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April 24, 2006

VIA FEDERAL EXPRESS

Ms. Joyce A. Dawson
Hearing Clerk
United States Department of Agriculture
1400 Independence Ave., S.W.
South Agriculture Bldg. – Room 1081
Washington, D.C. 20250

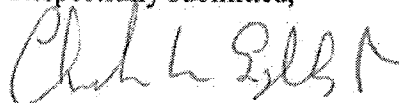
Re: **Milk in the Central Marketing Area; Docket No. A0-313-A48; DA-04-06**

Dear Ms. Dawson:

Enclosed please find six copies of Dean Foods Company's Comments and Exceptions to Recommended Decision to be filed in the above-referenced matter. I have also enclosed an additional copy to be date-stamped and returned to me by U.S. mail.

If you have any questions regarding this submission, please do not hesitate to contact this office.

Respectfully submitted,



Charles M. English, Jr.

CME/sf
Enclosures

cc: Judge Marc R. Hillson (via e-mail)
Marvin Beshore, Esq. (via e-mail)
John H. Vetne, Esq. (via e-mail)
Ryan K. Miltner, Esq. (via e-mail)
Garrett B. Stevens, Esq. (via e-mail)
Jack Rower (via e-mail)
Dana Coale (via e-mail)
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USDA
OALJ/OHC

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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IN RE:

MILK IN THE CENTRAL MARKETING
AREA; HEARING ON PROPOSED
AMENDMENTS TO TENTATIVE
MARKETING AGREEMENT
AND ORDER

DOCKET NO. A0-313-A48; DA-04-06

COMMENTS AND EXCEPTIONS
TO RECOMMENDED DECISION

SUBMITTED ON BEHALF OF

DEAN FOODS COMPANY

Charles M. English, Jr.
Thelen Reid & Priest LLP
701 Eighth Street, N.W.
Washington, D.C. 20001

Attorneys for Dean Foods Company

April 24, 2006

**COMMENTS AND EXCEPTIONS TO RECOMMENDED DECISION
FILED ON BEHALF OF DEAN FOODS COMPANY**

These Comments and Exceptions to the Secretary's Recommended Decision (71 Fed. Reg. 9015-9033 (February 22, 2006)) regarding the issues of: (1) "de-pooling"; (2) performance standards; (3) transportation credits; and (4) the definition of "temporary" producer status for the Central Milk Marketing Order are filed on behalf of Dean Foods Company. Dean applauds the Secretary's reasoned decision-making in properly concluding that de-pooling of milk results in non-equitable treatment of producers and handlers; these actions by handlers constitute disorderly marketing conditions and should be corrected. Dean also concurs that action must be taken on an order by order basis rather than at a nationwide hearing. However, while Dean understands the Secretary's rationale for adopting the least restrictive corrective action in recommending adoption of Proposal 2, Dean respectfully disagrees with the conclusion that adoption of Proposal 2 will be sufficient to correct the problem. The Secretary's Congressional command is to maintain orderly marketing conditions. Thus Dean continues to advance its proposals that would more firmly assure long-term, continual and uninterrupted commitment to the market and the equalization fund.

Dean also respectfully takes exception to the Secretary's refusal to implement stronger performance standards (including a definition of "temporary" for loss of Grade A producer status) and transportation credits for the Central Order marketing area. Ample record evidence establishes the need for real change in this vast marketing area so that producers regularly supplying Class I plants receive the proper incentive to ship milk to where it is needed. That is not happening today and the Secretary's refusal to adopt these proposals will leave the Central Order in continuing disorder.

(1) De-Pooling is Disorderly Marketing and Must be Reigned In

In his Final Decision on this matter, the Secretary can and should reiterate strongly his correct conclusions based upon ample record evidence regarding de-pooling: (1) “it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform” (71 Fed. Reg. at 9026, c.3); (2) “when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, [Producer Price Differentials] were much more negative” (*id.* at 9027, c.2); “when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers” (*id.*); “the ability of manufacturing handlers and cooperative to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling” (*id.* at 9027, c.2-3); and “disorderly marketing conditions are present when producers do not receive uniform prices” (*id.* at 9028, c.1).

The only thing Dean would add to the above analysis is that the statutory mandate is also violated when de-pooling occurs because handlers are not paying uniform prices. Dean recognizes that the Secretary historically has relied upon the uniform prices received by dairy farmers provision more than the uniform prices paid by handlers, but, respectfully, the handler uniformity provision has equal statutory justification and rationale. Thus, the Secretary could and should in the Final Decision further recognize record evidence that de-pooling also gives rise to disorderly marketing conditions because of the inherent lack of handler uniformity.

Having correctly concluded that the Record establishes that de-pooling results in “inequities” that are “contrary to the Federal order program’s reliance on marketwide pooling” (*id.*), the Secretary correctly concludes that the order should “contain pooling provisions

intended to deter disorderly marketing conditions that arise when de-pooling occurs.” *Id.* With limited caveats, Dean certainly does not object to adoption of Proposal 2 as far as it goes. Dean simply concludes that Proposal 2 does not go far enough. Dean does not seek to burden the Record with a repeat of its arguments made in its Brief filed on February 18, 2005 in this proceeding; Dean incorporates by reference here that Brief. Instead Dean urges prompt adoption of Proposal 2 in order to achieve those limited protections from the predations of future de-pooling.¹ Nothing would be finer than to discover that adoption of Proposal 2 will suffice in protecting the industry from these accepted disorderly marketing conditions. However, in the event that adoption of Proposal 2 proves inadequate to staunch the losses that result from these now acknowledge disorderly marketing conditions, Dean reserves the right to return to the Secretary with the same or modified proposals in order to truly close the door on these activities. Dean thus respectfully disagrees with any conclusion by the Secretary that its proposals were unnecessarily restrictive or would disrupt “prevailing marketing channels.” The Dean proposals would merely “disrupt” the continued ability to de-pool milk that Dean believes may well occur after adoption of Proposal 2. If we are wrong and Proposal 2 corrects the problem, we will be more than delighted; however, we fear that we will have to return to this issue in the near term.

(2) Performance Standards

Dean again believes the Secretary has properly concluded that the present performance standards are inadequate to maintain orderly marketing conditions, but has again concluded that incremental change is superior to truly dealing with the problems and issues. With the exception of the proposed modification of the split plant provision (Proposal 10 remains strongly supported

¹ Since de-pooling opportunities exist when prices move rapidly upwards, the present situation with low milk prices leaves open the very real possibility that the industry could see higher prices by this summer and with those higher prices more de-pooling. The Secretary should act now to assure orderly marketing conditions later this year.

by Dean and there is ample support in the record for adopting it), the Secretary has simply adopted the least common denominator as proposed by the dominant cooperatives. However, the Central Order has been and remains a widely discussed problem in a number of federal order proceedings since adoption of federal order reform. The sheer geographic size of the Central Order (from Western Colorado to Southeastern Illinois and South Dakota to the Oklahoma) has adversely affected orderly marketing conditions in the Central Order. More (not less) needs to be done. As with the de-pooling issue, Dean is prepared to be proven wrong and hopes that the Secretary's limited actions will be sufficient; however, if the present disorderly conditions continue, additional actions may still be required.

The recommended decision to require split-plant decisions to be made annually is absolutely correct. Permitting monthly decisions as to split-plant usage merely plays into the hands of those who wish to de-pool milk and re-pool it in a subsequent month without cost. Proposal 10 is an excellent part of the over-all solution and should not (regardless of the level of any opponent complaint) be dropped in the Final Decision. Dean urges implementation of Proposal 10 at the earliest possible date.

(3) Transportation and Assembly Credits

Dean is perplexed by the Secretary's refusal to adopt (or recommend for adoption) any form of transportation or assembly credits in the Central Order. The problems associated with getting milk to St. Louis are real and ought not to be so easily dismissed based upon the purported ability of handlers (at tremendous cost) to receive milk at that location – it isn't the federal order that is making that milk available and the costs associated with supplying that location leave both handlers and the producers regularly supplying those facilities with unequal

raw product costs and non-uniform prices. Just as with de-pooling, the result is disorderly marketing conditions.

The fact remains that those facilities face unique circumstances requiring a new solution. With a vast Central Order, blend price differences simply cannot and will not move milk from where it is produced to where it is needed. To date the Secretary has declined invitations to break up the Central Order and now he proposes to refuse the next best solution – transportation and assembly credits. Given the overwhelming evidence and number of proponents supporting these credits, more discussion is needed in order for industry to understand why in this order they are not appropriate. Dean continues to support modified Proposal 3 and urges the Secretary to reconsider his refusal to take incremental steps in this area in the Central Order.

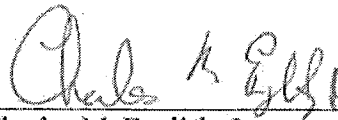
(4) “Temporary” Loss of Grade A Status

Finally, Dean respectfully suggests that the Secretary has missed the point regarding Dean’s proposal (Proposal 3) to define the term “temporary” with respect to a dairy farmer’s loss of Grade A status. While the Market Administrator can and should have discretion to permit a dairy farmer to rejoin the pool when a temporary loss exceeds 21 days, the burden at some point should be on the producer to establish that the temporary loss is not a fig-leaf designed to enhance de-pooling. Since the Secretary declines to accept this proposal at this time, Dean urges the market administrator to examine any future significant volume losses if one or more producers temporarily lose Grade A status during a month of inverted pricing - all of which would permit handlers to avoid the implications of Proposal 7 by not counting such producers’ milk in re-pooling limitations the next month. We trust that the “anti-manipulation” portions of

Proposal 7 (subparagraph 6) would be used to avoid such abuses in the future without the need to return to another rulemaking on this issue.

In conclusion, Dean acknowledges and appreciates the fact that the Secretary recognizes the disorderly nature of de-pooling and that he proposes to take significant action to restore and maintain orderly marketing conditions in this market. Recognizing the problem is often more than half the battle; fixing the problem is also important and Dean will await further future events before it concludes that this abuse has been eliminated (or at least sufficiently managed) in the Central federal milk marketing area. Proposal 10, split-plant annual decision proposal, should be adopted immediately. The Secretary should reconsider his refusal to reject transportation and assembly credits in the Central Order given its unique geographic character and ample evidence of the difficulty in moving milk from where it is produced to where it is needed.

Respectfully submitted,



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