

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Milk in the Northeast and Other
Marketing Areas

AO Docket No. 23-J-0067;
AMS-DA-23-0031

REC'D- USDA/OALJ/HCO
2024 MAR 11 4:28 PM

Ruling ACCEPTING as ARGUMENT the 2024 Feb 23 and Mar 8 Filings

This Ruling concerns the Hearing on proposed amendments to pricing formulas in all 11 Federal Milk Marketing Orders (“FMMOs”), filed as Docket No. 23-J-0067; AMS-DA-23-0031, In re: Milk in the Northeast and Other Marketing Areas.

The emergency relief requested in the February 23, 2024 filing by the American Farm Bureau Federation and National Farmers Union will be addressed NOT by the Administrative Law Judges but by Secretary Vilsack.

Administrative Law Judges remain responsible for rulings and orders until certification of the transcript is issued, which will be soon after March 22, 2024. Administrative Law Judges stopped taking evidence when the Hearing ENDED, on January 30, 2024.

The Response filed by the Milk Innovation Group and International Dairy Foods Association on March 8, 2024 asks that the Request for Emergency Return to “Higher-of” Class I Mover” filed on February 23, 2024 be rejected. Among other objections, the Response calls attention to a sentence in the Request, in the next-to-the last paragraph, that may rely on information not in evidence when the Hearing ended.

We find value in the arguments presented in

the REQUEST of the American Farm Bureau Federation and National Farmers Union filed with the USDA Hearing Clerk on February 23, 2024 (copy attached); and

the RESPONSE of the Milk Innovation Group and the International Dairy Foods Association filed with the USDA Hearing Clerk on March 8, 2024 (copy attached).

Accordingly, we ACCEPT as ARGUMENT (NOT evidence) these 2024 February 23 and March 8 filings.

We suggest that the parties include these filings in their filings that are due by April 1, 2024.

We request that the USDA Agricultural Marketing Service post this Ruling with attachments on the USDA / AMS webpage at

<https://www.ams.usda.gov/rules-regulations/moa/dairy/hearings/national-fmmo-pricing-hearing>

The most efficient way to file with the Hearing Clerk is to attach a document to an email and send to SM.OHA.HearingClerks@usda.gov, or to FAX the document to 1-844-325-6940 if you prefer. The Hearing Clerk's information can also be found on the USDA / AMS webpage and on the last page of this order.

To meet the deadlines for filing with the Hearing Clerk, filings must be RECEIVED by the Hearing Clerk by 4:30 pm Eastern on the due date.

Copies of this "Ruling ACCEPTING as ARGUMENT the 2024 Feb 23 and Mar 8 Filings" shall be sent by the Hearing Clerk to each of the parties.

Issued at Washington, D.C.,
this 11th day of March 2024

CHANNING
STROTHER

Digitally signed by CHANNING
STROTHER
Date: 2024.03.11 16:19:25 -04'00'

Channing D. Strother
Chief Administrative Law Judge

Digitally signed by Jill S Clifton
Date: 2024.03.11 14:08:06 -04'00'

Jill S. Clifton
Administrative Law Judge

Attached:

the REQUEST of the American Farm Bureau Federation and National Farmers Union filed with the USDA Hearing Clerk on February 23, 2024; and

the RESPONSE of the Milk Innovation Group and the International Dairy Foods Association filed with the USDA Hearing Clerk on March 8, 2024.

Hearing Clerk
United States Department of Agriculture
Stop 9203, South Building, Room 1031-S
1400 Independence Ave SW
Washington, DC 20250-9203
Phone: 1-202-720-4443
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February 22, 2024

The Honorable Thomas J. Vilsack
Secretary, U.S. Department of Agriculture
200A Whitten Building
1400 Independence Avenue, S.W.
Washington, D.C. 20250

Docket: 23-J-0067

REC'D- USDA/OALJ/HCO
2024FEB 23 1:13 PM

RE: Request for Emergency Return to “Higher-of” Class I Mover

Dear Secretary Vilsack,

On behalf of our members across the country, we thank you for the U.S. Department of Agriculture’s continuing effort to provide price stability and transparency to dairy farmers. U.S. dairy farm families face many challenges as they make their critical contribution to the well-being of our nation.

One of those challenges is the ongoing milk price spreads that have substantially lowered farmer milk prices under the current “average of” Class I mover formula. The American Farm Bureau Federation and National Farmers Union request that you address this challenge by issuing an interim final decision in the current federal milk marketing order hearing process that returns the Class I mover formula to the “higher-of” the Class III or IV calculations, as it was before the 2018 farm bill.

The 2018 farm bill included a provision that swapped the higher-of the advanced Class III or IV skim milk price formula for the simple average-of advanced Class III and IV skim milk formulas plus 74 cents. This was intended to produce a roughly equal long-term Class I milk price. This statutory change was made at the request of dairy processors and dairy cooperatives and was intended as a revenue-neutral way to improve risk management opportunities for beverage milk.

The current formula was based on a quick legislative decision and not based on a hearing record of demonstrated need; it has also not turned out to be revenue neutral for dairy farmers. A return to the “higher-of” is supported by the record in the current hearing, as well as by the rulemaking at the time it was first established in 2000.

Disruptive market conditions during the recent pandemic exposed and exacerbated a temporary but serious shortage of block cheddar cheese production. This led to very high Class III values, a huge imbalance between Class III and Class IV prices, and over \$700 million in Class I revenue losses to producers in the 11 federal order pools in 2020 alone resulting from the “average-of plus” Class I mover. This, along with the delay associated with advanced pricing, resulted in manufacturing milk prices higher than the market blends, leading to massive de-pooling of producer milk by manufacturing plants to capture those higher market prices. These large negative producer price differentials created significant disparities among the milk checks of different groups of farmers. These losses in pool value have continued through 2023 and into

2024, as Class IV prices have become the driver of the dairy market and the gap between Class III and Class IV prices has flipped, but remained large, with no end in sight. As of December 2023, cumulative pool losses have surpassed \$1 billion since the formula went into effect in May 2019, including pool losses of \$50 million in November 2023 and \$38 million in December of 2023. Dairy farmers with pooled milk face ongoing threats of decreased milk checks linked to the current Class I mover formula.

The members of both our organizations, through our respective grassroots policy development processes, have unanimously expressed the high priority they put on a speedy return to the “higher-of” Class I mover.

AFBF policy states: *“(G)iven the circumstances of the Class I mover changes in the 2018 farm bill, we support returning to the Class I milk mover formula to the higher-of Class III or IV in the most expedient manner possible.”*

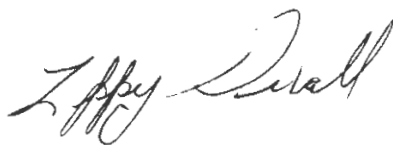
A special order of business adopted by the delegates at the 2023 National Farmers Union Convention supports the immediate return to a Class I pricing formula based on the higher-of Class III or Class VI.

In a forum held in Kansas City in October 2022 to address federal milk marketing order issues, the recommendation with greatest support from the 300-dairy farmer-majority participants was for a return to the “higher-of” Class I formula.

The FMMO hearing process has completed only step 5 of a 12-step process before changes would potentially go into effect for our dairy farmers. With about \$55 million in Class I losses related to the current Class I formula in January 2024 alone, each additional month without a change poses a threat to dairy farmers’ livelihoods. An interim final decision could speed implementation of this change by six months or more.

We understand that USDA is undertaking a comprehensive process of amending federal orders; however, dairy farmers remain stuck with current pricing regulations until USDA publishes a final rule. Current market dynamics underscore the need for expedited return to the “higher-of” Class I mover. The current Class I mover was a well-intentioned but misguided policy that has reduced dairy farmer income. Emergency implementation of the “higher-of” Class I mover formula will staunch persistent losses associated with a policy that has left dairy farmers struggling to make ends meet.

Sincerely,



Zippy Duvall
President, American Farm Bureau Federation



Rob Larew
President, National Farmers Union

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REC'D- USDA/OALJ/HCO
2024 MAR 8 8:30 AM

Docket: 23-J-0067

March 7, 2024

Via Email and US Mail
SM.OHA.HearingClerks@usda.gov
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The Honorable Jill S. Clifton
Administrative Law Judge
The Honorable Thomas J. Vilsack
Secretary, U.S. Department of Agriculture
200A Whitten Building
1400 Independence Avenue, SW
Washington, D.C. 20250-0225

**Re: Procedural Objection to AFBF's and NFU's Request for Emergency Return to
"Higher-of" Class I Mover**

The Milk Innovation Group (MIG) reiterates its objections to American Farm Bureau Federations' (AFBF's) and National Farmer's Union's (NFU's) attempt to circumvent both the established regulations and the hearing process in its request for emergency consideration of the change to the base Class I skim formula.

First, AFBF's February 22 post-hearing letter is neither a brief, nor a request for conclusions of fact, making it an impermissible ex parte communication. *See* 7 C.F.R. §900.16. USDA's regulations permit the filing of "proposed findings and conclusions, and written arguments or briefs, based upon the evidence received at the hearing..."; "[f]actual material other than that adduced at the hearing ... shall not be alluded to therein, and, in any case, shall not be considered..." 7 C.F.R. §900.9(b).¹ AFBF's letter is clearly the latter. For example, AFBF alleges that there were, "... about \$55 million in Class I losses related to the current Class I formula in January 2024 alone..." but the hearing closed on January 30, 2024, meaning this fact was not and could not have been introduced into the record.

USDA should reject the letter entirely. Otherwise, other participants will be left to conclude they must not only submit the proper formal briefs, but also advocate for new requests during the post-hearing period of the rulemaking process. The briefing stage should remain an organized filing process, not a chaotic letter writing campaign.

¹ MIG intentionally limits this response to the procedural shortcomings of AFBF's request. The merits will be addressed in the proper form of a post-hearing brief and conclusions of fact.

Honorable Jill S. Clifton
Honorable Secretary Thomas J. Vilsack
March 7, 2024
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Second, AFBF's request for emergency status is procedurally deficient. Such a request must be made at the outset of any hearing process. *See* 7 C.F.R. §900.4 (aptly entitled, "Institution of proceeding"). Pursuant to 7 C.F.R. §900.4(a), a hearing can proceed on an expedited schedule only if the Administrator determines "than an emergency exists which requires a shorter period of notice." A request for emergency would have required a shorter notice period, and such emergency status would need to be included in that notice. Without such, other interested parties do not have due process notice of the fact that the proceeding is taking place under expedited rules.

Third, USDA has just concluded the 49-day on the record rulemaking proceeding that expressly includes this issue. Pursuant to the AMAA (7 U.S.C. § 608c16(C)(iii)) and implementing regulations, as well as the announcement by the Administrative Law Judge who presides over the hearing, April 1 is the established briefing deadline for the parties to address the Proposals that were the subject of the hearing, including the various proposals relating to the base Class I skim formula. The AFBF letter ignores that deadline and does not seek a modification of that briefing schedule. The rules of practice expressly provide that any recommended decision must be prepared *after* the period allowed for the filing of briefs. 7 C.F.R. § 900.12(a). The Secretary would violate the parties' due process rights if he were to act inconsistent with that schedule and before all interested parties were able to file their briefs, especially since the Secretary has not provided in the Notice of Hearing or otherwise advance notice of such a deviation. *See generally*, 5 U.S.C. § 556.

Finally, to be clear, MIG expects that various parties, including AFBF, will be submitting post-hearing briefs and conclusions of fact that may address some of the positions contained in AFBF's letter. MIG clearly makes no objection to that advocacy, but rather requests affirmation of the Department's commitment to proper due process by not considering AFBF's February 22 letter. The volume of evidence and complexity of issues at the hearing, coupled with the diverse views of the various participants, counsels that the full hearing process must be followed in this matter.

We have been authorized by the International Dairy Foods Association to state that it joins in the positions stated in this letter.

Respectfully submitted,

Davis Wright Tremaine LLP



Charles M. English, Jr.



Ashley L. Vulin

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CERTIFICATE OF SERVICE

Milk in the Northeast and Other Marketing Areas

Docket No.: 23-J-0067

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct, and this is to certify that a copy of the RULING ACCEPTING AS ARGUMENT THE 2024 FEB 23 AND MAR 8 FILINGS and ATTACHMENTS has been furnished and was served upon the following parties by electronic mail on March 12, 2024 by the following:

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Docket No.: 23-J-0067

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