

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

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In the Matter of:

PROPOSED AMENDMENTS TO THE) DOCKET NO.: AO-388-A22, et al.;
APPALACHIAN, FLORIDA AND SOUTHEAST) DA-07-03
FEDERAL MILK ORDERS)

BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUBMITTED BY

**DEAN FOODS COMPANY
AND
NATIONAL DAIRY HOLDINGS LLC**

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INTRODUCTION

This Brief and Proposed Findings of Fact and Conclusions of Law is submitted on behalf of Dean Foods Company (“Dean”) and National Dairy Holdings LLC (“NDH”). In this proceeding, dairy farmer cooperatives have requested on an emergency basis, temporary, but significant, increases in minimum Class I prices paid by fluid milk plants such as those operated by Dean and NDH. Both Dean and NDH concur with other participants that the Southeast region of the United States is a deficit milk production region and that the deficit is growing. Both companies agree that the dairy farmers who regularly and consistently supply milk to fluid milk plants in the Southeast need to be appropriately compensated for their raw milk. However, this latest hearing in the Southeast (the fourth since Federal Order Reform effective January 2000 and the seventh on these kinds of issues since 1992) merely repeats and compounds previous hearing problems resulting from the same tried and failed solutions without relying on any evidence from accepted economic models for altering (however temporarily) the Class I price surface in the Southeast.

Simply put it is time for a new model and new thoughts. But an emergency hearing is not the opportunity for such creativity. Moreover, industry needs to thoughtfully discuss where it is and where it is going before demanding more hearings that look for more of the same failed efforts. It isn't that Dean and NDH disagree with the notion that the price surface may need to be altered, it is that the proposed price surface fails utterly to follow the Department's established policies for making adjustments to the Class I price surface. Indeed, by proponents' own admissions, their economic calculations failed to consider relevant (and multiple) reserve supply areas, failed to take into consideration “shadow pricing”, failed to account for non-linear pricing for shipments of packaged milk product, calculated a single basing point price to Miami and then backed off of the Miami price for all other locations rather than calculating unique prices for each location as has been done for some 25 years, and otherwise generally are designed to lead

the Secretary to make the most extraordinary arbitrary and capricious decision. Based upon the existing Record there is virtually no chance that the Secretary could make a legally sustainable determination concerning the proper level of Class I prices.

This is not the fault of the Secretary, but of the proponents. It is also not the fault of the participating fluid milk processors (as was hinted at by proponents' counsel) who were under no obligation to provide the missing economic analysis and carry no burden of proof in this proceeding. Moreover, the Record reveals that there is an existing model in the Southeast that actually functions and generates sufficient milk supplies and protects the dairy farmers regularly and consistently supplying the milk. The Florida market functions remarkably well for a deficit market; however, that market has operated differently than its sister Orders for the Southeast and Appalachian markets by tailoring diversion limits (the volumes of dairy farmer milk received at facilities other than fluid milk plants in Florida) to insure that dairy farmers regularly and consistently supplying the Florida market are adequately compensated.

It is often forgotten that federal milk orders are designed to provide a minimum price for dairy farmers, not a maximum or market price. Florida has found the proper balance with a minimum price, diversion limits and over-order premiums that works far better (and requires far fewer hearings) than the looser diversion limits in the other two orders combined with even more regulation through a complex transportation credit program.

The Secretary of course can change his policy rationale for setting Class I prices, but any such change in course requires an economic and policy rationale sufficient to meet the standards set forth by the United States Supreme Court in *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983). On this emergency Record before the Secretary, such cannot be done. Indeed Dean and NDH maintain that there is no emergency condition justifying the proposed change for two reasons: (1) there is an alternative method of returning additional monies to dairy farmers in the Southeast that does not require a policy change of the magnitude

requested by the proponents (i.e. lowering the diversion limits in Orders 5 and 7); and (2) record high Class I prices now and for the foreseeable future obviate the need for emergency action.

The concerns of Southeastern dairy farmers are very real, but so are the concerns of Southeastern milk processors that an irrational policy shift leading to unequal changes in Class I prices can result in many unpredicted (except by these processors) consequences that may well not only fail to improve the situation for the Southeastern dairy industry, but could indeed make a bad situation worse. While diversion limits issues can and should be dealt with on an emergency basis, these parties urge the Secretary to deny the Class I proposals or at a minimum to delay any decision pending the Secretary's obtaining additional information and proposals consistent with existing Class I pricing philosophy.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dean and NDH propose the following Findings of Fact and Conclusions of Law and respectfully request that the Secretary make specific findings on each proposed finding and conclusion pursuant to 5 U.S.C. § 557(c):

PARTIES

1. Dean operates multiple fluid milk processing plants (known as handlers as defined in 7 C.F.R. Part 1000) in the Southeast region.¹ Tr. 579-580.
2. NDH operates six fluid milk processing plants (handlers) in the Southeast region. Tr. 472.

¹ For convenience only, the Southeast region is used to include the geographical area covered by the Florida (Federal Order 6 – 7 C.F.R. Part 1006), Southeast (Federal Order 7 – 7 C.F.R. Part 1007) and Appalachian (Federal Order 5 – 7 C.F.R. Part 1005) federal milk marketing orders. Witnesses at the hearing commonly made this generalization. By accepting this generalization, neither Dean nor NDH suggest that these orders should be treated as one order or merged. Indeed it is the position of both Dean and NDH that federal milk marketing orders are already too large geographically and that orders (especially the Southeast) should be broken up into smaller geographical regions that would enhance economic performance of all orders by creating blend price differences between and among orders that would better move milk to where it is needed.

3. Dean, NDH and other processors (Kroger by direct appearance) opposed the Class I price surface changes found in proposals 1, 2 and 3.

THERE IS NO EMERGENCY FOR CLASS I PRICING PURPOSES

4. While there is general agreement that a long-term problem exists regarding the viability of the southeastern dairy industry, there was disagreement over the question of whether there is an emergency justifying the adoption of temporary, significant Class I prices. Tr. 546-548. Moreover, the problems in the Southeast did not happen overnight and likely cannot be cured overnight through emergency rulemaking. The Kroger witness testified that the same problems have been discussed throughout his career dating back to the early 1980's. Tr. 446. Furthermore, repeated hearings in the Southeast dating back to the 1990's have grappled with the recurring problem of milk market deficits with no solutions actually working. It is time for a new and different approach.

5. Specifically as to an emergency in May and June 2007, the dairy industry has entered a period of historically high prices paid for milk by handlers and paid to dairy farmers as a result of a combination of supply and demand factors for milk. Just this week, the Market Administrator for Order 7 announced that the May 2007 blend price for Fulton County, GA is \$18.73 per cwt, a \$1.37 increase from April 2007 and \$5.83 per cwt higher than for May 2006. Official Notice requested of the June 2007 Market Information Bulletin for Order 7, Volume 8, No. 6 available on the internet at www.fmmlanta.com. That is an astounding 45.2 percent higher than last year. The announced Class I price for June is yet another \$1.92 higher than May 2007, suggesting yet another enormous jump in milk prices paid in June. According to that official publication, the underlying commodity prices that link directly to minimum prices under federal orders have and are continuing to increase dramatically. Indeed, on the date this Brief is due, the Secretary has just announced that Class I prices for July are up another \$3.07 per cwt! Official Notice of the attached Advanced (Attachment A) Class I Price Announcement for July

2007 requested. In the face of these historically high (and still rising milk prices) if the Secretary declares an emergency for purposes of examining prices in the Southeast, then there is nothing that is no Agency action that is not an emergency. A conclusion that there is on the date this is Brief is filed an emergency would itself be arbitrary and capricious.

6. Proponent witness acknowledged that these high milk prices are likely to remain at least until the fall of 2007. Tr. 384-385.

7. As will be discussed in greater detail below with respect to diversion limits, there are other avenues open to the Secretary to improve the income of those dairy farmers regularly and consistently serving the fluid milk market that could be adopted on an emergency basis that would obviate the financial need (especially given present price levels) to adopt ill advised increases to Class I differential price surface in the Southeast only.

8. There is another pending "emergency" proceeding regarding Class I and II price levels the results of which are unknown and have not been factored into any economic analysis by proponents in this proceeding. Tr. 383-384. That proceeding, a national hearing on the proper formulas used to calculate Class I prices, has the potential of further increasing Class I and II price levels. The proponents' analysis of financial impact would necessarily be affected by the results of that proceeding unless the Secretary chooses to take no action in that proceeding.

9. Fluid milk processor witnesses testified that however temporary any Class I price surface change may be, the competitive impacts of such changes are more long-lasting, indeed changes in milk customers due to raw milk cost competitive changes can be permanent. Tr. 448. Moreover, as is detailed below, changes in supplying these markets with packaged milk from outside these Orders will also create permanent changes to the market. Tr. 535-540. Thus very real and permanent harm can result from an ill-advised decision to "temporarily" increase Class I prices in the manner proposed by proponents.

10. The Secretary should thus conclude that there is no emergency warranting either the omission of a Recommended Decision or even the adoption of the flawed proposed temporary Class I price surface.

FLAWED PROPOSED CLASS I PRICE SURFACE ABANDONS SECRETARY'S POLICY

11. The proposed Class I differentials are quite clearly results driven – a target price for Miami was selected and a rationale developed to support that price. Then by their own admission proponents backed off of that price going backwards from Miami while performing a rough “justice” by “smoothing” the results based upon industry knowledge. For rulemaking this procedure simply fails to meet any judicial test. It is arbitrary and capricious on its face.

12. The so-called reserve supply point selected (and their calculations clearly show that there is only one) is Wooster, Ohio. The Secretary has never listed Ohio as any kind of basing point for pricing milk. The proponents claim to have looked at other scenarios, but rejected them because Wooster, Ohio resulted in the lowest price in Miami. While NDH and Dean are grateful that the lowest price was selected, that is merely one aspect of this results driven drama. Moreover, if Wooster resulted in the highest acceptable price at Miami for proponents, that is more likely a function of the rest of their analysis which priced raw milk strictly off of transportation costs for the Southeast region only while ignoring the rest of the country entirely.

13. Nonetheless, Wooster, Ohio cannot be used by the Secretary as a reserve supply point for pricing Class I milk. While Dean and its industry allies has maintained that milk from Ohio may be available to serve the Pennsylvania market if the Pennsylvania price gets out of line with Ohio, that is not the same thing as conceding that Wooster serves as a reserve supply for the entire Southeast region as proponents assert. To the contrary, Dairy Farmers of America (a major member of the proponent coalition in this proceeding) in late 2006 asserted, in a Pennsylvania state rulemaking in testimony given under oath and sponsored by counsel for

proponents here, that Eastern Ohio (including quite clearly on the map the DFA witness sponsored and that is also Exhibit 38 in this proceeding) has insufficient milk to meet its own needs. In the face of that testimony – quite clearly a party admission under F.R.E. Rule 804(b) -- the Secretary cannot use Wooster, Ohio as a reserve supply point for pricing milk in the Southeast. It would be arbitrary and capricious for the Secretary to conclude otherwise in the face of DFA's own testimony to the contrary in late 2006. Moreover, Ohio does not stand out, independent of DFA's testimony, as any kind of reserve supply location using the Secretary's previous definitions from 1985 through Federal Order Reform.

14. The problem faced by the Secretary is that the entire analysis of proponents was based upon Wooster, Ohio. The Secretary might be tempted to perform a new analysis based upon an alternative location as a starting point, but that would be unfair to all participants since no testimony or evidence was introduced based upon an alternative analysis, alternative impacts and alternative competitive problems. The proponents themselves said that their package of proposals stood or fell as a group and were clearly unwilling to consider even modest modifications at the Hearing. Tr. 77-79. Thus their own analysis and support for the proposals did not countenance an alternative extra-record analysis based upon an alternative and unknown model result using an alternative basing point or points that would result in to date unknown pricing. Parties who may have concluded that they were not hurt or were even helped by the proposal may have concluded that they did not need to participate, but could now well find that the results of an alternative analysis would lead to a different conclusion. Thus, if the Secretary were to be tempted to perform such an alternative analysis, the only judicially safe route would be to reopen the hearing to take such new evidence. This problem is not of the Secretary's making and the Secretary should not take responsibility for fixing proponents' fatal flaw.

15. Having started with a fatally flawed basing point for pricing all milk in the Southeast, the proponents then thoroughly compound the problem by performing a wholly

invalid analysis for calculating the price for every location other than Miami. By their own admission, proponents did not compare the price in Mt. Crawford, Virginia for instance to alternative basing points based upon its relative distance to those basing points compared to the distance from those same basing points to Miami. Tr. 218. Rather they simply backed off of the price set for Miami. Tr.219. To be sure, proponents assert that they simultaneously looked at prices to “smooth” them out (Tr. 221-222), but there is no exhibit or evidence in the record of how that alleged smoothing was performed, no way to test the thought process of the alleged smoothing and no economic data backing such alleged smoothing up.

16. Regardless, the Secretary does not, has not and should not use this method of calculating minimum Class I prices. As early as 1985, the Secretary used a different analysis for calculating Class I price relationships within a marketing order. 50 Fed. Reg. 9661-9678 (March 11, 1985). While that method of calculating prices was refined by the Secretary when he analyzed the Cornell model for Federal Order Reform purposes (64 Fed. Reg. 16026 *et seq.*, 16108-16121), the basic model as a starting point has never been rejected by the Secretary.

17. A review of that 1985 Decision involving the then Texas Order 126 is instructive. For almost 15 years, Schepps Dairy in Dallas, Texas (a plant that today is part of Dean Foods) had complained that the location differentials in the Texas market were out of alignment and improperly favored handlers located in Houston over those located in Dallas by permitting Houston handlers to underpay for milk relative to the cost of serving the Dallas market. Eventually after multiple hearings and litigation, Schepps persuaded the Secretary to adopt a different approach and different alignment based upon an approach that compared the different costs for providing raw milk to both Dallas and Houston using the most efficient (closest) reserve supply centers for each and comparing the relative distances from those supply areas to the point of consumption. 50 Fed. Reg. at 9670 (“in establishing location adjustments, incentives should be created to attract milk from the nearest alternative supply areas that are available to

supply fluid milk needs”). This process is far more detailed and economically sound than taking the price at Miami and backing it off to calculate Charleston. In fact, that is simply not what was done by the Secretary in 1985. In the 1970’s, Schepps in effect unsuccessfully urged precisely the kind of analysis supported by proponents now. The Secretary expressly rejected that approach and was upheld by the Courts. *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979). The Secretary cannot now assert that a method of calculation he rejected in the 1970’s should be used without a sufficient explanation of why the Secretary was wrong then. This kind of explanation would have to meet the heightened standard articulated by the United States Supreme Court in *Motor Vehicle Mfrs., supra*.

18. Moreover, the Secretary’s approach for calculating these kinds of prices in 1985 was then used repeatedly in the series of 1986 hearings required by the 1985 Farm Bill and later hearings involving plant location adjustments for plants located in Arkansas (60 Fed. Reg. 25014 *et seq.* (May 10, 1995)), New Mexico (56 Fed.Reg. 42240 *et seq.* (August 27, 1991) and 58 Fed. Reg. 12634 *et seq.* (March 5, 1993)) and Indiana (58 Fed. Reg. 33347 *et seq.* (June 17, 1993)). Attempts to calculate Class I prices essentially the way proponents want to today have been soundly and repeatedly rejected by the Secretary. The precedent is now rock solid and long-standing that a change simply should not be made based upon an emergency proceeding. Such policy considerations need greater thought and industry discussion and input.

19. In Federal Order Reform, the Secretary refined the earlier approaches using the Cornell model as a starting point for his own analysis. The Cornell model performed a special analysis on a nationwide basis for recommending a Class I price surface. The Secretary concluded that sound economics meant that Class I differentials required a broader approach (when looking at significant changes as proposed today) than simply looking at individual markets. 64 Fed. Reg. at 16108 *et seq.*. Proponents reject that approach in this hearing without a sufficient justification (other than this is an emergency and they cannot wait for a full analysis).

The Secretary concluded in 1999 that the Class I pricing model needed to consider some form of “shadow pricing” – a formulation of how the market could react to changes such that an additional price change would alter distribution entirely. Proponents claim to have performed a smoothing, but not a shadow pricing analysis. The Secretary concluded that the cost of moving raw milk was linear, but that the cost of moving packaged milk was non-linear. 64 Fed. Reg. at 16108. This conclusion was and is important because Cornell concluded and the Secretary agreed (64 Fed. Reg. at 16109) that upper limits were placed on setting Class I minimum prices based upon the ability of those outside a region to react and change distribution based upon minimum prices that are set too high.

20. Moreover, Cornell concluded and the Secretary made an express finding that the movement of packaged milk, as opposed to raw milk, followed a non-linear progression whereby milk moving more than 900 miles in packaged form crossed over the cost threshold and was actually cheaper to move after than distance than raw milk. However, here proponents admit that they made no non-linear analysis in their smoothing of prices.

21. The Secretary concluded in 1999 that the Class I pricing surface required consistent application of these complex pricing “principles.” 64 Fed. Reg. at 16109-16110. The proponents by their own admission have used multiple and different principles based upon their perceived need. Miami needed to be high so they set it high, but pricing in border areas nearest locations with no changes are set differently. Miami minus pricing also results in an obvious dislocation for plant locations that are most distant from straight lines drawn from Worcester, Ohio to Miami and Texas to Miami. It is no coincidence that processors like Kroger, NDH and Dean complained most about proposed pricing locations in Tennessee, Western Kentucky, Alabama, Florida and South Carolina. Tr. 436-439, 474-477, and 535-536. These locations end up with the greatest divergence of pricing based upon proposals that simply do not follow established economic practice. The proposed location pricing is simply arbitrary and capricious.

The non-specific "smoothing" method used by proponents is nothing more than an extra-record attempt to adjust prices based upon feel and touch rather than economic logic and sound principles adopted by the Secretary.

22. The failure to consider shadow pricing and the impacts of non-linear costs for moving packaged milk simply add to the confusion and to the arbitrary and capricious results of the proposals. The Secretary may not rely on an analysis that leaves out such significant elements. On the other hand, Dean attempted in the short time available to it to perform simplified (and in the case of an Order 30 facility perhaps extreme) analyses of unintended economic incentives created by the proposals. Ex. 36 and Tr. 538-549. This admittedly simplified analysis really was designed to show what may well happen if the proposals are adopted.² Plants located outside the marketing area will have increased incentives to market milk into the marketing area and could indeed find themselves in a position in which they are better off financially to alter their distribution sufficiently so as to become pooled on Orders 5, 6 or 7. The problem is that while the plants could gain in blend price changes by altering their pooling, the Class I price surface would not change for them while it does change for their competitors. This is a function of arbitrarily changing only Class I prices for some plants and not others.

23. This fact is a significant change from when the Secretary examined prices pre-1999. Prior to Federal Order Reform, a change in location pricing in an Order would usually result in a change in price for such an out of area plant that sold into the area because each order established a price surface for plants in and out of the area based upon regulation by that order. Federal Order Reform instead established one price at each plant location regardless of where a

² The fact that Dean's analysis is simplified does not undercut its validity in light of the fact that proponents did nothing to counter it either in their original testimony or by way of rebuttal. The Secretary's past practice of considering the implications of his pricing decisions using complex models leads to the conclusion that the Record needed this kind of analysis performed by someone. Again it is not the Secretary's fault that proponents failed to make the adequate record necessary to make a reasoned, and legally sustainable, decision.

plant is regulated. Thus, Federal Order Reform has truly linked Class I prices nationwide because a change in the location price for even one location will change the economic incentive nationwide to serve that location. This fact strongly suggests that changes to the Class I price surface must be considered on a broader basis than just the Southeast region.

24. The flawed backing off of Miami analysis and “smoothing” is not applied uniformly. In fact, this non-uniform application is deliberate. Tr. 218-221. While owners of plants close to the border areas that are Orders (I got confused with this sentence) without changed pricing appreciate a lower price increase, the deliberate non-uniform application of rules simply cannot meet the standards of the Administrative Procedure Act. The only reason that different rules (“smoothing”) are applied is because this hearing was called for only a portion of the Federal Order program. But the Secretary concluded as part of Federal Order Reform that the Class I price surface is really a national price surface. Trying to now go back and deal with only one region automatically creates this kind of insurmountable problem. A decision to modify a significant element of the national Class I pricing surface, but not all of it strikes at the heart of being arbitrary and capricious. This is not the same thing as undertaking an individual market analysis where one or two locations might be in need of a price modification. Here a very significant portion of the Class I price surface is going to be changed while the remainder of the federal order price surface will not be modified at all (everything outside of Orders 5, 6, and 7). Furthermore, as a result of not changing the remainder of the price surface, a deliberate effort is undertaken to modify prices using effectively different rules for different locations based purely on expediting the process (within Orders 5 and 7 a deliberate attempt is applied to reduce the impact of the changes along the borders with surrounding orders to the north and west).

25. The proposals may well be the result of a well intentioned, but economically misguided, effort to estimate the costs of serving the fluid market in the Southeast, but they fail to meet any judicial test. Moreover, just the alleged “temporary” nature of the proposals does

not alter the legal requirements facing the Secretary in choosing whether to adopt these proposals. Dean and NDH know of no provision in the Administrative Procedure Act that lowers the standard of review just because a proposal is allegedly temporary.

26. Furthermore, Dean and NDH take issue with the assertion that the changes are temporary in that changes to the Federal Orders are permanent unless and until they are changed (they could be temporary as with the special hurricane relief provisions adopted in 2005 if a specific sunset provision (e.g. December 31, 2007) is put in place, but such was not proposed or discussed in this hearing record.

27. It also makes no difference that the proponents' proposals might (for Miami) result in a lower Class I price than an alternative economic model. What matters is getting it right and getting it right before or at the hearing so that the parties may adequately explore the rationale and results of the proposals. Moreover, the evidence and analysis presented is just too simplistic to meet the Secretary's own stated concerns regarding how to make changes to Orders. The proposals should be denied.

28. The underlying problem is not at all the Secretary's "fault". Proponents sought this hearing and then simply did not provide the kind of analysis that must be performed in this most complex (and controversial) part of Federal Milk order pricing. A rush to judgment cannot substitute for valid evidence based upon valid economic analysis.

DEAN FOODS' PROPOSAL FOR DIVERSION LIMITS GENERATES SAME INCOME FOR PRODUCERS WITH DIFFERENT DISTRIBUTION

29. Ironically, there is one Order open in this proceeding with existing rules that create additional economic incentives without creating all of the Class I price dislocations proposed in Proposals 1 through 3. The Florida Order maintains tight diversion limits that have assisted that order in retaining blend price strength while attracting additional milk supplies when needed. Dean's evaluation and testimony was that the other southeastern orders (5 and 7)

are much more closely like Order 6 (Florida) than they are other federal orders to the north and west. Tr. 529-531, Ex. 36. Orders 5 and 7 have similar and growing population centers as Order 6. Ex. 36. All three markets are clearly deficit. Tr. 530. It is more than theory that these orders are more like Order 6 than Orders 1 (very large milk supply and large milk production) and Orders 33, 30, 32, 106 and 126 that surround these orders.

30. Since industry and the Secretary appear to hold constant unsuccessful hearings in the Southeast on a too regular basis, perhaps it is time for a different approach. Perhaps it is finally time to look at these markets and conclude that sound economics call for a more equitable sharing of the pool revenues by genuinely insuring that pool revenues are only shared by those who do more than simply say they would like to serve this market. Perhaps it is time to require (as does Florida) genuine association with the market before anyone can share in the pool without genuinely serving the market as intended by the Agricultural Marketing Agreement Act.

31. That is what Dean proposed in advance of the Hearing herein. While the Secretary asserted that that proposal was received too late to be included in the Hearing Notice, the Secretary also concluded properly that most of the suggestions of Dean Foods were logical outgrowths of this proceeding and could be considered. Ex. 41. Dean merely suggests that the presently applied through proper Market Administrator application shipping requirements for Florida (in the form of diversion limits) should be also be applied in the two other orders – 5 and 7. The Proposal makes much sense as described by the witness for Dean Foods. Tr. 530-533.

32. The caustic criticism upon cross-examination that no new income has been provided to the various order pools (Tr. 624-625) does nothing to change the ultimate facts. The industry has spent over 15 years at multiple hearings (many of them called as emergency hearings as this one was) attempting to find various ways to improve dairy farmer income for those serving the Class I market on a regular basis. And we spend hearing after hearing trying the same kinds of approaches and facing the same failures when we come back to the next

hearing or rulemaking. When will industry and the Secretary figure out that more of the same simply isn't working? Something else must be tried especially when the solution of simply raising prices doesn't work and instead creates new and different and greater incentives for milk to pool, but not necessarily serve the fluid milk market.

33. The Dean Foods' proposal is simple and simply put: why not try a model that is working? The Florida market's diversion limits create real incentives to serve that market and at the same time provide handlers and the dairy farmers serving those facilities the proper set of economic incentives. Why create massive price increases that are not justified using the Cornell model and USDA policy rather than trying to get to the same overall financial result through incentives to serve genuinely the Class I market? Dean Foods urges the Secretary to be guided by the first rule of the Physician's Oath – "First do no harm." After countless hearings, rulemaking, state compact efforts and everything that has been tried but failed, why not try a more simple and elegant solution?³

34. The Southeast is like the Sick Man in Europe in the early 20th Century.⁴ Why not try a different cure? The Dean Foods proposal for tighter diversion limits should be adopted on an emergency basis in order to provide the proper set of incentives to serve the market and share in the marketwide pool.

TOUCH BASE RULES ARE INEXTRICABLY LINKED TO DIVERSIONS

Dean adheres to its view that touch base rules and diversion limits are linked. If the diversion limits proposed by Dean (that should result in increased income paid to dairy farmers

³ The dairy farmers from outside Florida who testified did so before hearing Dean's testimony. It is interesting to note that the only Florida dairy farmer to testify attended the entire proceeding (Tr. 632) but did not ask to testify until after Dean pointed out that no dairy farmer from Florida had testified. Tr. 514, 531, and 561. Dean could have waited until the brief to make this point. The bottom line is that dairy farmers located in and shipping to plants in Orders 5 and 7 who complained the most vocally can be compensated by adopting Florida's diversion limits.

⁴ The Sick Man of Europe is now used generically as a label for a European country in need of economic assistance. Originally until its demise as a result of World War I, the term referred to the Ottoman Empire. The term is used here to describe the fact that the Southeast dairy industry is in constant need of economic assistance.

regularly serving the Class I market) are adopted, then the touch base proposals of proponents can be adopted. But Dean continues to believe that adoption of the proponents' diversion limits or a decision not to change the diversion limits in Orders 5 and 7 at all, should then lead to a conclusion that the touch base rules stay the same. The Secretary has consistently stated that there is a real need to insure that those sharing in the blend price actually regularly serve that market. *See, e.g.*, 71 Fed. Reg. 54117-54134, 54130-54131 (September 13, 2006) and generally the Secretary's recent decisions for Orders 30, 32 and 33 regarding pooling issues.

Touch base requirements are a legitimate means for achieving this goal. Ironically it was the introduction of transportation credits that may have permitted the use of touch base rules to undermine the very purpose of those rules. Proponents contend that in certain rare circumstances the touch base rules working with transportation credits are causing inefficient movements of milk. Tr. 373-380. The question that arises is are we certain that it is the touch base requirement that is the problem or could it be the transportation credits? Again note that Florida Order 6 without transportation credits and with strong diversion limits appears to be functioning better than Orders 5 and 7. Note further that opponents of lowering the diversion limits claim that by limiting diversions for purposes of claiming transportation credits, the Secretary has created yet another "justification" for the Secretary not to lower diversion limits further. Tr. 240. So the transportation credits provision with its limitation on diversions becomes a reason to lower touch base requirements and not to lower diversion limits. That makes no sense. The point of limiting diversions with respect to transportation credits was to eliminate a potential for abuse of the transportation credits program, not to create a justification for maintaining diversion limits essentially at present levels. Again the question arises, could we have the wrong answer in place – could transportation credits be undermining the very problem that we are trying to solve?

Ironically, and perhaps unfortunately, this transportation credit problem was predicted and predictable. In one of the early proceedings on these issues one dairy farmer testified in 1996 with great foresight:

One dairy farmer stated that the importation of supplemental milk would contribute to the demise of the dairy industry in the South. He contended that hauling in supplemental milk does not benefit local suppliers of feed or fertilizer and will eventually harm the dairy industry in the South.

62 Fed. Reg. 27525, 27529, c.2 (May 20, 1997).

Proponents of all of these proposals are thus right on one issue, everything that is proposed is interrelated and needs to be considered thinking about the overall impact of all of the proposals. But the conclusion they reach is wrong because they ignore the lessons of the past, that everything industry has asked for and done in the Southeast has actually contributed or hastened the industry's demise in the Southeast region. The unnamed dairy farmer in the above quote was simply right. The question is now what harm will result from adoption of these proposals under consideration in this proceeding.

TRANSPORTATION CREDITS SHOULD CONTINUE TO BE PAID ON CLASS I ONLY

A proposal was also advanced to pay out transportation credits on Class II milk received at fluid milk (Class I) bottling plants. On the surface this might appear to be a good idea and may well assist Dean and NDH at certain facilities. But it makes no economic sense and creates the wrong incentives. It should be denied.

First it should be noted that when transportation credits were first adopted, concern was raised by Kraft Foods at the time that its stand alone Class II operations would be put at a disadvantage if the proposed transportation credits were adopted and mixed use (Class I and II) operations got the benefit of the credits while Kraft did not. 62 Fed. Reg. at 27530 (May 20, 1997). While the Secretary then did not directly address Kraft's concern, the Secretary put in

place a number of protections with respect to the system that may well have mitigated some of Kraft's concerns. But the request today revives that very real issue raised by Kraft in 1996-1997.

Second, since Class II does not pay into the transportation credit fund (and there is no proposal that it should especially as the Secretary has recognized that the market for these products is far less regional than Class I and thus must compete on a larger geographic basis), permitting payments out on such milk is simply inequitable. By definition, shippers to a Class I handler with higher than market average Class II use would be receiving a larger economic benefit than shippers to a Class I plant with no Class II use or below the market average. The AMAA simply does not permit this kind of allocation of unequal economic costs and benefits. Dean and NDH's objection is made even though as an economic whole one or both of them could theoretically benefit from this proposal. It should be rejected.

ANALYSIS OF 608c(18) – WHAT IS THE LAW?

For whatever reason there continues to be confusion raised by others (Tr. 292-293) concerning what portions of § 608c(18) are officially the law and what provisions may appear in various texts, but not actually still be the law. One witness quoted from predecessor statutory language that has by any analysis expired. Tr. 292. To set the record straight on this issue, this Brief confirms again that the temporary language of 7 U.S.C. § 608c(18) that until 1996 read as follows has permanently expired: "to meet current needs and further assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs".

The official text of the United States Code appears in U.S.C.S. not U.S.C.A. The fact that U.S.C.A. retains the expired language is irrelevant. The fact that U.S.C.S. in the current pocket part expressly excludes the critical language is dispositive. The language is no longer part of the statute.

The U.S.C.A. is published by West Publishing Company and uses the statutory text as it appears in the United States Code.⁵ The U.S.C.S. is published by Lawyers Cooperative Publishing and LexisNexis and follows the text of the public laws as they appear in the United States Statutes at Large.⁶ Title 1, Section 204(a) of the United States Code provides:

The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

1 U.S.C.S. § 204(a) (2007). The United States Supreme Court's interpretation of 1 U.S.C. § 204(a) concluded that "the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent." *United States v. Welden*, 377 U.S. 95, 98 (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943)). Because the U.S.C.A. reflects the text of the United States Code, and the U.S.C.S. reflects the text of the United States Statutes at Large, the U.S.C.S. prevails when the two are inconsistent.

CONCLUSION

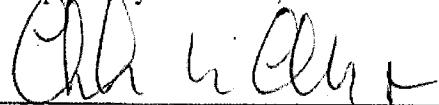
The Southeast fluid milk market does indeed need a reexamination. However, piecemeal Class I changes cannot and should not be adopted because of the dislocations that will necessarily result. If the Secretary does conclude that a change to the Class I price surface is in order in the Southeast nonetheless, the proposals and evidence are not sufficient to justify

⁵ J. Myron Jacobstein, Roy M. Mersky & Donald J. Dunn, *Fundamentals of Legal Research* 168 (6th ed. 1994). See also *United States Code Annotated*, 7 U.S.C.A. §§ 181-670 Title Page: "Comprising All Laws of a General and Permanent Nature Under Arrangement of the Official Code of the Laws of the United States with Annotations from Federal and State Courts."

⁶ J. Myron Jacobstein, Roy M. Mersky & Donald J. Dunn, *Fundamentals of Legal Research* 168 (6th ed. 1994). See also *United States Code Service Lawyers Edition*, 7 U.S.C.S. §§ 601-1345 Title Page: "All federal laws of a general and permanent nature arranged in accordance with the section numbering of the United States Code and the Supplements thereto."

adoption at this time. The results are not uniform or uniformly calculated. The unfairness to handlers not on the straight line from Wooster, Ohio to Miami, Florida is obvious and not justified by any economics. The fact that plants within these orders but closer to orders for which no change is (or can be) proposed have a price calculated differently from that as for Miami, Florida is arbitrary and capricious. The major proposals should be denied. The alternatives proposed herein regarding diversion limitations should be immediately adopted, but the flawed Class I proposal should be rejected.

Respectfully submitted,



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ATTACHMENT A

**Announcement of Advanced Prices and Pricing Factors for July 2007 1/
Release Date: June 22, 2007**

Base Skim Milk Price for Class I 2/:	\$15.61	(per hundredweight)
Advanced Class III Skim Milk Pricing Factor:	\$14.83	(per hundredweight)
Advanced Class IV Skim Milk Pricing Factor:	\$15.61	(per hundredweight)
Advanced Butterfat Pricing Factor 3/:	\$1.6708	(per pound)
Class II Skim Milk Price:	\$16.31	(per hundredweight)
Class II Nonfat Solids Price:	\$1.8122	(per pound)
Two-week Product Price Averages:		
Butter	\$1.5125	(per pound)
Nonfat Dry Milk	\$1.9084	(per pound)
Cheese	\$1.8555	(per pound)
Dry Whey	\$0.7595	(per pound)
Special information for Appalachian and Southeast:		
Diesel Fuel Price	\$2.757	(per gallon)
Mileage Rate Factor	\$0.00449	(per cwt. per mile)

1/ See Price Formulas at www.ams.usda.gov/dyfmoms/mib/price_form_2007.htm

2/ Higher of advanced Class III or IV skim milk pricing factors. The Class I skim milk price equals this price plus applicable Class I differential.

3/ The Class I butterfat price equals this price plus (applicable Class I differential divided by 100).

Note: The Class I price equals (Class I skim milk price times 0.965) plus (Class I butterfat price times 3.5), rounded to the nearest cent.

For information only: The Class I base price is: \$20.91
(Sometimes referred to as the Class I mover, it equals (base skim milk price for Class I times 0.965) plus (advanced butterfat pricing factor times 3.5).)