DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

Milk in the Northeast Marketing Areas; Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders	))))))	Docket Nos.: AO-14-A-70; DA-02-01

BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED ON BEHALF OF NEW YORK STATE DAIRY FOODS ASSOCIATION, INC.

INTRODUCTION

This Brief and Proposed Findings of Fact and Conclusions of Law is filed on behalf of the New York State Dairy Foods Association. The New York State Dairy Foods Association ("NYSDF") participated in the underlying Hearing regarding orderly marketing conditions for the federal milk marketing order 1 (Northeast Order), 7 C.F.R. Part 1001, with fact witnesses, expert witnesses and through cross-examination of witnesses. This Brief divides the Hearing issues into five parts: (1) Reporting and Payment dates; (2) Pooling issues; (3) Marketwide Service Payments; (4) Emergency Conditions; and (5) Small Businesses and the Regulatory Flexibility Act.

NYSDF supports immediate changes to the reporting and date provisions of the Order consistent with the reality that the information required by the reports is simply not available on or before the day upon which the report must be filed. The requested changes to the payment dates are both consistent with the proposed reporting date change and to the reality of when producer patrons of co-operatives are actually paid. As to the pooling issues, NYSDF supports immediate changes consistent with changes made or proposed to be made in other federal milk orders that would ensure that the milk participating in the federal order pool actually serves or is available to serve the fluid milk market in the Northeast. The proposed Cooperative Service Payments (styled as available for marketwide services, but in actuality as proposed only available to cooperatives) must be rejected. Finally, the only emergency conditions are those created by milk not actually or readily available to serve the fluid milk market, those depriving fluid milk processors of reasonable access to available milk, and the evidence that factually impossible reporting dates are causing disruption to the entire industry.

PROPOSED FINDINGS OF FACT AN D CONCLUSIONS OF LAW

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), NYSDF requests that the Secretary make a specific finding of fact or conclusion of law as to each of the following:

A. Reporting and Payment Dates

1. NYSDF has proposed amending the reporting date to the market administrator by moving the date from the 9th to the 10th of the month following the milk delivery. Order 1 is the single largest milk marketing order. The huge volume of milk pooled on the order, the co-mingling of tanker loads of milk between co-operative and independent milk producers, the complications of reporting necessary components for all of this milk has created significant problems within the Order for actually getting the necessary work done in time to report to the market administrator. Tr. 1137-1138 and 1142-1143.

2. The Market Administrator acknowledged the difficulty in receiving timely reports on a routine basis. In fact, for the month of August, the reports due the day before the Hearing began, 29 of 86 reports were received by the Market Administrator after the close of business on September 9th. Tr. 1266. The fault for the late reports does not often lie with the party actually having to file the report. Instead, that party must rely on reports filed with it by others to insure

that the reports it files are accurate. Otherwise, the party filing the report with incomplete information is forced to estimate its obligations, which can result in substantial overpayments (e.g. Marcus Dairy's $25,000 overpayment that as of the date of the hearing has not been resolved). Tr. 1137-1138.

3. As explained by one witness, the process of reporting is a staged process. First, the parties involved must reach agreement on the total pounds of milk. Only then can the issue of components be resolved. Tr. 1165-1167. The suggestion by opponents of Proposal 1 that the NYSDF members work overtime in order to get their job done was hypocritical and non-responsive. Tr. 1183-1184. When a full one-third of the reports received by the Market Administrator are late, there is a very real problem created by conditions unique to Order 1. This is an example where "one size does not fit all". Based upon the testimony, the Secretary should conclude that simply mandating reports by a specific date does not always work and that recognizing economic reality and the unique characteristics of this market should lead the Secretary to adding a single day to the reporting schedule. Moreover, the parties who urged NYSDF members to "work overtime" are the very parties whom NYSDF members testified failed to get them the necessary information on a timely basis. Tr. 1144. No amount of overtime worked by employees of NYSDF could create reports out of thin air when opponents simply failed to work enough overtime to get the information to NYSDF members on a timely basis. No opponent witness contradicted this testimony.

4. Moreover, as testified by Marcus Dairy and others, many members of NYSDF are small businesses subject to Regulatory Flexibility Act analysis and relief as necessary. Tr. 1143, 592, 596. The idea that small businesses should undertake expensive overtime in order to fill out reports when they don't have all the necessary information that they must receive from the very

entities asserting that the small businesses should work overtime, flies in the face of the Regulatory Flexibility Act. Frankly, the provisions as adopted by federal order reform, probably unintentionally, have created an enormous burden on small businesses, which cannot be fixed by overtime, but imposes costs on small businesses (e.g. the Marcus Dairy $25,000 unresolved overpayment).

5. A full 2 and one-half years after implementation of federal order reform, one-third of the market administrator reports are filed late. This cannot be attributed to unfamiliarity with the federal order reform procedures. The proposal to move the report date by one day is a reasonable approach especially if the Market Administrator then enforces more rigorously the actual date of filing.

6. Part 2 of the reporting date proposal recognizes the burdens imposed on the Market Administrator's office by the existing structure and the need to change the reporting date by moving it back one day. The Market Administrator's announcement of the producer price differential ("PPD") should be on or before the 14th or the first day thereafter that the office is open. If the 14th falls on a Sunday, it should not be necessary to impose on the Market Administrator's office the obligation to report on the 12th or to work overtime on weekends. On the other hand, the NYSDF proposal does not require that the Market Administrator wait until the 14th or even the 15th if the 14th falls on a Sunday. The Market Administrator has the power and right to announce the PPD and other applicable prices earlier if he is able to do so based upon information received by him and his office's ability to generate the necessary prices. This flexibility makes the proposal genuinely uncontroversial. If the Market Administrator is able to generate pricing on the 12th notwithstanding the change in the reporting date, then he can do so.

7. Part 3 of Proposal 1 also ought not to be controversial. Presently, handlers are required to make payments to the Producer Settlement Fund ("PSF") in a manner to permit the Market Administrator's office to make payment on the 15th of the month or two days after the present due date of the 13th. Recognizing the flexibility in when the Market Administrator shall announce the PPD and other prices in Part 2 of Proposal 1, Part 3 simply takes the existing 2 day payment date structure and applies it to the date that the Market Administrator makes his announcement. Note that contrary to assertions of opponents that NYSDF handlers are simply looking to delay payments, that Part 3 of Proposal 1 does not set the payment date to the PSF as the 16th. Rather NYSDF handlers are perfectly prepared, subject to ACH bank transfer rules that end up taking 2 days to complete (Tr. 1141), to make payment earlier than the 16th if the Market Administrator is able to provide price information earlier than the 14th. It may very well be the case, than under the combination of NYSDF proposals, the Market Administrator receives better, more timely and more accurate information, permitting his office to actually release prices earlier than under present circumstances. This could result in earlier, not later payments to and from the PSF. In any event, the actual payment date may very well be the same as it is today, or if it is one day later, it will be because the information necessary to generate the prices was genuinely not available. The entire system would benefit from a more realistic and more accurate information that will flow naturally from adoption of this proposal.

8. Proposal 4, proposing to amend 7 C.F.R. § 1072 is also consistent with the intent and results that would be generated by adopting Proposal 1. Rather than setting the 16th as the fixed date for making distribution from the PSF, the Market Administrator would have one day from the date that he receives payments. Under the present system, the market administrator effectively has that one day from the presumed date of payment of the 15th. So Proposal 4 fits in

nicely with Proposal 1's intent of providing flexibility, while at the same time making certain that the Market Administrator actually has the funds necessary to make distribution on the date prescribed.

9. Part 4 of Proposal 1 would move the partial payment date to the 30th of the month for the first 15 days of milk delivery. This proposal appeared on its face to be controversial with producer co-operatives, but after analysis, the controversy should evaporate and reality should permit adoption of this proposal. First, the payment date for producers in the prior existing Order 2 was the 30th of the month or the last day of the month (upon reflection it would be reasonable to conclude that in order to accommodate the month of February, the prior order's language ought to be considered by the Secretary in consideration of this part of Proposal 1). Prior to federal order reform, old Order 1 provided for partial payment on the 5th of the month following. The uncontradicted testimony of NYSDF was that the co-operatives operating in the old Order 1 and old Order 2 territories were making payments to their producer patrons consistent with the old rules. Tr. 1167-1168. Of course, payments to cooperatives would remain the same, that is one day earlier than payment to producers.

10. Therefore, the objections by the co-operatives to the testimony of NYSDF concept of trying to make the partial and final payment dates more consistent with past practices is, like the testimony concerning working overtime, inconsistent with the real life actions of the co-operatives. The crocodile tears spilled by opponents cannot mask the reality that producer payments by the co-operatives are consistent with how everyone made payments to producers in the past and how the co-operatives are making payments now.

11. In any event, Part 4 of Proposal 1 would still leave producers in New England receiving payment 5 or more days earlier than prior to federal order reform and, unless the co-

operatives change their habits, 5 or more days earlier than co-operative patrons. Opponents accused NYSDF members of wanting to play the float with dairy farmer income for 4 days (moving the partial payment date from the 26th to as late as the 30th) when they are presently as large regional or national co-operatives playing the float as long, if not longer than would ever be possible by NYSDF members if proposal 1, part 4 is adopted.

12. For all the foregoing reasons, Proposal 1 in its entirety and Proposal 4 should be adopted. As will be discussed in somewhat greater detail below, these proposals merit emergency consideration and adoption. Given the fact that for the very week of the Hearing a full one-third of the reports to the Market Administrator were received after the close of business on the 9th of month, the disruptions inherent in a system that simply cannot and does not permit timely and accurate reporting of fundamental federal order information constitutes, by definition, disorderly marketing conditions.

B. Pooling Provisions

13. Pooling provisions of federal milk orders, because they determine which producers share in the monies paid for milk, are generally viewed as most directly affecting the rights of dairy producers. However, the handlers who pay for the raw milk, in particular Class I handlers who pay the highest prices for raw milk, are also affected by pooling decisions made by the Secretary. The Secretary's statutory charge is to establish and maintain orderly marketing conditions. 7 U.S.C. § 602(1). In order to meet this statutory obligation, the basic tenets of the federal milk order system are: (a) the setting of an adequate price intended to bring forth a sufficient supply of fluid milk and (b) uniformity of treatment of handlers and producers who stand ready, willing and able to serve the fluid needs of the market.

14. At issue in this hearing are the rules that determine which producers and under what circumstances producers may share in all the minimum price proceeds paid in the Northeast Order. These pooling provisions were adopted most recently through the process known as Federal Order Reform, an informal rulemaking process required by Congress and resulting in a significant reduction, primarily through merger, of the number of federal milk orders.

15. Two things have occurred since the adoption of federal order reform that necessitate the Secretary taking a fresh look at the pooling provisions.

16. The first is commonly referred to as "paper" or opportunistic pooling. As was discussed in this Hearing record (Tr. 1059) and extensively in hearings for the Upper Midwest, Mideast and Central milk marketing order areas, handlers have found ways to exploit the federal order system to pool milk, but not actually move milk. Through this consolidation process, it appears that USDA often adopted the most liberal provision for pooling selected from any one of a number of orders merged together regardless of whether the provision was actually necessary or used at the time (e.g. 1999). This process of "one from each column" does not necessarily actually result in orderly marketing conditions as noted by the open pooling results testified to by numerous witnesses at the Northeast Order hearing.

17. The second thing that has occurred is a result of the new ability that cooperatives have to market independent milk and milk of smaller cooperatives. Much of the milk of independent producers or these smaller cooperatives was already being delivered to Class I handlers. So the combination of these supplies with the cooperative supplies permit cooperatives to show a much higher percentage of sales to the Class I market, even though the net quantity of milk available to the Class I market remains unchanged. Tr. 1140 and 980-981. This means that

a 20 percent shipping percentage for the critical months of September, October and November and a 10 percent shipping percentage for the months of August and December are less meaningful today than when they were adopted.

18. NYSDF members' ability to obtain raw milk for Class I bottling and their resulting raw milk procurement costs are tied directly to pooling provisions of the federal milk orders. When money paid for milk is spread more widely to producers not regularly serving the Class I market, producers shipping to the Class I market necessarily look to Class I processors to make up the difference outside the federal order minimums. Therefore, Class I processors have a pecuniary interest in the outcome of this hearing. Simply put, it is their money paid for their raw milk receipts that create the economic incentives over which dairy farmers are in dispute. And in order to remain competitive, if the producers who ship to these handlers have their pay prices reduced (for instance through the adoption of marketwide service payments discussed below), these handlers will likely obliged to increase their payments to their producers to make up for the loss that results.

19. Exhibits 5 and 5a indicate that there is much more than a sufficient supply of milk available for fluid needs in this market. The decisions of the Secretary and the case law that have resulted from 60 years of regulation establish that the "sufficient supply of milk" standard is a fluid milk measurement.[1] Nonetheless with a sufficient supply of milk, the fluid needs of the market may not always be served by an order system that encourages an excess reserve supply of milk to be associated with the market. Pooling provisions that are too loose are thus as likely to disrupt the market as provisions that are too tight. Most of the participating parties agreed that

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[1] See generally Borden v. Butz, 544 F. 2d 312, 316 (7th Cir. 1976) (the primary purpose of a minimum fixed price system "is to bring forth an adequate supply of pure and wholesome milk" [for Borden's bottling operations of fluid milk]). See also Schepps Dairy v. Bergland, 628 F.2d 11, 17 (D.C. Cir. 1979).

the present circumstances are disruptive because the provisions are too loose allowing milk to be pooled that would never be available as a market reserve.

20. The principal evidence of pooling provisions that are too loose is the sudden appearance on the Northeast Order of milk being pooled on Northeast order from areas of the country not traditionally associated with this market as being available as a reserve milk supply. Note that as fluid milk handlers, NYSDF members do not object to a party outside the marketing area from pooling milk on the Northeast Order should the milk actually serve the fluid milk market needs on a regular basis. However, as was evident from the hearing testimony (including the testimony of a handler with milk supply connections in both the Northeast and the Upper Midwest – Tr. 302 *et seq.*), the milk from the Upper Midwest that is or was suddenly pooled on the Northeast Order was not and is not available for the fluid milk market. In fact, when the "short" milk season arrived in 2002, the millions of pounds of milk from the Upper Midwest were no longer to be found pooled on the Northeast Order.

21. Thirty-two months of operating under Federal Order reform has revealed that at least as to the Northeast Order, this policy has resulted in significant erosion of producer returns to those producers actually serving the fluid market on a regular basis. Class I processors pay the same regulated minimum prices regardless. The difference is that less of that regulated minimum price is returned to the producers shipping to the Class I market as more of the money is spread more widely to producers not regularly serving the Class I market.

22. Individual dairy farmers and cooperative witnesses who testified at the hearing supported tightening pooling provisions, although again, they may have asked for varying degrees of tightening. These producers generally serve the fluid market and yet their funds have been subject to significant erosion when their funds are shared with manufacturing supplies in

Minnesota and Wisconsin. Exs. 5 and 5a. Those supplies simply cannot and do not regularly serve as a reserve supply of milk for the Northeast milk marketing order. The federal pricing structure already creates too little incentive for producers to deliver milk to fluid distributing plants. Absent the Secretary's immediate and emergency action with respect to the proposals submitted, what little incentive there is to deliver milk to fluid plants will largely evaporate.

23. The failure to insure that milk is delivered to these fluid distributing plants, notwithstanding the fact that they pay the highest regulated price and the fact that an adequate supply of milk is obviously associated with this market, is a disorderly marketing condition in and of itself.[2] The Secretary is charged with establishing and maintaining orderly marketing conditions. 7 U.S.C. § 602(1). Therefore, the Secretary is obligated to take action as requested at the hearing in order both to establish and maintain orderly marketing conditions - that is the proper sharing of milk proceeds among those producers actually ready, willing and able to serve the fluid market in the Northeast Order.

24. However, the more difficult task for the Secretary is not to tighten the provisions so tight as to make it less likely that milk will be delivered than is needed or that milk will be forced to ship when it is not needed. It is for this reason that NYSDF supports increasing the shipping percentages by 5 percent for each of the months of August through November. NYSDF testimony supports the proposition that the shipping percentages have needed to be increased since federal order reform. Tr. 1140-1141, 1164 and 1292-1294. A minimal level of shipments set at 15 percent in August and 25 percent for September through November will insure that needed milk supplies are made available to the fluid milk market when needed. If the shipping

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[2] See e.g. Kyes v. United States, 369 F.2d 714, 716-717 (Ct. Cl. 1966), cert. denied, 387 U.S. 929 (1967) (fundamental objective of AMAA is to effect an orderly exchange of commodities in interstate commerce to protect both the interest of the consumer and the purchasing power of the farmer.)

percentages for any given month are too high, the Market Administrator can lower the shipping percentages; however, the burden should not be on the fluid milk handler who pays the Class I differential that is designed to bring forth the adequate supply of milk to have to come forward and cause the shipping percentages to be increased. Rather the burden, if any, of lowering a percentage that may in some cases be too high, should be on the handlers who otherwise benefit from the pool draw on behalf of their dairy farmer patrons. It is for this reason that NYSDF supports proposal 2.

25. On the other hand, while NYSDF agrees that the "free ride" period has created opportunities to paper pool, the free ride period is still a necessary element of orderly marketing when it comes to making certain that the market's actual reserves are handled in an orderly fashion during the flush months. Moreover, if producers or handlers who have traditionally served the fluid market in the fall short months are burdened with unnecessary shipments in the flush months, then they may choose to stop pooling entirely or to pool through cooperatives who have already met their shipping requirements. This would mean that less milk would be readily available to the fluid milk market at the time that it is needed. This fear is not theoretical, but real. Tr. 1294-1296. NYSDF therefore proposed at the hearing a modification to the Proposal 5 by the cooperatives that would require shipments to pool plants even during the months of January through July by supply plants located outside the Northeast (to be clear outside both the marketing area and territory found in any of the states that have territory inside the marketing area so as to permit continued pooling of traditional plants in Upstate New York, northern Vermont, New Hampshire and Maine). This makes proposal 5 (as to supply plants) work in a fashion similar to rules adopted on an interim basis in the Mideast Order. NYSDF also opposes those portions of Proposal 5 that conflict with its position taken as to Proposal 2.

26. As to diversion limitations, the Secretary should conclude that whatever shipping requirement is adopted should then be the reciprocal of the diversion limit – that is that the percentages for shipping percentages and diversions should add up to 100%. Since NYSDF urges adoption of a 0 percent shipping percentage for January through July, a 15 percent shipping percentage for August, a 25 percent shipping percentage for September through November and a 10 percent shipping percentage for December, the Secretary should similarly adopt a 100% diversion allowance for January through July, an 85 percent diversion limitation for August, a 75 percent diversion limitation for September through November, and a 90 percent diversion limitation for December. This is a slight modification of Proposal 3. By necessity, NYSDF opposes the portion of Proposal 6 that provides for different diversion limitations.

27. Also with respect to Proposal 3 versus Proposal 6, NYSDF supported at the hearing a two-day touch base requirement for the months of August through December. The need for milk associated with this market to touch base at a pool plant (not necessarily a Class I plant) twice a month during the short months is hardly a difficult standard. Moreover, the cooperatives' proposal would require a one-day touch base requirement every month year round. Again the cooperative proposal may well require unneeded shipments of milk during the months of January through July. Therefore, Proposal 3 is more reasonable than Proposal 6 in that the two-day touch base requirement is limited to the short months of the year and no shipping requirement is imposed for those months when fluid milk needs do not traditionally require that the milk be shipped.

28. Despite misunderstanding by counsel for the cooperatives at the hearing, Proposal 3 includes a proviso that permits the Market Administrator to adjust upward or downward both the diversion limitations and the touch base requirement. This Market Administrator flexibility

also makes Proposal 3 more reasonable than Proposal 6 in that Proposal 6 provides no such fail safe mechanism regarding the touch base requirement. Whether the milk is needed or not at a pool plant, one day of producer milk must be shipped every month throughout the year under Proposal 6.

29 A final principle for NYSDF is that federal milk marketing orders ought not to provide a triumph of form over substance and similarly situated operations are to be treated similarly by the regulations. This leads NYSDF to support Proposal 14. This proposal would permit unit-pool handlers with Class III and Class IV uses to nonetheless pool milk through unit pooling so long as 60 percent or more of milk processed at each plant is processed as Class I or Class II. In the unique environment of the Northeast Order, the perceived need (as noted by cooperatives in Proposal 7) for balancing facilities should result in a recognition that certain mixed use facilities can and do provide assistance in balancing milk supplies. However, if the "cost" of providing such balancing service is the loss of pool status, the handler with such mixed use facilities will instead have an economic disincentive to provide the very service that the market needs. The principle of orderly marketing dictates that rather than providing an economic disincentive for providing such services, such mixed use facilities which are part of a pool-unit should be rewarded with pool status. The 60 percent Class I and Class II requirement per plant should provide sufficient protection against potential abuse. Proposal 14 should be adopted. Tr. 1413-1416.

30. NYSDF opposes proposals 8 through 11 (as modified at the hearing so as to leave unchanged the regulatory treatment of partially regulated pool plants under 7 C.F.R. § 1001.7(a)) submitted by Friendship Dairies. Those proposals are designed to make it easier for handlers to pool milk under this Order regardless of whether or not milk is actually made available to fluid

milk processing plants. NYSDF welcomes Friendship Dairies to participate as a pool plant under rules that make the benefits of pooling (draw from the pool) consistent with the need to supply milk to the fluid distributing plants that pay the Class I differential that results in the pool draw in the first place.

C. Marketwide Service Payments

31. The proposed Marketwide Service Payment provision (in reality a cooperative service payment provision as set forth in the Notice of Hearing) should be denied: (1) the statutory authority for a payment for services of marketwide benefit is just that, permissive authority, but not a statutory mandate; (2) the proposal as drafted would result in payments only to cooperative marketing associations and not to other ("proprietary") handlers even though the permissive authority plainly references both groups equally; (3) a portion of the proposal is contrary to the authorizing legislation; (4) the proposed adjustment in payments between and among producers is set at too high a rate; (5) the proposed adjustment in payments between and among producers has no standard, reporting or audit function designed to insure that the money is actually used for marketwide services or that the producer members of the receiving cooperatives will pay the money to their producer patrons; and (6) there is ample evidence that the proposal would result in payments on milk that cannot or will not provide marketwide benefits or that at times serves other milk markets.

32. As a preliminary matter, Pub. L. 99-260, § 9, Mar. 20, 1986, 100 Stat. 51 ("the 1986 Amendment"), provides for a 90-day period from the date of receipt of a marketwide service proposal to the date of hearing and a 120-day period after a hearing is conducted to implement a marketwide service proposal.[3] Congress did not describe what constitutes the time

[3] Leaving aside the issue of whether the Secretary complied with the 90-day hearing date provision, Congress does not appear to have provided a penalty of any sort should the Secretary fail to comply with either

"after a hearing is conducted." However, given the circumstances and problems that the Secretary and the parties have faced in this proceeding with respect to the transcript, NYSDF concludes that the date for the submission of Briefs should constitute the time "after [the] hearing is conducted." More importantly, the provisions of the 1986 Amendment are procedural only. The 1986 Amendment does not alter the permissive authority granted in 7 U.S.C. 608c(5)(J). The 1986 Amendment does not alter in any way the evidentiary requirements or the nature of the findings that must be made by the Secretary in order to adopt a provision under 7 U.S.C. § 608c(5)(J). Since the Secretary's authority is permissive and since there are abundant reasons discussed below to deny the Proposal, Proposal 7 should be rejected by the Secretary.

33. Proponents of Proposal 7 asserted that the proposal is a marketwide service proposal. In fact, the Proposal as drafted would apply in the present circumstances of Order 1 only to larger cooperatives. When challenged by Proponents on this claim, NYSDF's expert correctly noted that "If it quacks like a duck and swims like a duck" (Tr. 1005) then it is a duck – in this case a cooperative service payment. Tr. 1104-1105. The Proposal conveniently is drafted to exclude Class I processors who balance their own supplies. Tr. 1002-1003. The Proposal is conveniently drafted to exclude smaller entities, cooperatives or proprietary handlers, on the basis that they don't own Class III or Class IV outlets even though several of those entities testified that they too perform balancing. Tr. 593-596. This unequal treatment is unacceptable and unlawful. The authorizing language in 7 U.S.C. § 608c(5)(J), referencing services of marketwide benefit, specifically refers to all handlers, not just cooperatives.

34. There is no reason to require a receiving handler to operate a plant with Class III or Class IV usage. A number of witnesses testified that there are numerous ways in which

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provision. As such, while the Secretary should certainly comply with the law, if possible, the inability to do so does not affect the question of whether to implement such a provision.

balancing services are provided. A handler with a milk supply, cooperative or independent, may contract with a non-pool plant to dispose of surplus milk thus balancing the milk supply. Tr. 1022-1023. A handler with a pool distributing plant, but less than 1,000,000 pounds of milk per day may and in some cases does provide balancing services. Tr. 592-596. A cooperative supplying Class I milk to the market may dispose of its own surplus, with economic consequences borne by that cooperative. Tr. 1022-1023 and 571-577. The Secretary cannot conclude that the balancing provided these entities is any less valuable (per cwt) to the Northeast market then that provided by the proponent cooperatives.

35. The Proposal contains a provision that contravenes the central purpose of the Agricultural Marketing Agreement Act ("AMAA") to bring forth an adequate supply of milk for fluid use. *See* footnote 1. Proposed 1001.74(a)(2) provides that only 65 percent of the receiving handlers' milk supply may be shipped to pool distributing plants. Leaving aside the fact that the explanation for the provision from the proponents makes no sense (if too much milk is for a pool distributing plant, then there cannot be true balancing), the universally recognized milk regulatory expert Carl Conover, testified that such a limit would **discourage** the delivery of milk to fluid milk distributing plants if the handler who is requested to make the delivery is at or near the 65 percent limit. Tr. 1065. This means that adoption of the proposal with the (a)(2) language would create a disorderly marketing condition not solve one because if adopted fluid milk will not be made available when needed readily. This the Secretary may not do.

36. As to the issue of the rate of any marketwide service payment, NYSDF supports the testimony of the Milk Industry Foundation that the proposed rate is too high and are nonetheless already paid for out of over-order premiums. Ex. 21, pages 15-21. Several of the NYSDF witnesses and other handlers testified about their payment of over-order premiums, a

portion of which at least, was dedicated to these "balancing costs." Tr. 865, 877, 886, 986. The cooperative witness acknowledge that Class I handlers already pay substantial over-order premiums for Class I milk. Tr. 763. The legitimate question that must be asked is will adoption of this proposal insure that there will be no double payment for these services? And the resounding "No" demonstrates the lack of feasibility in the proposal. Dr. Ling's testimony indicated that there were significant supplies of excess reserve milk available to be pooled on the Northeast order. Tr. 1065. This excess reserve supply means that greater capacity must be maintained in order to deal with this milk. However, why should producers shipping to Class I facilities pay to maintain this greater capacity? The interest rate used by Dr. Ling in his testimony to impute costs is significantly higher than the interest rates actually charged the cooperatives. Tr. 486. Facilities have a depreciation charge imputed to them whether or not the plants are fully depreciated. Another consideration is the establishment of make allowances for Class III and IV which, in NYSDF's opinion, sufficiently compensate cooperative handlers for balancing services especially since the existing formulas are based upon capacity usage similar to that of the proponent handlers (e.g. compensation at a level determined by USDA to already provide a sufficient profit has already occurred). All of these factors substantially inflate the level of any marketwide service payment beyond that which could possibly be justified.

37. There are two related significant concerns that absolutely must be considered by the Secretary. The first is the question of whether adopting marketwide service payments in one order, but not others will negate the Secretary's conclusion to establish make allowances on a national basis without a finding of economic necessity. Cooperatives (some with a national presence) will effectively obtain a higher make allowance making it easier for them to compete

in the national market even though the largest consumer demand is in their own backyard.[4] Of even more immediate concern to fluid milk handlers who would not qualify in the Northeast is the existence of at least one significant cooperative fluid milk handler that could qualify (indeed it was listed as a Proponent of Proposal 7) for marketwide service payments. Adoption of Proposal 7 (and certainly without any restrictions on how the money is used or protections to insure that the money is actually paid as an "extra" to the dairy farmers) would mean that this cooperative fluid milk handler would have an absolute economic advantage in competing with regulated fluid milk handlers who do not receive the marketwide service payment. Tr. 994-995. **Indeed the result of permitting collection by the cooperative fluid milk handler of the marketwide service payment that is not similarly paid to proprietary fluid milk handlers most certainly creates non-uniform prices paid by handlers for their milk in direct contravention of the express purposes and statutory authority of the AMAA.** This improper result, alone, means that Proposal 7 must be rejected.

38. Two of the cooperatives have, flying in the face of their testimony of "losses" suffered in their manufacturing facilities, expanded those "money-losing" facilities. Tr. 653 and Tr. 484. The witnesses acknowledged that the cooperatives made those reasonable business decisions to expand their facilities in light of all facts and circumstances, including the fact that no marketwide service payments were available at that time. It can hardly be a service of marketwide benefit to ask producers shipping to Class I processors to pay for those expansion exercises. The Secretary should instead conclude that the alleged "losses" as of September 2002 are not real – at least not for purposes of this proceeding.

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[4] It may well be that the make allowance or yield factors and overall formulas need to be in greater alignment with California, but marketwide service payments in the Northeast at least are not the way to go in order to rectify that problem. Certainly Proposal 7 suffers from enough other legal, economic and factual deficiencies in order to reject it without reaching this issue.

39. Any decision by the Secretary to shift payments among producers is especially sensitive and subject to judicial review as to producers' financial impact under *Stark v. Wickard*, 321 U.S. 288 (1944). Proponents point to former Order 2's provision regarding marketwide services. For once, NYSDF believes that proponents have a point – the five plus pages of former 7 C.F.R. § 1002.77 (in addition to the market administrator's regulations issued under former 7 C.F.R. § 1002.77(i)) are highly relevant, but not for the reasons desired by proponents. The services were different services, including the provision of public information and economic analysis. Former 7 C.F.R. § 1002.77(e). The rates of payment were less – 3 cents for education and information and 1 cent for operating marketing facilities. Former 7 C.F.R. § 1002.77(f). Most importantly, the producers money (and make no mistake about it, we are talking about producer money here even though proprietary handlers likely will see a significant impact when they are economically forced to pay for the same service twice) was at least somewhat protected in that handlers receiving the money were required to file annual public reports verifying that the marketwide services were provided and providing **allocation of expenditures to such services**. Annual budgets were also required. And the Market Administrator had auditing powers. Former 7 C.F.R. § 1002.77(j).

40. Here where the amount to be taken from producers is greater than before, even more protection should be provided, not less. And how do the producers even know that the money will be returned to the producers who are incurring this cost? The Secretary should insure that the money, if taken from some producers, is at least returned to the other producers. And it is wholly proper for the Secretary to insure that those payments are dealt with properly. Tr. 1065-1067. This situation is not at all the same as the treatment of cooperatives with respect to money paid to them by handlers for the sale of milk (the Secretary traditionally does not

follow that money). This is instead the all important question of how another producers' money is being spent. Tr. 1065-1067. NYSDF believes that research by the Secretary into the genesis of the former Order 2 language will reveal that concern for how other producers' money was being spent was at the heart of that regulation. With no language provided at the hearing to even consider how to proceed as to these reporting, budget and auditing requirements, the Proposal should fail on this ground alone.

41. Last, but not least, is the question of which milk is providing marketwide services and on whose behalf. Central to the Secretary's conclusion to terminate the earlier marketwide service payment proceeding in the Southeast (52 Fed. Reg. 15951 (May 1, 1987)) was the conclusion that producers' whose milk checks would be reduced by marketwide service payment deductions could be paying for services rendered to other markets.

42. In this proceeding it was established that one facility in Utah is pooled as an Order 1 plant by virtue of its route disposition. Ex. 5, Page 15. While it is true that that milk returns some Class I value to the Northeast order pool, there is no assurance that milk diverted off of that plant doesn't remove an equal or greater value. Moreover, there is no way that milk in Utah is available marketwide. The Secretary must remember that the payment for marketwide services is just that – a market service, not a service to one plant in Utah – 2,000 miles away.

43. In addition, while the need to mask confidential data and the proponents' own refusal to testify about milk movements between and among orders (Tr. 482-483) makes it difficult to ascertain how much milk is moving between and among orders, there is abundant evidence that such occurs on a regular basis. The increase and decrease in both the number of producers from various states and counties and the pounds of milk pooled on Order 1 versus Orders 5, 6, 7 and 33 can only be explained by the shifting of supplies of milk from one order to

another. Tr. 1062-1064 and Exs. 5, 5a, 6, 7, 8, 9 and 15. There are simply too few balancing facilities left in the southeast to permit balancing of the entire supply of milk marketed on Orders 5, 6 and 7. Dairy Market News, Report 70, No. 1, January 3, 2003 (establishes that 23 loads came out of the southeast that week and 100 loads in the prior week). Report 69, Number 52, December 27 states that the Southeast did not have enough capacity to handle its surplus for that week. Official Notice requested of these Dairy Market News publications that were published prior to the Briefing date.

44. Northeastern facilities logically received some of this milk. With southeastern facilities nearly full, where does the extra milk go? The answer is back up to Order 1 (Dairy Market News, Report 69, 52 says that "milk is looking for a home in Northeast and that milk in southeast cannot be accommodated there." While we don't know for certain whether this milk is pooled on Order 1, it could be. Regardless milk from Southeast returned for balancing on Order 1 means that an unknown portion of the balancing capacity that producers are being asked to pay for is actually maintained on behalf of someone else – and we simply don't know how much because the proponents did not come forward and respond to cross-examination on this issue. Whose fault is that? Not opponents. This is precisely why the proposal was turned down in the southeast and why it should be rejected on the basis of this hearing record.

D. Emergency Conditions

45. The statistics submitted in Exhibits 5 and 5a together with the testimony of affected dairy farmers, their representatives and the handlers establish the emergency conditions requiring immediate action by the Secretary as to limited issues only. Proposals 1 and 4 dealing with reporting and payment dates are clearly emergency situations that require immediate

attention. The industry and Market Administrator should not be required to engage in impossible gyrations caused by outside forces that make it difficult for them to provide timely and accurate reports. The Market Administrator should not be forced to choose, should payments to him be insufficient as a result of all the problems discussed with reports and payments in this Hearing record, between making less than 100 percent payment from the PSF or using reserve funds. Notwithstanding the more than sufficient supply of milk for fluid needs, dairy farmers are justifiably concerned about the significant and ongoing erosion in their income caused by paper pooling. Faced with the reality of falling prices nationally for manufactured products, federal order prices are likely to remain relatively low in the immediate future.

46. Only prompt emergency action from the Secretary can avoid further loss to these farmers resulting in new and greater disorderly marketing conditions. The Secretary is urged to omit a Recommended Decision and to act immediately to "establish and maintain" orderly marketing conditions in the Northeast order, but again only as to Proposals 1 and 4 and the portion of Proposal 5 supported as modified by NYSDF.

E. Small Businesses and the Regulatory Flexibility Act

47. A purpose of the Regulatory Flexibility Act is to provide protection for small businesses from excess regulatory costs. Another purpose is to make certain that, all other things being equal, an undue burden is not placed on a **significant** number of small businesses by regulatory action. The first step in the analysis is to determine whether a significant number of small businesses are likely to be affected by the proposed regulation. If so, a full scale Regulatory Flexibility Act analysis must be performed. When it comes to the Reporting Date issue, NYSDF submits that the burden on small businesses will be lessened not increased by a

one day extension of the present time afforded to present reports including the information received from rather large businesses (e.g. regional and national cooperatives).

48. As to Proposal 7, the so-called Marketwide Service Payment proposal, NYSDF and small independent farmers have testified that the impact on small businesses (the smaller independent dairy farmer) will be extremely significant. Moreover, by USDA's own admission in the Hearing Notice, most dairy farmers qualify as small businesses. 67 Fed. Reg. at 49888 (August 1, 2002). If USDA is going to adopt Proposal 7, it must engage in the full-fledged Regulatory Flexibility Act analysis. 5 U.S.C. § 601 *et seq.* If USDA is not going to adopt Proposal 7, then it need not engage in that analysis. Individual dairy farmer witnesses, testifying for themselves and on behalf of their small business neighbors, testified about the significant impacts that the adoption of Proposal 7 would have on their businesses, literally choices between paying for health insurance or employee Christmas bonuses or retirement on the one hand and the marketwide service payment coming out of their pockets on the other side. Tr. 576, 585 and 1253. A decision to take that dairy farmer income for uses that are not even proscribed or documented in any way without the required Regulatory Flexibility Act analysis (and NYSDF believes a conclusion that the cost is too high) simply is not legally permissible.

49. The Small Business Administration, the agency charged with enforcement of RFA, has described the major purpose of the RFA as being:

> [T]o establish as a principle of regulatory issuance that federal agencies endeavor, consistent with the objective of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of entities subject to regulation.

The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies, U.S. Small Business Administration, Office of Advocacy, Washington, D.C., 1998, p. 1.

50. While the RFA does not exempt small businesses from regulation, under the RFA the agency must, when it determines that there will be a substantial economic impact on a significant number of small entities, conduct additional analysis regarding the impact on small businesses. And as stated in the Hearing Notice (Ex. 1), the Secretary must, within the statutory authority of the program, ensure that the regulatory and informational requirements are tailored to the size and nature of small businesses.

51. The first question then is does the RFA require any additional or special analysis. The clear answer here is "yes" as to Proposal 7. Dairy farmers are by and large small businesses. A number of independent producers and smaller cooperative representatives testified about the significant adverse impact that adoption of Proposal 7 would have on their businesses. The threshold has been crossed. If the Secretary is **inclined** to adopt Proposal 17 then she must first engage in the full blown RFA analysis since there will clearly be a "substantial economic impact on a significant number of small entities."

CONCLUSION

For the foregoing reasons, NYSDF urges adoption of the Proposals 1 through 4 and 14, as modified at the Hearing or in this Brief and rejection of Proposals 5 through 11, except that that portion of Proposal 5 which eliminate the free ride period in January through July for plants located outside the marketing area and the states with any marketing area territory. Emergency action is necessary only as to Proposals 1, 4 and that portion of 5 supported by NYSDF in order for the Secretary to operate the Northeast Order according to her statutory requirements. Proposal 7 should be rejected. Serious consideration of Proposal 7, furthermore, requires the

Secretary to engage in a full blown Regulatory Flexibility Act analysis since its adoption would have a substantial economic impact on a significant number of small entities.

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