

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**Dairy Programs, Agricultural Marketing Service**

**PROPOSED AMENDMENTS TO THE  
MIDEAST FEDERAL MILK ORDER**  
73 Fed. Reg. 43160 (July 24, 2008)

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**DOCKET NOS.**  
**AO-166-A77; DA-08-06**

**POST-HEARING BRIEF ON BEHALF OF  
UNITED DAIRY, INC.**

This post-hearing brief is filed on behalf of United Dairy, Inc., pursuant to 7 C.F.R. §900.9(b), with proposed findings and conclusions for ruling by the Administrator or Secretary as required by 7 C.F.R. §§900.12(b), 900.13a(b), and 5 U.S.C. §557(c).

1. On June 6, 2008, Dairy Farmers of America (“DFA”), joined by sister cooperatives who collectively market milk as the Mideast Milk Marketing Agency (“MEMMA”), asked USDA to hold a hearing to consider Class I price differential increases in the southern tier of the Mideast Marketing Area. DFA/MEMMA asked for a hearing on an “emergency” basis, with proposed omission of a recommended decision. The Class I differential increase proposed by DFA/MEMMA for most plants in the southeast part of the Mideast marketing area is \$0.20/cwt, with the singular exception of the United Dairy plant in Charleston, W. Va., for which proponents seek a \$0.40 increase.
2. The “emergency” claimed by DFA/MEMMA to support its proposal was the implementation, five weeks earlier, on May 1, 2008, of Class I price increases and related amendments in various parts of the Appalachian and Southeast Milk Markets (collectively “southeast markets”). Exhibit 12; 73 Fed. Reg. 11194 (Feb. 29,

2008)(interim decision for southeast markets), and 73 Fed. Reg. 14153 (Mar. 17, 2008)(amending order).

3. The amendments to the southeast markets were adopted (at the request of DFA/DCMA) to help attract raw milk from Ohio and other heavy production areas to plants in the chronically deficit milk production region, where the Secretary found that failure to act would threaten adequacy of milk supply for fluid use in the southeast. 73 Fed. Reg. at 11206-08.

4. DFA/MEMMA's hearing proposal and supporting testimony for the Mideast price changes claimed that, as a result of pricing changes in the southeast markets, "Southeastern Orders are now better able to attract milk from reserve regions such as Order 33 into their markets and *away from the local Mideast Order plants.* (73 Fed. Reg. 11208-11212, (February 29, 2008));" As a result, DFA/MEMMA claim that it has become "increasingly difficult to supply the southern tier of fluid milk processing plants in Federal Order 33." Ex. 12 pp. 1 – 2, and Ex. 14 pp. 3-4, italics supplied.

5. Thus, DFA/MEMMA's Mideast Marketing Area proposal, in significant part, seeks on an emergency basis to undermine the emergency remedy adopted by USDA for the southeast markets, at the request of some of the same cooperatives. The Mideast proposal is, admittedly, designed to offset the effect of the southeast amendments to attract milk "away from the local Mideast Order plants." Exs. 12, and 14. The proposals would reduce incentives for Ohio milk to supply the southeast markets by increasing incentives for the same milk to be transported no further than southern Indiana, southern Ohio and West Virginia.

6. The foremost question of fact and regulatory policy in considering proposed adjustments to Class I prices is whether a price change (or specific price level) is needed to attract a sufficient quantity of milk for fluid use (or to discourage excessive supplies from remaining in locations where milk is abundant). 64 Fed. Reg. 16026, 16109, 16111, 16117-18 (April 2, 1999)(Final Decision, FMMO reform); 63 Fed. Reg. 4801, 4892-93, 4906 (Jan. 30, 1998) (Recommended Decision, FMMO reform); 51 Fed. Reg. 24677, 24679 (July 8, 1986)(multi-market Class I location adjustment decision for Indiana, Ohio, Illinois and Wisconsin-area markets)(“Milk prices...are established at a level that will insure an adequate supply of milk for the regulated market.”); 73 Fed. Reg. at 11196 (statement of position of DFA/DCMA in the southeast markets hearing). USDA affirmed this standard in the emergency amendments to the southeast market orders: “In light of the chronic milk deficit conditions of the southeastern region, only higher minimum regulated prices can reasonably generate the additional revenue needed to assure that the Class I needs of the region can be continuously met.” 73 Fed. Reg. at 11208 (USDA findings and conclusions).

7. While claiming in its proposal and testimony that the recent decision for the southeast markets have made it more difficult to attract milk in the southern tier of the Mideast market (Exs. 12 and 14, *supra*), these claims are not credibly based on observed transactions and marketing conditions. The proposal advancing this claim was made only five weeks after the southeast order amendments became effective on May 1, 2008, before the May pool been calculated, and before any data on supply changes (if any) had been assembled by the Market Administrators. In truth, proponent’s claims are, at best, anticipatory, speculative, and based on a far too-short (if any) period of observed market

response to the amendments to the southeast orders. Their proposal was, in fact, in advanced gestation shortly after the hearing for the southeast markets was concluded, and several months before USDA's southeast decision was even announced. Ex. 13.

8. Unlike markets for the southeast, DFA/MEMMA cannot (and did not) support their request by reference to long-term data showing that the Mideast region is suffering from rapidly declining milk production and "chronic milk deficit conditions." 73 Fed. Reg. at 11208; Kinser, Ex. 18 p. 9. On the contrary, each of the states of Michigan, Indiana, and Ohio have experience a milk production surge since the advent of Federal Milk Marketing Order reform. Combined milk production in these three states increased from 12.5 billion pounds in 2000 to 15.9 billion pounds in 2007 – an increase of 3.4 billion pounds or 27.3% NASS, Milk Production, Disposition and Income, ('01 and '08), <http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1105>; Meyer, Ex. 23 P. 2.

9. At the same time, demand for Class I milk in the Mideast Market has actually delined by 8.8%. Ex. 23 p. 2. Federal Milk Order Market Statistics, annual ('00 – '07) [http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateE&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=AnnualPublications\(Summaries\)&description=Annual+Publications&acct=dmktord](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateE&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=AnnualPublications(Summaries)&description=Annual+Publications&acct=dmktord), and Order 33 market statistics, <http://www.fmmaclev.com> .

10. Since Class I demand has reduced rather than increased in the Mideast, the new production and diminished Class I demand has resulted in milk in search of a market rather than (as in the southeast) a market in search of milk. Some of the added production available in the Mideast has been used to supply the increasingly deficit

southeast markets. USDA Dairy Programs' periodic publications reporting *Producer Milk Marketed Under Federal Milk Orders by State of Origin*, for 2000 – 2006, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateE&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=StateofOrigin&description=State+of+Origin&acct=dmktord> , reveal that milk serving the Appalachian Market from producers in Ohio, Michigan and Indiana increased since federal milk order reform by 607 million pounds, from 693 million pounds total in 2000 to 1.3 billion pounds in 2006. Similarly, milk serving the Southeast Marketing Area from farms primarily in Indiana, Michigan and Ohio increased by 736 million pounds, from about 222 million pounds in 2000 to about 958 million pounds in 2006. Marketings from the three Mideast states to Orders 5 and 7 account for about 1.3 billion of the 3.4 billion pounds of increased available milk production in the three states between 2000 and 2007. That still leaves over two billion pounds of local, increased Mideast milk production available to meet (shrinking) Class I demand or destined for surplus manufacturing use.

11. In view of these facts, it is not surprising that DFA/MEMMA could point to no objective evidence of real or threatened milk shortages at Mideast southern tier plants, or of excessive premiums required to attract milk to these plants. Rather, proponents relied upon a self-serving and non-credible construction of “available supply” of milk, and of supply/transportation costs that were assembled in disregard of whether plants closer to

the milkshed had any need or available capacity for the Mideast's increasing milk supply.<sup>1</sup>

12. Contrary to the theme of proponents' theory, persuasive evidence of record reveals that MEMMA cooperatives have actively encouraged development of new milk processing capacity in the Mideast southern tier, and (as may be expected where milk is in search of a market) that MEMMA members have competed among themselves and with other suppliers for the opportunity to supply this new demand. Exhibit 24, Patricia Stroup for Nestle Foods. *See also* Ex. 16 (Carson, United Dairy), Ex 17 (Hitchell, Kroger), Ex. 18 (Kinser, Dean Foods), Ex 23 (Meyer, National Dairy Holdings).

13. There is clearly no evidence of current or impending inadequate supply to United Dairy's plant in Charleston, West Virginia, much less evidence that would support a \$0.40 increase at this location when its primary competitors for raw milk and packaged milk sales are faced with 'only' a \$0.15 to \$0.20 increase under the DFA/MEMMA proposals. Ex. 16; Carson, Tr. 321-354.

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<sup>1</sup> Llyle Ruprecht, a producer witness, explained that there is increasing competition for Ohio milk to meet needs of distant buyers, such as Maryland & Virginia Cooperative. But there is no need for milk from Wayne County, Ohio, to serve as a supplemental source for Charleston. Ruprecht, Tr. 363-64. (Describing proponents' analysis as "surrealism."). Unexplained inconsistencies in data on available supply in Exhibits 5 and revised Ex. 13 underscore the apparent result-oriented construction of proponents' "available supply" analysis. This data should be stricken, or disregarded, by the Secretary, for reasons stated in Dean Foods' Motion to Reopen. The motion was erroneously denied by the ALJ, we believe, who concluded that parties were on notice of the inconsistencies by posting of Exhibit 13 on the Dairy Programs' website was enough. The suggestion that parties have an obligation to look for defective needles in an information haystack prepared by USDA personnel misplaces fiduciary responsibilities between the agency and stakeholders or beneficiaries of the program. Moreover, the Dairy Programs' website has recently been modified to the point where it is difficult for insiders, and virtually useless for general public access.

14. The United Dairy plant at Charleston is the only distributing plant in West Virginia, and serves an important function in supplying milk to West Virginia schools and to remote areas in the rural West Virginia Mountains. The plant has experienced no difficulty attracting an adequate supply of milk. *Id.*, Tr. 325-26. Consistent with the general surplus nature of milk production in the Mideast, United Dairy has had to turn down offers of producers to supply milk to its plants. *Id.*

15. Adoption of the DFA/MEMMA proposal to place the United Dairy in an isolated high-priced zone, and at a unique disadvantage to its primary competitors, might be occasioned by the simple fact that United's primary competitors are fully supplied by DFA/MEMMA, while United secures most of its milk supply from independent producers. The DFA/MEMMA proposal threatens the continued existence of this plant, which is an important source of procurement competition serving to enhance producer prices, and a market for producers who wish to exercise their right under the Agricultural Fair Practices Act to remain independent. Ruprecht, Tr. 354 – 384; Carson, Ex. 16. The remaining thrust of proponents' claims that the Class I price at Charleston should be higher than the price charged to its primary competitors is based on perceived "alignment" of prices with plants to the south. Alignment for this purpose, based on proponents' testimony, relies on a subjective art form and eyeballing the pricing map, rather than objective data on competitive procurement and distribution patterns. Responding to similar subjective claims for the same area in 1986, the Secretary concluded that the Ohio Valley (Order 33) Class I price in Beckley, West Virginia, should not be increased to align with Bristol, Tennessee, because...

...the record evidence does not indicate that such alignment is a major factor influencing the economic value of milk at the Beckley location. Rather, the

record establishes that the value of milk at this location is influenced mainly by the close competitive relationship for the limited supplies and sales among handlers serving the region, particularly with a Charleston plant operation. Under this situation, it is desirable to maintain the same price structure throughout the region.

51 Fed. Reg. at 24687. The same observations and analysis apply today to the relationship between the Charleston plant and its principal (Dean Foods) competitor in nearby Marietta, Ohio.

### CONCLUSIONS ON EMERGENCY PROCEDURES

As previously noted, DFA/MEMMA have also requested “emergency” procedures. Under such procedures, USDA may issue a decision *before* receiving public comments on the agency’s views of the facts and issues. Comments are thereafter received, but may be of little effect. As one court observed, comments on a rule considered only after a rule or policy has been adopted always carries with it a risk that the agency will be less open-minded to changes. *McLouth Steel Products Corp v. Thomas*, 838 F.2d. 1317, 1323 (D.C. Cir. 1988). For this reason, a decision without prior comments is the statutory exception in administrative law.

For formal rulemaking such as this, Congress mandated that agencies issue recommended decisions, subject to review and revision, followed by a final decision. Congress permitted the agency to omit a recommended decision only if “...the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.” 5 U.S.C. § 557(b)(2). The USDA Rules of Practice closely mirror the statutory language and maintain the requirement that any deviation from the issuance of a recommended decision be both imperative and unavoidable:

Sec. 900.12 Administrator's recommended decision.



(a) Preparation. As soon as practicable following the termination of the period allowed for the filing of written arguments or briefs and proposed findings and conclusions the Administrator shall file with the hearing clerk a recommended decision.

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(d) Omission of recommended decision. The procedure provided in this section may be omitted only if the Secretary finds on the basis of the record that due and timely execution of his functions *imperatively and unavoidably requires such omission*.

7 C.F.R. § 900.12 (emphasis added). Only if the agency “*finds* on the record that due and timely execution of its functions *imperatively and unavoidably*” requires the omission of a recommended decision is an exception provided that honors the “usual course” rule. 5 U.S.C. §557(b)(2)(emphasis provided); 7 C.F.R. § 900.12(d). These are the key words that govern resolution of the issue: “finds,” imperative” and “unavoidable.”

Emergency rules in “notice and comment” rulemaking are governed by a similar (though less demanding) standard of “good cause” with findings and reasons. 5 U.S.C. §553(b)(3)(B). On review of agency declarations of emergencies, courts have insisted that exceptions to the ordinary APA procedures of comment or exceptions before a rule is made final “should be narrowly construed and only reluctantly countenanced.” *Zhang v. Slatterly*, 55 F.3d 732, 744 (2<sup>nd</sup> Cir. 1995). Reasons for restricting emergency rulemaking to rare circumstances include the maintenance of high quality rulemaking, fairness of the process and public confidence in the process. *United States Satellite Broadcasting Co. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984); *United States Steel Corp. v. United States Environmental Protection Agency*, 605 F.2d 283 (7th Cir. 1979) (affirming agency finding of “good cause”).

DFA/MEMMA cannot meet the “unavoidable” standard for emergency rulemaking in this case, because the record shows that proponents knew of and planned

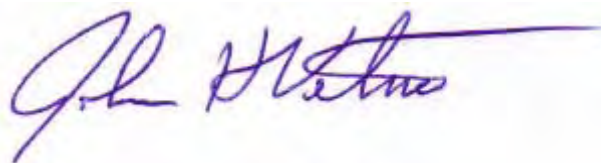
for this hearing when the southeast amendments were considered over one year ago. The late timing of this hearing was clearly avoidable.

DFA/MEMMA cannot meet the “imperative” standard – a conjunctive requirement rather than an alternative reason – because marketing and transaction information in the Mideast that may be due to the southeast markets decision have not yet had time to develop. The Secretary acted in the southeast market, in contrast, only after years of milk production decline and “chronic” supply shortage. Moreover, the proposed amendments for the Mideast are likely to subvert the emergency pricing rules for the southeast by intercepting milk available to the southeast markets from Mideast-area farms before such milk reaches the southeast.

#### CONCLUSIONS

Proponents have not, and cannot, meet the burden of proof and persuasion required of them under 5 U.S.C. §556(d) and under consistent policies of USDA to increase Class I prices only where there is a genuine supply need conforming to the standard of 7 U.S.C. §608c(18).

Respectfully submitted,



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