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Before the Secretary
United States Department of Agriculture

Regarding Milk in the Mideast Marketing Area
Proposed Amendments to Orders

Docket No. AO-11-0333; AMS DA-11-0067; DA-11-04

November 28, 2011

Hearing Brief

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Land O'Lakes (LOL) is a dairy cooperative with more than 4,000 dairy farmer member-owners. The cooperative has a national membership base, whose members are pooled on five different federal orders, including Federal Order 1. Joining in the brief are Agri-Mark, Inc., a dairy cooperative with 1,250 members that are pooled on Order 1, Maryland and Virginia Milk Producers Cooperative Association, Inc., a dairy cooperative with 1,530 members that are pooled on five different orders, including Order 1 and St. Alban's Cooperative Creamery, Inc. a dairy cooperative with 450 members that are pooled on Order 1. (Northeastern Cooperatives)

Given the abbreviated federal order hearing process mandated by the 2007 Farm Bill and upon reliance on the Notice of Hearing that any changes from the hearing would affect only the Mideast Order, the Northeastern Cooperatives chose not to offer formal testimony at the Cincinnati hearing. We made that decision because it had no unique evidence to offer on the noticed proposals and felt that the briefing process adequately afforded the cooperative the opportunity to express its views, opinions and arguments.

**The Northeast Cooperatives Recommend the Adoption
Of Proposals 1 and 2**

This brief is responsive to the Notice of Hearing, dated September 8, 2011 that listed the proposals offered by Foremost Farms USA Cooperative, Inc.,

et al. Proposal 1 would amend the Mideast Order to pool a distributing plant, located in the marketing area, which has more than 50% of its route distribution in Federal Order marketing areas on the Mideast Order, if the plant does not have more than 25% of its sales in any one Order. The Notice specifically notes that the proposed change would only affect the Mideast Marketing Order. Proposal 2 permits the Secretary to make any changes in the Mideast Marketing Agreement and Order to conform to any changes that may result from the hearing.

Testimony was offered that showed that Superior Dairy had invested in new packaging technologies, resulting in increased sales into other Federal Orders and lower relative sales in the Order 33 marketing area. The witness from Superior noted that its distribution into Order 1 represented 28 percent of sales, while its Order 33 sales decreased to 20 percent. Consequently, Superior became pooled on Federal Order 1 in April 2010. During 2011, Superior bought a satellite operation in Wauseon, Ohio, a non-functioning plant with minimal receiving, storage and bottling facilities. By distributing milk, bottled in Canton and through Wauseon, Superior manipulated its sales distribution so that its Canton plant would fail to be pooled on any Federal order. In March 2011 Superior transferred adequate volumes of milk packaged in Canton through Wauseon; such that Canton failed to qualify as a distributing plant on any Federal order. (Exhibit 31)

The Proponents' witness testified that disorderly marketing conditions in the Mideast Marketing Order resulted from Superior's actions. Currently Superior's Canton plant is a partially regulated handler and as such, Superior's payment for sales in regulated areas is defined by Section 1000.76 and, as the witness testified, most handlers opt to account to the Market Administrator under Part (b) of that Section. That option does not require a settlement-pool obligation for a partially regulated handler that can demonstrate that it has paid producers, in aggregate, the minimum order class use values. The minimum payment calculation includes all payments to producers, including premiums. Such a plant, in effect, operates as if in a handler pool. (Exhibit 21)

Proponents' witness estimated that Superior would have had an average of \$0.93 per hundredweight to "... gain market share for packaged fluid milk products or to procure milk supplies with a competitive advantage or to simply enhance the plant's bottom line in a manner not available to competitors. . . ." (Exhibit 21, pg. 13) The Proponents go on to request that

the Mideast Marketing Order be amended so "Plants located within the marketing area with combined route distribution and transfers of at least 50% into Federal Order marketing areas but without 25% of route distribution and transfers into any one Federal Order will be regulated as a distributing plant in this Order." (Exhibit 21, pg. 14) The Proponents acknowledge that their amendment will not change current Order standards that would pool the plant on the Order with the greatest sales, if sales in more than one Order exceed 25 percent.

Proposal 2, submitted by the Secretary, allows the Department to amend provisions of the Mideast Order, to conform to any changes adopted from the Hearing. The Proposal does not request any authority to amend any other Federal Orders.

The Northeast Cooperatives respectfully request that the Secretary adopt the Proposals, as written, in the Notice of Public Hearing on Proposed Rulemaking.

The Northeast Cooperatives Object to a Modification to the Noticed Proposal

At the end of the hearing the witness representing Superior proposed that any plant within the Order 33 marketing area and having 50 per cent of its Class I distribution in Federal Order marketing areas be pooled on Order 33. When questioned by the Department's marketing specialist, regarding the resolution of consequences when other orders have conflicting language, the witness suggested that the Secretary craft the necessary "legislative language" to effectuate his suggestion. Rather than proffering a proposal for the Department to consider when alternative proposals were solicited, Superior merely offered a wish list at the end of the hearing.

In effect, Superior is requesting to be treated as a plant that produces aseptic or ultra-pasteurized products, even though the Canton plant shares none of the production or sales characteristics of such plants. In effect Superior is requesting that the 25 percent in area qualification and that the "tie break" provision that pools a plant on the order with the greatest sales when a plant qualifies on more than one order be relaxed for their unique economic

benefit. Superior noted in their testimony that 28 percent of its sales was in the Order 1 marketing area and 20 percent in the Mideast marketing area.

During the Hearing, the 1988 Decision in the Ohio Valley and Louisville-Lexington-Evansville (L-L-E) Marketing Area was noted. The result of this decision was that a plant, located in L-L-E Marketing Area, with greater route disposition in the Ohio Valley Marketing Area be pooled, based on the marketing area of where the plant was located. There are two major differences between the 1988 Decision and Superior's proposal. First, not only was the Hearing Proposals noticed, so that all interested parties had the opportunity to come and offer evidence but the Decision was the result of combined hearing of Orders 36 and 46. The Decision from the 1988 Hearing amended both marketing agreements, Order 33[10033.56 (c)] and Order 46 [1046.7 (e) (2) and (3)].

Attorney Yoviene noted that her clients did not attend the October 4th Hearing because of the limited scope of the Hearing Notice. (NT Day 2, pg. 128) It is also noteworthy that the Hearing Judge commented on the scope of the Hearing ruling in response to an objection by the Proponents' attorney, "But I prefer to keep us on track, discussing 33, discussing what the Secretary has agreed to discuss." (NT, Day 1, pg. 215)

The second difference is that 1988 Decision required that the plant show a minimal association with the L-L-E Marketing Order before the plant could be locked-in. The 1988 Decision required that the plant meet the in area requirements of 1046.7 (a) before it could be locked in. Superior's request goes beyond relaxing the "tie breaking" provision and would pool a plant on Order 33 that does not have minimal sales in the Marketing Area.

Additionally, it can be argued that the 1988 Decision was a result of the overlapping route disposition that would be prevalent in that era's environment of local, rather than the current system of regional Federal orders. It is also interesting to note that the 1988 lock-in provision did not carry through to Order 46's successor, Order 5.

The witness representing Superior testified that its request to lock its plant on Order 33 was economic (NT, Day 2, pg. 155-6) and it based that assessment on the testimony of the Department's witness, who testified regarding pool values between April 2010 and March 2011. The Department's witness testified that the average difference between the PPD

values of a producer pooled on Order 1 and delivering milk to Canton, Ohio and a producer delivering to the same location and pooled on Order 33 for the eleven month period was approximately \$0.13 per cwt. (NT, Day 1, pg. 97-8)

However, the witness stipulated that the calculation included only the volume of Superior's independent supply. Under cross examination from the Proponents' attorney the Department's witness responded:

Q. Okay. Now, can you tell us the volumes that were represented in that calculation for Superior's Canton plant that was pooled on Order 1?

A. I don't believe so.

Q. Okay. What is the volume then -- I mean, how -- was it just their independent producer milk that was pooled in Order 1 that was the volume you used there?

A. Yes

Q. Okay. So if they were supplied by cooperatives with milk during that period of time, it's not included in that calculation?

A. Yes (NT, Day 1, pg. 98-9)

From this exchange, it is unclear whether the cooperative milk, delivered to Canton during the period, was pooled on Order 1. The cooperative's milk could have been diverted Order 33 milk, thereby not subject \$0.13 per cwt. difference in Order values. Indeed none of the Proponents' witnesses testified to any economic hardship from selling milk to Superior. Had Superior's request been properly noticed, the testimony or cross examination might have been clearer.

The attorney, representing Guers Dairy, et al, unsuccessfully tried to elicit from the witness, representing Superior, the level of premiums in Pennsylvania and other areas of the Northeast marketing area. (NT, Day 2, pg. 188-9) Had Superior's eleventh hour request been noticed as a proposal, that interested party may have provided a witness to provide direct testimony of competitive premiums in the Northeast. Indeed, had Superior's request been properly noticed, interested parties representing northeastern dairy farmers, may have requested the Order 33 Market Administrator to disaggregate the Ohio Mailbox Price Survey to determine the average producer premium in the Superior Dairy milk shed. The producer premium level could be compared to the Announced Cooperative Class I Prices for Cincinnati and Cleveland that are published monthly in Dairy Market News.

Such a comparison could shed light on the relative hardship endured by Superior in paying its 120 nonmember patrons.

**The Northeast Cooperatives Request the Adoption
Of Proposals 1 and 2**

Accepting an un-noticed and non-specific proposal offered at the Hearing is bad procedure and bad policy. Therefore, the Northeast Cooperatives respectfully request that The Mideast Order be amended consistent with Proposals 1 and 2.