basis of the record that due and timely execution of his functions imperatively and unavoidably requires such omission." The Secretary can utilize this procedure by adopting an interim order and soliciting comments on that order before making it final, as was done after the 2006 hearing on these identical issues. This uncontested record clearly supports following that same procedure. In summary:

- The southeastern order marketing areas are deficit milk production regions which require supplemental supplies from increasingly distant sources. The regulations for Orders 5 and 7 have recognized this circumstance with Transportation Credit Balancing Funds (TBCFs) established in the mid-1990s.
- The cost of over-the-road milk transport has nearly tripled since the rates of compensation in the TBCFs were last updated, leaving those regulations woefully deficient in funding to accomplish their intended purpose.

[5] Exh. 83A, p. 12; Herting/Sims Tr. 486. As the extensive colloquy on (and off) the hearing record documented, Exh 83 was originally prepared by Jeff Sims of Lone Star Milk Producers. Mr. Sims was unable to attend the hearing because of exposure to COVID. Therefore, the testimony in 83A was presented by Mike Herting of DFA who vouched for it on the basis of his personal knowledge and experience.

- The increased cost of milk hauling has severely burdened milk producers in the marketing areas, cooperative producers in particular, since those producers incur the cost of transportation for both the out-of-area supplemental supplies and the cost of delivering their own production to pool distributing plants. (Exh. 56, p. 2; Calvin Tr. 209; Purser Tr. 198 ("We pay to haul the milk that we make as well as the milk we don't make."); Tweed Tr. 220 ("The balancing cost from month to month is listed on our statement."))
- Unless there is relief for these costs, the necessary supplies for Southeast order pool distributing plants are at risk.

With the incontestable facts of the distressed marketing conditions in these southeastern orders and the need for urgent relief, we will now detail the DCMA proposals which we request be adopted.

## III. THE SECRETARY SHOULD UPDATE THE TRANSPORTATION CREDIT BALANCING FUND PROVISIONS IN ORDERS 5 AND 7 BY ADOPTING DCMA PROPOSALS 1 AND 2

### A. Overview of the DCMA proposals

Since 1996, with an update in 2006, the deficit milk supply for the Southeast Orders has been partially addressed with order provisions which assist the importation of supplemental supplies from outside the region during the months of the year when the local supply is shortest. These provisions known as the Transportation Credit Balancing Fund ("TCBF") in Orders 5 and 7 have operated effectively within their limitations. But, not having been updated since 2006, the TCBF monetary reimbursements have become quite outdated and woefully insufficient given

the increases in the costs of moving milk which have occurred over the intervening nearly 17 years. In the meantime, as we have seen, the supply-demand situation in the Southeast Orders has continued to degrade, with in-area production sharply falling on a regional basis and nearly disappearing in large swaths of the region. At the same time, fluid milk demand has declined less sharply and leveled out in some areas of the Southeast. In the Florida Order, Class I disposition increased from 2021 to 2022 and that trend has continued in 2023. (Exh. 81, p. 2; Exh. 7, p. 10, No. 6)

Consequently, the marketing conditions in the Southeast in 2023 require both: (1) updated order provisions to address the need for more funds to support out-of-area supplemental milk supplies; and (2) new provisions to support the demand for milk to move in-area from points of supply to demand. DCMA's proposals have been carefully designed to address both of these needs. Proposals 1 and 2 will update the TCBF provisions for Orders 5 and 7. Proposals 3, 4, and 5 propose new Distributing Plant Delivery Credits to support local, in-area production and its delivery from farm production points to distributing plant demand locations for Orders 5, 6, and 7.

## B. The TCBF provisions of Orders 5 and 7 should be amended as requested in DCMA proposals 1 and 2

As noted, the TCBF provisions were first implemented in Orders 5 and 7 in 1996. In 2005 the provisions were amended to update the cost reimbursement and add a fuel adjustment formula which automatically adjusts reimbursement for changes in diesel fuel costs. DCMA's proposals 1 and 2 will update those provisions in several respects. The updating primarily involves conforming the monetary reimbursement formula, and the assessment rate which supports the cost reimbursements, to more current actual costs, thereby making it a meaningful

contribution to the costs of bringing supplemental supplies of milk to the region. In addition, refinements to the months of mandatory and discretionary payment and to the method of calculating reimbursable miles are proposed.

The DCMA proposals to update the TCBF provisions were explained, supported, and recommended for adoption with detailed documentation and analysis by Elvin Hollon, an expert in agricultural economics and milk marketing (*See* Exh. 12 (statement); Exhs. 15-74 (supporting data)). His extensive testimony and supporting exhibits stand unchallenged in the record and provide more than the substantial evidence required for the Secretary to adopt the DCMA proposals as recommended. We will not burden the record by reiterating in detail in this brief what is undisputed, particularly the updating of the monetary reimbursement calculations. We will, however, review in summary the monetary factor updates and discuss the recommended changes in order language and the assessment rates.

**1. <u>Update the mileage rate for the TCBFs to reflect more current costs</u>**

Currently, Orders 5 and 7, in 7 C.F.R. § 1005,83 and 1007.83, respectively, direct the Market Administrator to compute an identical mileage rate for handler cost reimbursement from each order's TCBF. The computation formula consists of five (5) factors in 1005.83(a)(1) - (a)(5) and 1007.83(a)(1) - (a)(5). Part (a)(1) which provides the formula for determining the average current diesel fuel cost would not be changed. Our proposal would, however, update factors (2) through (5) to reflect current costs and operating facts, as follows:

- In (a)(2), the base cost per gallon of diesel fuel, now $1.42 per gallon, would be increased to $2.26 per gallon representing the average cost for the period of September – October 2020. Use of this time period makes sense because diesel fuel was relatively constant

during this period providing a useful date set for collecting hauling rates. (Exh. 12 p.24; Exh. 38; Hollon Tr. 159) The volatility of diesel fuel prices is a major factor in the overall cost of transportation and a key dynamic which requires regulatory support. The historical and projected continued volatility in these prices was described in detail by DCMA witness Sarah Vanadia, a Commodity Risk Management Analyst for DFA. (*See* Exh. 78; Vanadia Tr. 365- 378)

- In (a)(3), the average miles per gallon (mpg) for over-the-road full milk tankers, now 5.5 mpg, would be increased to 6.2 mpg to reflect increases in truck fuel efficiency. (Exh. 12, p. 25; Exh. 41; Hollon Tr. 161)
- In (a)(4), the average cost per loaded mile, presently $1.91, would be increased to $3.67 to reflect cost increases in tank truck operation from 2005 to 2021. (Exh. 12, pp. 26-27; Exhs.41-43; Hollon Tr. 161-67)
- In (a)(5), the average payload of a milk tanker delivering to the market, presently 480 cwt, would be increased to 497 cwt to reflect current average load weights. (Exh. 12, p. 26; Exh. 43; Hollon Tr. 166)

**2. <u>Revise the months of mandatory and discretionary payment from the TCBF</u>**

Currently, Orders 5 and 7 require payments from the TCBF for qualifying supplemental milk deliveries in the months of July through the following February. The Orders allow payment in the month of June if payment is requested and the Market Administrator finds extension of payment to June "necessary to assure the market of an adequate supply of milk for fluid use." 7 C.F.R. 1005.82(b); 1007.82(b)

DCMA proposals 1 and 2 would eliminate February as a mandatory payment month and

make February a discretionary month, subject to the same criteria and procedure as currently apply for June. The judgment of the DCMA cooperatives' marketing staff, supported by Mr. Hollon's testimony, is that February's demand for supplemental milk is not as great as the other months of mandatory payment and making that month discretionary will allow the percentage payout to be somewhat greater in the payout months in Order 7 (Exh. 12, pp. 31, 35; Hollon Tr.175, 185).

**3. Revise the non-reimbursed mileage factor in § 1005.82(d)(3)(iii) to 15% of miles from origination point to delivery plant from the current flat 85 miles and allow the Market Administrator to adjust that non-reimbursement percentage when necessary**

Currently, Orders 5 and 7 direct the Market Administrator to "subtract 85 miles" from the distance from the origination point of the supplemental milk to the receiving pool plant. The resulting mileage is then eligible for payment on a per-mile basis. Our proposal would revise the subtraction factor from 85 miles in all cases to "15 percent of the miles [from origination point to receiving pool plant]". DCMA submits that a mileage percentage subtraction will more uniformly and more equitably reimburse all supplemental deliveries. (Exh. 12, p. 36-37; Hollon Tr. 186)

A uniform reduction in percent of miles will more equitably share the unreimbursed miles from origin to destination. Currently, shorter deliveries of supplemental milk have a greater percentage of miles unreimbursed. This arguably could give suppliers an incentive to import supplemental supplies from a greater distance. By reducing all mileages by a uniform percentage, this potential disorderly incentive is eliminated. Furthermore, the closer-in milk is better compensated, which is simply fairer. Fifteen percent will mean 116 unreimbursed miles on a haul of 774 miles, which was the average distance in the DCMA survey of October 2020.

(Exh. 12, pp. 4-5; Tr. 98)

**4. Increase the maximum assessment rate in each Order**

Currently, Order 5 provides in 7 C.F.R. § 1005.81(a) for a maximum assessment of $0.15 cwt of Class I producer milk to fund the TCBF. DCMA proposal 1 would increase that maximum assessment rate to $0.30. Currently, Order 7 provides in 7 C.F.R. § 1007.81(a) for a maximum assessment of $0.30 cwt of Class I producer milk to fund the TCBF. DCMA proposal 2 would increase that maximum assessment rate to $0.60. (Exh. 12, pp. 33-35; Hollon Tr. 179-85)

DCMA members reviewed an extensive amount of data, including calculations of various estimated MRF levels in order to arrive at the proposed assessment maximums. This evaluation process is shown in Exhibits 51-54. Exhibit 51 details the range of options that would cover the full costs based on the chosen example MRFs and the reasonable assumptions underlying the calculations of the MRF. Exhibits 52-53 focus the range for Order 5 to a maximum rate of $0.30 per cwt – a rate that DCMA members feel will cover full costs for some time and still allow room for increases in costs to be covered with no occurrence of proration. Also, we expect this initial rate to be reduced by the Market Administrator, as has been done recently, to a level more reflective of current market conditions soon after implementation.

For Order 7 the members chose a maximum rate of $0.60 per cwt (also Exhibit 51 and 52) which would allow for much of the current supplemental milk costs of Order 7 to be paid although it is assumed some proration would continue to occur. (Exhibit 54) After some period of time and experience with the new MRF constants and experience with the current costs of haul, the assessment level could be reviewed or the mileage reduction factor could be changed to

better reflect cost recovery by the Market Administrator.

In summary, each DCMA member reviewed its own business plans and options and they collectively reached the proposed rates based on the analysis as summarized above. Furthermore, and importantly, the proposed rates were subjected to, and found to satisfy, the competitive test of finished product competition discussed at V.B below.

#### 5. The requirements for qualification for participation in the TCBF should not be revised

DCMA does not propose to alter the qualification criteria for payments from the TCBF funds. Those qualification criteria have been developed over the multiple prior hearings for the TCBF. As so-constructed, with qualification criteria, the TCBF system has worked well within its current financial limits. Those financial specifications need to be updated, as the record documents. However, the payments should remain applicable only to the seasonal months of greatest demand so that the out-of-area payments remain supplemental. Eliminating the qualification criteria and making the TCBF system year-round will tilt these Orders' regulated revenues too far in favor of out-of-area supplies versus the in-area milk supplies which need additional support.

## IV. TO EXTEND TRANSPORTATION COST REIMBURSEMENT TO LOCAL PRODUCERS, DCMA PROPOSALS 3, 4, AND 5 FOR DISTRIBUTING PLANT DELIVERY CREDITS IN ORDERS 5, 6, AND 7 SHOULD BE IMPLEMENTED

The Southeast markets have not provided transportation cost reimbursement to handlers acquiring in-area and year-round milk supplies for the market's Class I distributing plants. This inequity is addressed by DCMA proposals for Distributing Plant Delivery Credits in Orders 5, 6, and 7 as detailed in Proposals 3, 4, and 5 (Exhs. 75, 76, 77). The proposed order language adds

necessary reporting requirements to part .30 and .32 of each order and a new part .84 to each order. These new proposed credits have the following operating provisions:

**A. Modeled on the TCBF fund, a Distributing Plant Delivery Credit Fund (DPDCF) and payment program is established in Orders 5, 6, and 7**

The Distributing Plant Delivery Credits are intended to extend to in-area milk supplies reimbursement for costs of delivery similar to the reimbursement for supplemental milk supplies which occurs via the TCBF program. Therefore, the basic structure of the Distributing Plant Delivery Credit program is modeled on and follows the TCBF structure in many respects including these features: (1) an assessment on Class I producer milk to be paid into a Distributing Plant Delivery Credit fund will finance the credits; (2) a set of criteria for the deliveries which qualify for the credit is established; (3) a reimbursement rate per eligible mile (identical to the TCBF rate) is payable; (4) 85% of the miles from origination point to receiving plant will receive payment; and (5) the Market Administrator will have the ability to adjust assessment and reimbursement rates under specified conditions and police utilization of the credit program. (§§ 1005.84(a); 1006.84(a); and 1007.84(a)). (Exh. 13; Hollon Tr. 262-314)

**B. The geographic eligibility criteria for the credits is established for each order to include the marketing areas of Orders 5 and 7 for each other; and identified historical year-round procurement areas outside the marketing areas of Orders 5 and 6**

Farm milk eligible for the delivery credits is defined in each order to capture the local, year-round supplies for each order, as follows:

- Order 5: the marketing areas of Orders 5 and 7, plus additional specified counties in the Commonwealth of Virginia and the State of West Virginia;
- Order 6, the Order 6 marketing area, plus additional specified counties in

the State of Georgia;

- Order 7, the marketing areas of Orders 5 and 7.

The intent is to make local and year-round supplies for each order eligible for these year-round delivery credits. (Exh. 75, § 1005.84(e); Exh. 76, § 1006.84(e); and Exh. 77, § 1007.84(e)). The identification and role of the counties in Virginia and West Virginia for Order 5 was discussed by Mr. Smith for Maryland and Virginia. The counties are in non-federally regulated area and provide supplies for an Order 5 pool distributing plant in the same unregulated area. The counties are also the regular source of milk to Order 5 pool distributing plants in the Carolinas. Under these circumstances, the counties are parts of the regular procurement area for Order 5 and the handlers obtaining milk supplies from these counties should be entitled to the distributing plant delivery credits. (Smith Tr. 389-90)

The Order 5 provisions also provide for the qualification for credits of milk from an Order 5 pool supply plant in Virginia. This plant, located in the marketing area, assembles milk delivered in farm pick-up trucks from smaller, mostly plain-sect, producers in Pennsylvania, Maryland, and Virginia. The milk is then cooled and shipped in larger over-the-road transports on a regular basis to Order 5 distributing plants. Transshipping via the supply plant is the necessary method for these producers to supply the market. Distributing plant delivery credits would apply only on the mileage from the supply plant to the Order 5 distributing plant. (Smith Tr. 389-390)

The Georgia counties' supplies to be included in the Order 6 area for distributing plant credits were described in detail by Mr. Covington of SMI. (Exh. 81, pp. 2-3; Covington Tr. 410-411) These counties are a year-round integral part of the supply for the Florida Order and

the handlers acquiring milk from those areas should be entitled to the distributing plant delivery credits. Supplies from these Georgia counties regularly going to the Florida Order were also described by Mr. Herting. (Exh. 82, pp. 2, 6; Herting Tr. 441)

As with the TCBF fund provisions, for Orders 5 and 7, the respective Orders' marketing areas are considered in-area sources of milk. Those sources are not eligible for TCBF – out-of-area supplemental payments – but should be eligible for in-area distributing plant delivery credits.

### C. The reimbursement rate for miles-to-plant for this credit is set at the same rate per eligible mile as for the out-of-area TCBF supplies

The Distributing Plant Delivery Credits will be paid at the identical rate per compensable mile as the supplemental milk supplies under the TCBF system. (§§ 1005.84(h); 1006.84(h); and 1007.84(h)). As Mr. Hollon testified, DCMA chose to use the same mileage rate factor for inside-the-market transportation as for the outside-the-market TCBF. This rate is a conservative compensation rate for local transportation costs which frequently include stop charges, fixed minimum charges, volume adjustments, and possibly rate-per-mile factors. DCMA concluded that "it would be difficult to impossible to [calculate an average in-area-only rate] in an acceptable manner so we decided to use the same MRF that would be calculated each month by the Market Administrator for the TCBF system." (Exh. 13, p. 12; Hollon, Tr. 279) This choice is "a conservative choice and completely transparent." (Exh. 13, p. 12; Hollon, Tr. 279)

### D. A range for the reimbursed portion of the farm to plant mileage is set at 75% to 95% so that 5% to 25% of total mileage is not reimbursed in the credit program

As with the TCBF program for supplemental milk supplies, the Distributing Plant Credits will not be payable on 100% of the mileage from origination point (farm) to receiving

distributing plant. Our proposal establishes a range of mileage reimbursement from 75% to 95% of gross miles (which is equivalent to subtracting 5% to 25% of farm to plant mileage). (Exh. 75, Proposal 5, § 1005.84(f)(1)(i); Proposal 6, § 1006.84(f)(1)(i); and Proposal 7, § 1007.84(f)(1)(i))

### E. The initial reimbursed mileage percentage is requested to be 85% with the Market Administrator having the authority to move the rate in the established range as market conditions dictate

DCMA proposes that the Market Administrator have discretionary authority to increase or decrease the applicable percentage upon a request from a market participant, the receipt of comments from the industry, and a finding that market conditions of supply and demand make the revision necessary.

### F. The Market Administrator is required to monitor closely the credits claimed to identify and disallow credits where any abusive practices and uneconomic movements of milk are found

Because this program of Distributing Plant Delivery Credits is not presently operating as such in any Order, and out of an abundance of caution to preserve orderly marketing, DCMA proposes that the Market Administrator have the obligation to monitor its operation closely and be able to disallow requested credits upon a finding, after due notice to the handler involved and appropriate investigation, that the requested credits involve persistent and pervasive uneconomic milk movements and do not further orderly marketing and efficient milk movements. (§§ 1005.84(e)(3); 1006.84(e)(3); and 1007.84(e)(3)).

### G. A maximum assessment rate and an initial assessment rate are established for the DPDCF in each order, with the Market Administrator having the authority to adjust the rate up or down as necessary and appropriate

Maximum and initial assessment rates for the DPDCF are proposed to meet market

conditions in each order. The maximum and initial rates are:

- Order 5, maximum $0.60, initial $0.55;
- Order 6, maximum $0.85, initial $0.80;
- Order 7, maximum $0.50, initial $0.45.

(§§ 1005.84(b)-(c); 1006.84(b)-(c); and 1007.84(b)-(c)). As discussed below, these assessment rates have been rigorously tested for competitive impact. See part V.B, *infra*. The rates are reasonable and justified.

## V. THE DCMA PROPOSALS AND THE MARKETPLACE

Consideration of whether it is possible to solve the marketing issues faced in the Southeast without the proposed regulations and what impact adoption of the requested regulations would have in the marketplace will be discussed in this section.

### A. <u>It is not feasible to obtain the transportation cost relief needed from the marketplace without the proposed regulations</u>

Two questions were posed to a number of DCMA witnesses: Are the proposed regulations necessary? Have the DCMA cooperatives attempted to obtain the necessary revenues from the market, without additional regulations? These questions were addressed and answered thoroughly by multiple DCMA witnesses, including Messrs. Herting, Smith, Covington and Hollon. Mr. Hollon summarized the case for the distributing plant delivery credits versus over-order prices succinctly as follows:

> "It provides a reimbursement system superior to over-order prices, which are challenging to maintain and even more challenging to increase.[6] Having a portion of transportation costs within the order pricing system treats all suppliers and buyers equitably. Handlers are generally more capable of passing through to packaged fluid milk wholesalers/retailers Class I price changes which are

[6] Fuel price increases, which can be of significant magnitude and difficult to anticipate (Exh. 79; Vanadia Tr. 366-377) are a major element of transportation costs which are extremely challenging to reflect in over-order pricing.

specifically outlined on Federal Order price announcements."

(Hollon, Tr. 275-76)

The testimony of DCMA marketing personnel supported this testimony citing at least (3) reasons why federal order regulations are required to address these marketing challenges.

**1. Customer requests for price transparency**

First and foremost, regulatory minimum prices are what customers request. Federal order prices are published monthly by the Market Administrator. All parties in the marketing chain have access to those prices and are aware of them. The published FMMO prices can be utilized by processors in connection with sales of processed products to their customers. (Smith Tr. 394; Covington, Tr., 419-20; Herting, Tr. 449-50; Exh. 13, p. 9; Hollon Tr. 275)

**2. Assurance of price uniformity**

When prices are part of the FMMO system, all handlers/processors know that their competitors are subject to the same minimum pricing. This allows processors to compete for sales on the basis of service, quality and other factors under their control, with the assurance that all have the same starting point in raw product price. (Smith Tr. 394; Covington, Tr., 419-20; Herting, Tr. 449-50)

**3. Assurance of payment**

Cooperatives have assurance of getting paid on a timely basis for FMMO minimum prices. This is an important part of the FMMO system. When cooperatives charge over-order prices to Class I processors, timely and full payment is not assured and is a real risk, as more than one witness attested. (Smith Tr. 394; Covington, Tr., 419-20; Herting, Tr. 449-50)

In summary, uniform minimum prices, assessed and distributed through the order system

is the only realistic option for cooperatives, as marketing handlers, to obtain fair reimbursement for marketing costs which vary from farm to plant and customer to customer and for buyers to have confidence of minimum prices paid by all. The marketplace of over-order charges is simply not a viable vehicle to recover the costs addressed in these hearing proposals.

### B. A detailed, in-depth analysis of the competitive impact of the DCMA proposals establishes that they will not place southeastern order pool distributing plant operators at a competitive disadvantage with out-of-area plants

In putting forth the proposals in this hearing which will increase the minimum total obligation that pool distributing plants in Orders 5, 6, and 7 will have for Class I producer milk, DCMA is sensitive to the need to keep these customers competitive with sources of milk and packaged products from other Order areas. To evaluate that issue, DCMA presented the testimony of Emma Downing-Reynolds, a dairy policy and industry relations employee of Dairy Farmers of America. Ms. Downing-Reynolds holds an M.S. in Agricultural and Applied Economics with a Public Policy Analysis emphasis from the University of Missouri. She was tasked with developing information to evaluate the competitive impact of the Class I price assessments on out-of-area sources. For this project, she drew upon data available from DAT Solutions, a U.S.-based provider of transportation information and freight exchange services. DAT is a trucking industry relied-upon source of prevailing rates for transport of commodities or other products by truck from point-to-point in the continental U.S. Its database includes information from 120,000 carrier customers representing 2 million trucks, 10,000 broker customers and 13,000 shipping customers, representing more than 536 million loads and trucks posted annually.

The DAT database includes many lane rates for packaged milk. From that available

database, she prepared a table (Exh. 78, pp. 4-5) which reveals the Reefer Transport Cost between 60 selected routes from origin cities out of the Southeast area to destination cities in the Southeast marketing area. The point-to-point pairings were selected by Mr. Hollon in consultation with DCMA cooperatives' marketing personnel. They represent a comprehensive array of actual and potential competitive interactions between the Orders 5, 6, and 7 plants and the out-of-area, as well as some in-area, competitors.

Using Ms. Downing-Reynolds' cost of transport, Mr. Hollon then compared the landed cost of packaged milk from the out-of-area origins, as well as some in-area origins,[7] to the cost at the in-area competitive locations. In all comparisons it was assumed that the in-area plants were charged the maximum assessment possible under the DCMA proposals -- which is $0.90 in Order 5; $1.10 in Order 7; and $0.85 in Order 6 – as well as the Class I differential. The out-of-area plants' cost at the competitive destination was each plant's Class I differential plus the transportation cost determined by the DAT analysis. The result of the comparisons is shown on Exhibit 70. **The bottom line is that there was no location at which in-area southeastern orders plants will be placed at a competitive disadvantage to their potential out-of-area, or in-area, competitors**.

**C. <u>Conclusion regarding marketplace issues</u>**

The testimony of the DCMA marketing witnesses and the results of the empirical analysis using the DAT data substantiates that the DCMA proposals are necessary to address the increased transportation costs in the Southeast and will do so in a way which will not

[7] For instance, on Exhibit 70 see Order 6 comparisons such as Orlando to Miami.

disadvantage the Southeast dairy industry. The data assembled in support of these DCMA proposals is truly overwhelming.

## VI. PROPOSED ALTERNATIVES TO THE DCMA PROPOSALS SHOULD NOT BE ADOPTED

Prairie Farms Dairy, Inc., (Prairie Farms) and the Milk Innovation Group offered, in the case of Prairie Farms, or suggested, in the case of the Milk Innovation Group, that the Secretary consider alternatives or amendments to the DCMA proposals. These alternative recommendations lack merit and should not be adopted.

### A. The Prairie Farms' proposals for assembly credits and expanded transportation-credits should not be adopted

Prairie Farms (sometimes "PF") is an Illinois-based Capper-Volstead cooperative with 682 dairy farmer member-owners (Tonak, Tr. 540). A small portion, apparently much less than 10%, of its member farms are in the southeastern order marketing areas (Tr. 540). However, it does own and/or operate nine (9) pool distributing plants in Orders 5 and 7 (TR. 541). Those plants are supplied predominately by sources other than Prairie Farms' membership (Tonak, Tr. 541-544). Prairie Farms submitted five (5) proposals, numbered six (6) through ten (10), for this hearing. (Exh. 1) Its proposals 6 and 7 would eliminate qualifying criteria for payments from the TCBF funds and thereby make the payments available to all producers, both inside and outside the marketing areas, during the qualifying months. Proposals 8, 9, and 10 would establish a new uniform Assembly Performance Credit (APC) payable on all producer milk, both within and outside the marketing areas, delivered to Order 5, 6, or 7 pool distributing plants. This payment would be made from an assessment of $0.50 per cwt on "all Class I milk delivered to a pool distributing plant". The funds would be

paid out in a uniform distribution, projected (by the Market Administrator at PF's request) to be $0.40-$0.45 per cwt based on the marketwide utilization of pool distributing plants (*See* Exh. 9, Tables 7-9). The Prairie Farms proposals lack critical substantiation, would not address the marketing challenges in the southeastern orders, and do not have the support of a substantial number of producers in the southeastern markets.

**B. <u>Lack of cost-out and cost justification</u>**

A primary shortcoming of the Prairie Farms proposals is their lack of cost justification and costing-out analysis. This applies to both the expansion of the transportation credits and to the APCs. With respect to the transportation credits, if the eligibility were expanded to all milk, within and outside the marketing area during the pay-out months, as set out in Proposals 6 and 7 and the testimony of the Prairie Farms witness (see Exh. 84, p. 6), the pay-out per mile would be drastically reduced, likely to the point where it would hardly be consequential. Taking just the month of October 2022 in Order 7 as an example: In that month there were 280.1 million lbs. of producer milk delivered to pool distributing plants (Exh. 9, p. 9); T-credits were claimed on 134.1 million pounds (Exh. 8, p. 20); and the pro-ration payout was 25.89%. With more than double the pounds eligible, the proration would have likely been less than 10%, a dysfunctional payout. Even if the PF proposal incorporated the new assessment and updated MRF of the DCMA proposals, the pro-ration percentage is going to be very low. Prairie Farms has not analyzed the impact of its proposal for expanded eligibility for transportation credits (Tr. 547). As Mr. Tonak testified:

> "Q. So, in this hearing record, if the Department were to adopt your proposal, there'd be no way of knowing what financial impact it would have?
>
> A. That would be correct." (Tr. 547)

Clearly, the record lacks support for adoption of these proposals.

A similar deficiency is present in the proposals for Assembly Performance Credits. Prairie Farms has provided no substantial cost-justification for the proposed $0.50 APC. The general testimony of the PF witness that assembly, dispatch, and delivery costs "vary widely" but would be "partially born[sic]" by the APC is not supported by any detailed (or even less than detailed), substantiated costs of assembly, dispatch, delivery, or transportation which is also cited as an element of the APC (Exh. 84, pp. 7-8; Tr. 518-19). Even without consideration of the other objections discussed below to the APC, the abject lack of cost analysis and justification for the proposed assessment and credit requires that the proposal be rejected.

The Prairie Farms APC proposal has several additional defects:

- By directing new revenues to all producer milk irrespective of its location, it continues the disparate treatment of in-area versus out-of-area milk supplies. One of the key issues with the current provisions in the Southeast orders is that the costs and challenges of in-area milk production has not been recognized. The PF APCs perpetuate that discrimination by allocating a substantial proportion of the new revenues generated by their $0.50 assessment on local Class I uses to out-of-area producers. This is in Prairie Farms' interest, of course, as it does not have many local producers. But the fact is that the PF APC program does not address the need for revenues directed to supporting the local in-area producer supplies.
- Furthermore, the uniform payment of the APC to all pool distributing plant deliveries does not address the mismatch of supply and demand locations within

the southeastern orders' marketing areas. There is substantial testimony by numerous witnesses that this problem has been magnified with the reduction in both farms and plants in the Southeast. The uniform distribution of new revenue does nothing to ameliorate this inequity. The DCMA Distributing Plant Delivery Credits, on the other hand, are tailored to the cost of farm to plant delivery, whether south to north or east to west. The PF APC program is not well-designed for the Southeast markets.

- Also, the overlay of the APC with transportation credits on all producer milk has not been costed out or reconciled. To the extent that the programs compensate the same milk, year-round, as pointed out above, the transportation credits will be almost inconsequential, due to pro-rationing, and the resulting program will not effectively address the marketing challenges in the region in any targeted way.
- Finally, the PF program simply does not have the support of any substantial number of producers in these orders. PF is not in Order 6 at all, either with producers or distributing plants and its representation in Orders 5 and 7 is primarily on the handler/buyer side. No other interested parties appeared to support the PF proposals. This record will plainly not support their adoption.

**C. <u>The Milk Innovation Group testimony</u>**

The Milk Innovation Group witness's suggestion that a program of assembly credits should be funded out of existing pool revenues is a non-starter. It would do nothing to address the problems of supporting the costs to produce milk for, or move milk to, southeastern order pool distributing plants. Re-shuffling existing pool revenues in the Southeast would be the

equivalent of rearranging the deck chairs on the Titanic. The threat to the welfare of the ship would not be averted; only the view of some boat-occupants to the oncoming glacier would be impacted. New revenues targeted to the costs of getting milk to the demand points in the marketing area as designed in the DCMA proposals are what is needed.

## VII. CONCLUSION

The hearing record comprehensively establishes that there are serious disorderly marketing conditions in the southeastern Federal Orders 5, 6, and 7. Those conditions are so serious that they threaten the assurance of an adequate supply of fresh and wholesome milk for southeastern consumers. To address this urgent condition, it is imperative that the DCMA proposals be adopted on an expedited basis. The record establishes that expedited implementation is both (1) 'imperative' – as testified to by the dairy farmer witnesses, (see pp. 9-10, above): e.g. "It . . . can't come soon enough." – and (2) 'unavoidable' – there is no free-market solution available – as testified to unanimously by the DCMA cooperative marketing personnel (see pp. 22-24, above). Thus, the record unequivocally meets the criteria for expedited action, 7 C.F.R. § 900.12(d) and the Secretary should so find.

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## CERTIFICATE OF SERVICE

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