UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:		
MILK IN THE NORTHEAST AND		
OTHER MARKETING AREAS;		**Dockets: AO-14-A77**
Class III/IV Milk Price Formulas		**DA-07-02**

REPLY BRIEF ON EVIDENCE ISSUES – INCORPORATION OF PRIOR RECORD

This brief is submitted in reply to the June 4, 2007, opposition brief of DFA and Dairylea Cooperative ("DFA Brief") on certain evidentiary issues.[1] DFA/Dairylea argue that evidence in the prior (2006) make allowance hearing record should not be incorporated in this proceeding because: (1) the hearing records are from "separate" proceedings [DFA Brief at 2]; (2) Section 8(d)(4) of the Rules of Practice does not permit incorporation of a prior hearing record for use as evidence [DFA Brief at 2-3]; (3) Rule 804, Federal Rules of Evidence, does not support incorporation of prior testimony in this case; and (4) such incorporation by reference would constitute a "quite unusual and bright line departure" from past agency practice [DFA Brief at 4].

Responding to DFA arguments 1, 2 and 4, there is compelling administrative precedent for incorporation of the record of a prior hearing into a later record addressing similar issues.

In the early 1960's, a number of regional hearings were held by USDA to provide a more uniform method of pricing 'reserve' milk – i.e., milk used to produce butter, powder and cheese. In 1963-64, a regional hearing was held for Northeast milk orders to consider a variety of proposals, including regional pricing of reserve milk by product price/make allowance formulas. In a separate proceeding concluding in1962, the Secretary had adopted a U.S. average competitive price for manufacturing grade milk as the minimum price for reserve milk in the Northeast. When the issue of reserve milk pricing came up again in the 1963 hearing, the complete record of the prior hearing was fully incorporated by official notice, consistent with 7 CFR §900.8(d)(4).

> The findings and conclusions of such April 25, 1962 decision of the Under Secretary, ***as well as the record evidence of the hearing*** (held during the periods of June 19-30 and July 10-August 2, 1961) were officially noticed in the record of the present hearing."

[1] On April 12, 2007, in the course of the hearing segment in Indianapolis, Indiana, counsel for Agri-Mark, et al., submitted a memorandum of law supporting the request of the Agri-Mark witness for incorporation of the hearing record for the prior make allowance proceeding into the hearing record of this proceeding on make allowance issues. The ALJ permitted other parties to file responsive briefs by June 4, 2007.

30 Fed. Reg. 1646, 1647 (Feb. 1, 1964) (Final Decision, Milk in Greater Boston, Mass., Marketing Area et al.) (emphasis supplied). Illustrating the usefulness of such incorporation of evidence from the prior related proceeding, the Secretary's 1964 decision referred to and relied upon relevant evidence from the prior, 1961 hearing.[2]

DFA/Dairylea's innovative "separate proceedings" argument, advanced without supporting analytical precedent from any administrative or judicial source, implicitly seeks a blanket rule against receipt of relevant evidence from any prior hearing in any subsequent hearing. This position would effectively strike section 8(d)(4) from the Rules of Practice rather than apply it, and should be addressed (if at all) in a proposal to amend the rules of practice.

DFA/Dairylea also advances unnatural interpretations of the text of 7 C.F.R. §900.8(d)(4), contrary to the rule's unambiguous content. DFA/Dairylea suggests that prior hearing testimony under the rule may be considered only for some purpose short of full evidentiary value – i.e., "for reference and context." (DFA Brief at 3). The rule expressly provides for such material to be "incorporated into the evidence ***by*** reference," not merely incorporated *"for"* reference. DFA/Dairlea's further argument that the word "document," as used in §900.8(d)(4) is "discrete," and does not include a complete prior hearing record (DFA Brief at 3), disregards rules of grammar and syntax.[3] The rule twice gives expansive meaning the word "document" as follows: "…document (including the record of any previous hearing)."[4]

Finally, DFA/Dairylea's *ipse dixit* assertion that incorporation of evidence from the prior record is unjustified by guidance from Rule 804, Federal Rules of Evidence, is advanced without acknowledgment of judicial analysis cited in proponent's brief, and without reference to any precedent supporting DFA/Dairylea's contrary views. DFA's claim that there is "not sufficient identity" of issues between the 2006 "make allowance" hearing and "make allowance" elements of the 2007 hearing is simply not comprehensible. The evidentiary issue is identical in each case:

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[2] As explained by the Secretary, the prior record provided evidence to help explain and distinguish the US average manufacturing grade milk price from the M-W price series. "The U.S. average price, the construction of which was described in the record of the 1961 hearing, is computed by an entirely different statistical technique." 30 Fed. Reg. at 1649.

[3] DFA/Dairylea's misguided argument that only "discrete" portions of a prior record may be incorporated by §900.8(d)(4) also disregards the Proponent Cooperatives' previous identification of discrete portions of the prior record that are of particular relevance to manufacturing cost issues in this record. *See* pp. 2-3 of Proponents' March 30, 2007, Advance Submission of Hearing Statements.

[4] The rules additionally provide that official documents and records may be received by "an official publication thereof." 7 C.F.R. §900.8(d)(3). Hearing records are now officially published in full on USDA's website.

i.e., what does it cost to convert raw producer milk to marketable butter, powder, cheese and whey products? [5] Likewise, DFA's claim that the foundation of witness "unavailability" has not been laid (if relevant in light of 7 C.F.R. §900.8(d)(4)), is disproved by judicial authority holding that witness "unavailability" exists where (as in this case) there is no subpoena power available to compel testimony by a reluctant or absent witness. (*See* discussion of witness unavailability and authorities on p. 3 of proponent's April 12, 2007, Memorandum of Law).

CONCLUSION

The record of the 2006 make allowance hearing relating to milk product manufacturing costs issues should be received in evidence, by incorporation by reference, for unrestricted use as evidence relating to milk product manufacturing cost issues in this hearing. Such evidentiary use of the record of the prior hearing, upon request of a party, is required by 7 C.F.R. §900.8(d)(4), advances efficiency in building the record of this hearing, and promotes development of a complete evidentiary record upon which the Secretary may make a reasoned decision and exercise lawful rulemaking discretion.

Respectfully submitted,

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June 18, 2007

[5] Evidence relating to milk manufacturing costs from the prior hearing is expressly relevant to manufacturing cost issues in the 2007 hearing. The fact that additional issues are also on the table in the 2007 hearing, like there were additional issues before the Secretary in the 1963 Northeast hearing (30 Fed. Reg. at 1647), does not diminish the relevance or usefulness of manufacturing cost evidence in the prior proceeding to manufacturing cost issues in this one. If the prior record includes any evidence not relevant or material to the issue of manufacturing costs, DFA has the opportunity to request exclusion of such evidence "insofar as practicable" pursuant to 7 C.F.R. §900.8(d)(4), or to argue in post-hearing briefs that such evidence should be given little or no weight. 7 C.F.R. §900.9.