

Proposed Rules

Federal Register

Vol. 60, No. 183

Thursday, September 21, 1995

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1004

[Docket No. AO-160-A71; DA-93-30]

Milk in the Middle Atlantic Marketing Area; Decision on Proposed Amendments to Tentative Marketing Agreement and To Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document adopts changes in some provisions of the Middle Atlantic milk marketing order based on industry proposals considered at a public hearing. The changes will reduce the standards for regulating distributing plants and cooperative reserve processing plants and increase the amount of producer milk that can be diverted to nonpool plants. Additional changes will authorize the market administrator to adjust pool plant qualification standards and producer milk diversion limits to reflect changes in marketing conditions. Also, the decision provides that a pool distributing plant that meets the pooling standards of more than one Federal order should continue to be regulated under this order for two consecutive months before regulation can shift to the other order. A decision on a proposal that would utilize only a route disposition standard to determine under which Federal order a plant should be regulated cannot be made on the basis of the hearing record, and therefore is not adopted.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 690-1366.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and,

therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. The amended order will promote more orderly marketing of milk by producers and regulated handlers.

These proposed amendments have been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have a retroactive effect. If adopted, this proposed rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Prior documents in this proceeding: Notice of Hearing: Issued February 25, 1994; published March 4, 1994 (59 FR 10326).

Recommended Decision: Issued July 10, 1995; published July 14, 1995 (60 FR 36239).

Preliminary Statement

A public hearing was held upon proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Middle Atlantic marketing area. The

hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), at the Holiday Inn-Independence Mall, 400 Arch Street, Philadelphia, Pennsylvania, on May 3, 1994. Notice of such hearing was issued on February 25, 1994, and published March 4, 1994 (59 FR 10326).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on July 10, 1995, issued a recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein. No exceptions regarding the findings and conclusions of the recommended decision were received.

The material issues on the record of the hearing relate to:

1. Pool plant definitions and qualifications;
2. Diversions of milk to nonpool plants;
3. Regulation of distributing plants that meet the pooling standards of more than one Federal order.
4. Discretionary authority to revise pooling standards and producer milk diversion limits.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pool Plant Definitions and Qualifications

Two proposals that would modify the pool plant definition of the order should be adopted. One proposal would exclude diversions of producer milk from a pool distributing plant's receipts in determining whether or not the plant satisfies the pool plant definition standard. Currently, the order's pool plant definition includes diverted producer milk as a receipt at a distributing plant in determining whether the plant has a sufficient proportion of its receipts in Class I use to qualify as a pool plant. The other proposal would reduce the percentage

of a cooperative association's member milk that must be transferred to pool distributing plants from 30 percent to 25 percent of receipts for a reserve processing plant to qualify as a pool plant.

Pennmarva, a federation of certain Middle Atlantic marketing area dairy cooperatives, and Atlantic Processing, Inc., an association of cooperatives, proposed the changes to the pool plant definition of the order which were published as Proposal No. 1 and Proposal No. 4 in the hearing notice. Pennmarva's members include Atlantic Dairy Cooperative; Dairymen Incorporated (Middle Atlantic Division); Maryland and Virginia Milk Producers' Cooperative Association; and Valley of Virginia Co-operative Milk Producers Association—associations that market more than 90 percent of the producer milk associated with the order. Atlantic Processing, Inc., members include Mount Joy Milk Producers Cooperative and Cumberland Valley Milk Producers Cooperative.

According to the Pennmarva witness, changing the distributing plant pooling standard (Proposal No. 1) is a more comprehensive solution to past informal rulemaking actions which suspended the requirement that 40 percent of a pool plant's receipts be disposed of as Class I milk during the months of September through February. These suspension actions were taken because of the decline of Class I use in the Order 4 marketplace and because of a shift in regulation of two plants that were regulated under the order.

Pennmarva testified that a more permanent change to the pool plant definition is warranted because: (1) The Order 4 market is primarily serviced by cooperatives in a system-wide fashion and that accounting for diversions at the individual plant level given this cooperatively-supplied nature of the Order 4 market is burdensome; (2) there is a lack of complete knowledge by the servicing cooperative of the total receipts and Class I sales of the pool distributing plants from which the cooperative diverts milk; and (3) continued association of diverted milk on the order would still be provided for because of the producer definition of the order.

Cooperatives in Order 4 attempt to market milk, said Pennmarva, in a manner that will minimize the overall transportation costs. Pennmarva said that accounting for diversions at the individual plant level places an unnecessary and costly burden on cooperatives. Pennmarva also noted that to a pool handler who buys his/her entire milk supply from a cooperative,

there are no market-disruptive consequences if milk is over-diverted. According to Pennmarva, handlers continue to pay the appropriate class price for the milk when an excess amount of milk is diverted from the plant. However, the cooperative supplying milk must reduce the volume of milk from the pool when it over-diverts milk shipments so that the plant will continue to qualify as a pool plant.

Additionally, Pennmarva testified that the lack of complete knowledge of a pool distributing plant's other milk supplies makes it unnecessarily difficult to effectively operate under the current requirements of the pool plant definition. No supplier knows either the total receipts of the distributing plant or the Class I disposition of the plant, said Pennmarva. Similarly, Pennmarva testified, suppliers of a pool distributing plant have no knowledge of the plant's in-area Class I sales. This lack of knowledge by the supplying cooperative is especially important, according to Pennmarva, because the "lock-in" provisions of the pool plant definition do not apply to the requirement that 15 percent of the plant's sales must be within the marketing area.

Pennmarva testified that deleting diversions from a plant's receipts in determining its regulatory status would have limited effects given present marketing conditions within the order. According to Pennmarva, plants that meet the 15 percent in-area sales and 40 percent Class I disposition pooling standard in the months of September through February, and 30 percent Class I disposition during the remainder of the year, will continue to be pooled under the order. According to Pennmarva, diversions from such plants either by a cooperative or by a handler with a non-member supply will continue to be regulated through the producer definition of the order. Pennmarva also indicated that both the producer definition and the pool reserve processing plant definition will continue to encourage deliveries of cooperative and non-member milk supplies to Order 4 pool plants in meeting priority Class I needs of the market while decreasing the uneconomic movement of milk.

No opposition to excluding diverted milk as a receipt at a distributing plant for determining pool plant status (Proposal No. 1) was received.

Currently, a cooperative must ship a minimum of 30 percent of its member milk to an Order 4 pool distributing plant in order for its milk to be pooled. Pennmarva proposed to reduce the minimum percentage to 25 percent as published in the hearing notice as

Proposal No. 4. Pennmarva testified that this reduction is needed to continue the pooling of Order 4 producers historically associated with the market and is preferable to suspension of such provisions.

Pennmarva testified that this change is warranted because of recent changes in the market. Pennmarva cited that between 1990 and 1992, the level of Class I sales has remained unchanged, while producer receipts expanded. The expansion of producer receipts caused a reduction of the Class I utilization for the market, according to published statistics. Class I use dropped from 53.1 percent in 1990, to 50.7 percent in 1991, and to 48.0 percent in 1992. Level Class I sales and expanding production in Order 4 between 1990 and 1992, said Pennmarva, reduced the proportion of Order 4 milk delivered to pool distributing plants by cooperatives operating reserve processing plants.

Pennmarva also testified that in 1993, both Class I and producer receipts declined. According to market administrator statistics, production decreased by 162.3 million pounds and Class I sales fell by 265.6 million pounds—resulting in a Class I utilization percentage of 45.1 percent.

According to Pennmarva, the reduction of Class I use in Order 4 during 1993 was partially attributable to a shifting of an Order 4-regulated distributing plant located in Lansdale, PA, in November 1992 and another distributing plant located in Reading, PA, in January 1993 to regulation under another Federal order. Pennmarva said this had the effect of reducing the Order 4 pool plant deliveries required by reserve processing plants to maintain pool status.

Pennmarva maintained that the shifting of regulation of these two plants has had a dramatic effect. In a one-year period from October 1992 to October 1993, Atlantic Dairy Cooperative, which operates a pool reserve processing plant, delivered 13.3 percent less milk to a Lansdale, PA, distributing plant. Between December 1992 and December 1993 Maryland and Virginia Milk Producers Cooperative Association, which also operates a pool reserve processing plant, experienced a 14 percent reduction in deliveries to a Reading, PA, distributing plant.

Pennmarva noted other changes in the Order 4 market, including the closing of a distributing plant in Harrisburg, PA, and a change in the product mix of two large Order 4 distributing plants that eliminated yogurt and cottage cheese production. Pennmarva said this loss of Class II business at distributing plants caused a reduction in the amount of

pool-qualifying milk deliveries for the cooperative supplying milk to these plants. Additionally, Pennmarva made note of previous suspension actions to extend the period of automatic pool plant status for supply and reserve processing plants.

No opposition to reducing the shipping standard (Proposal No. 4) was received.

Regarding Proposal No. 1, the record is clear that cooperatives play a dominant role in servicing the Middle Atlantic marketing area, accounting for some 90 percent of milk deliveries to pool distributing plants. While accounting for diversions on an individual plant basis has merit, good reason exists to conclude that in this market, retaining individual plant accounting for the purposes of diversions does place a burden and costs on cooperatives who seek to deliver milk to where it is needed in the most economic fashion. This is especially important and justified due to the changing marketing conditions of declining Class I use in the marketing area.

As indicated by the testimony and in a brief filed by Pennmarva, distributing plants generally have more than one supplier, and such suppliers generally do not know the plant's total receipts and Class I disposition. This makes it difficult to determine what milk can be diverted from any single pool plant in a given month. Inadvertent over-diversions of milk will result in milk not being eligible for pooling and the benefits that accrue from such pooling.

Part of the Order 4 pooling provisions rests on a 15 percent route disposition standard. Adoption of Proposal No. 1 would enable cooperatives supplying the market to more economically move milk without undermining this standard or other pool plant definition standards.

Regarding Proposal No. 4, changing marketing conditions, namely expanding producer receipts and a decline in the Class I utilization of the market, provide support for changing the pooling requirements for reserve processing plants operated by a cooperative, without negating the demands of the Class I market. Such prevailing marketing conditions have in the past resulted in the suspension of certain pooling provisions of reserve processing plants operated by cooperatives so that producer milk normally associated with the Order 4 market would remain pooled under the order. Proposal No. 4 offers a more permanent and reasonable solution to potentially repetitive requests by Order 4 producers for suspension of such pooling standards by easing the

shipping standard by 5 percentage points.

2. *Diversions of Milk to Nonpool Plants*

Two proposals that would increase the permissible percentage of milk deliveries for both cooperative (or federation of cooperative associations) and non-cooperative (nonmember) milk that may be diverted under the producer definition of the order should be adopted. The proposal for increasing the permissible percentage of cooperative milk that can be diverted to nonpool plants was proposed by Pennmarva and was Proposal No. 7 as published in the hearing notice. The proposal for increasing the permissible percentage of nonmember milk that can be diverted to nonpool plants was proposed by Johanna Dairies, Inc. (Johanna), a handler regulated under both the Middle Atlantic and New York-New Jersey marketing orders and was Proposal No. 9 as published in the hearing notice.

Another proposal by Pennmarva—intended to more clearly define the pooling requirements for producer deliveries to pool plants and the status of producers whose marketing is interrupted by compliance with health regulations under the producer definition of the order—was abandoned and received no evidence or testimony at the hearing. This proposal was Proposal No. 6 as published in the hearing notice.

In Proposal No. 7, Pennmarva recommended increasing the permissible percentage of milk that can be diverted to nonpool plants to a maximum volume of 55 percent of receipts instead of the current 50 percent maximum. For nonmember milk, Johanna proposed increasing the maximum allowable deliveries from the current 40 percent to a new maximum of 45 percent.

Citing statistics prepared by the market administrator, the Pennmarva witness observed that over the three-year period of 1991 to 1993, producer receipts under Order 4 increased by 158.8 millions pounds, while Class I disposition fell by 277.3 million pounds. Similarly, over the same three-year period, the witness also noted the annual Class I utilization of the market fell from 50.7 percent in 1991, to 48 percent in 1992, and to 45.1 percent in 1993. This witness testified that because the market's Class I use decreased, diversions to nonpool plants increased. According to Pennmarva, such a situation makes it difficult to keep producers historically associated with the market pooled under the order.

Johanna provided similar testimony and indicated that there is no equitable basis why diversions of nonmember milk should not similarly be increased from the current 40 percent of receipts for nonmember milk to a maximum of 45 percent of receipts. Johanna testified that the producer definition historically has offered disparate treatment between member (cooperative) and nonmember milk in terms of the allowable percentage of milk that can be diverted to nonpool plants and still be priced under the order. Johanna noted that the incremental difference between the two has consistently been 10 percentage points, and that if the allowable percentage of member deliveries can be increased by 5 percentage points, nonmember milk should similarly be increased by the same amount.

Johanna also supported Pennmarva's observations of the market administrator statistics that show the steadily declining percentage of Class I milk receipts within the order's pool. The same statistics, Johanna said, support the adoption of their proposal.

No opposition to the adoption of Proposals Nos. 7 and 9 was received.

Regarding Proposal No. 7, changing marketing conditions, namely increasing producer receipts and declining Class I use, provide support for adoption of this proposal to increase the percentage of milk of cooperative members which may be diverted to non-pool plants during the months of September through February. This proposal offers a reasonable unopposed solution for more orderly marketing and to keep milk pooled under the order that has historically been associated with the market.

Regarding Proposal No. 9, the record does not reveal any reason to not similarly increase the permissible diversion limit by handlers with non-cooperative member milk supplies for the same reasons already indicated regarding Proposal No. 7.

3. *Regulation of Distributing Plants That Meet the Pooling Standards of More Than One Federal Order*

a. A proposal to leave the determination of which order regulates a plant with pool-qualifying disposition in more than one Federal order to the provisions of § 1004.7(f)(1) cannot be decided upon on the basis of the hearing record. The provisions of § 1004.7(f)(1) requires that if a pool plant qualifies as a pool plant in another order, the plant will be regulated under that order unless the plant has a greater volume of Class I dispositions in the Order 4 marketing area. Currently, this order provision is subordinated by an

additional provision in § 1004.7(f)(2) that yields a plant's pool status to another order whenever such plant qualifies as a pool plant under the other order. It is this subordinating provision that is proposed to be deleted from the order (Proposal No. 3 as published in the hearing notice). In other words, Proposal No. 3, offered by Pennmarva, would determine the regulation of a plant under the order on the basis of where the plant has its greatest Class I route disposition in the event that a plant qualifies as a pool plant under another order.

According to Pennmarva, the yield provision contained in § 1004.7(f)(2) unnecessarily subordinates the Middle Atlantic milk order to the provisions of another Federal order. Such subordination is not needed, said Pennmarva, because the provisions of § 1004.7(f)(1) defines a comprehensive and adequate standard for determining whether a pool plant should be regulated under Order 4.

Pennmarva testified that two pool plants, one located in Lansdale, PA (Lansdale), and the other located in Reading, PA (Reading), have changed from being regulated under Order 4 to Order 2. These changes, said Pennmarva, have had the effect of depressing the Order 4 blend price relative to the blend price of Order 2. According to Pennmarva, the New York-New Jersey 1992 average blend price was \$0.68 per hundredweight less than the Order 4 blend price for the same time period. Similarly, Pennmarva indicated that for 1993, the Order 2 blend price was \$0.50 per cwt. less than in Order 4.

Pennmarva testified that between 1992 and 1993 there also were changes in Class I receipts and utilization between Order 4 and Order 2. During this time period, Class I receipts of producer milk in Order 4 fell by 265,613,000 pounds while in Order 2 they rose by 170,765,660 pounds, said Pennmarva. During this same time period, the Class I utilization of Order 4 shrank by nearly 3 percentage points to a total of 45.1 percent, while the Order 2 Class I utilization grew by one percentage point to a total of 40.3 percent. Pennmarva attributed these changes partly to the change in regulation of the already-noted plants.

Pennmarva also testified that the exchange of milk between Orders 2 and 4 has historically been equal. However, according to Pennmarva, this relationship changed greatly in the past year. Citing Order 4 market administrator published statistics (the volume of packaged fluid sales from Order 2 into the Order 4 marketing area

in 1993), Pennmarva indicated that 327.3 million pounds of pooled and priced Order 2 milk was disposed of in the Order 4 marketing area, up by 134.7 million pounds from 1992—an increase of 70 percent. However, Order 4 priced and pooled milk in the Order 2 marketing area over the same time period increased by only 12.1 percent to a total of 238.0 million pounds. This change of the historical balance was attributed by Pennmarva to the shifting of regulation of the Lansdale pool plant in November 1992 and the Reading pool plant in January 1993 to regulation under Order 2. Even though these plants became regulated under the New York-New Jersey milk order, Pennmarva said, these plants continued to have significant Class I route disposition in the Order 4 marketing area.

Pennmarva also justified using the measure of greatest Class I route sales as the basis for deciding where a plant should be pooled by citing the provisions of nearby orders that provide for this measurement; specifically, the Carolina (Order 5) and the Eastern Ohio-Western Pennsylvania (Order 36) milk orders. However, noted Pennmarva, the New York-New Jersey order provides a different measure.

Pennmarva noted differences between Order 4 and Order 2 pooling provisions. Order 2 allows for transfers of bulk fluid milk (classified as Class I-A) between plants, while Order 4 specifically excludes deliveries to a plant, said Pennmarva. This difference in order provisions may result in a situation where a plant may have a greater in-area packaged route disposition in Order 4, but, testified Pennmarva, because Order 2 allows for plant transfers of bulk fluid milk (milk classified as Class I-A), such bulk transfers may cause the plant to have greater total Class I assignments in Order 2 than in Order 4. In this event, said Pennmarva, the subordinating language of § 1004.7(f)(2) causes the plant to be regulated as an Order 2 pool plant, even though it may have more packaged Class I route distribution in the Order 4 marketing area.

Pennmarva said this proposal would not change the pool plant definition of the New York-New Jersey order. According to Pennmarva, a plant which qualifies as a pool plant in either order prior to the adoption of this proposal will continue to qualify as a pool plant.

Significant opposition testimony was received regarding Proposal No. 3. Johanna testified that Proposal No. 3 seems intended to prevent them from pooling the milk from its Lansdale plant under the New York-New Jersey milk order despite the fact that the greater percentage of such milk ultimately is

distributed as Class I milk in that area. To the best of its knowledge, Johanna said, Proposal No. 3 would have no effect on any other handler. Moreover, the requirement that milk received at Johanna's Lansdale plant be pooled in Order 4 yields no material benefit to Order 4 producers.

According to Johanna, Proposal No. 3 fails to recognize the close relationship between the Order 2 and Order 4 markets and would be counterproductive to the goals of the Federal milk marketing scheme. Johanna contended that milk which is received and separated at one plant, and then shipped as bulk milk for subsequent packaging and Class I distribution by another plant, is most clearly associated with the market in which the milk ultimately is distributed on fluid routes. Johanna also asserted that if more than half of a plant's receipts from producers are regularly shipped to another plant for packaging and Class I disposition in another order, the plant initially receiving the milk, and those farmers who supply such milk, should be associated with and pooled under the order where those later fluid Class I sales are made.

Johanna testified that its Lansdale plant became pooled under Order 2 for legitimate business reasons and not for the purpose of circumventing where it is regulated. The reason for the switch in regulation from Order 4 to Order 2 was the cessation of milk processing at another Johanna plant located in Flemington, New Jersey (Flemington). Prior to this plant's closure, Johanna said, the Flemington plant had been distributing some 677 million pounds of Class I milk annually in the Order 2 market and had been an Order 2 pool plant for more than 15 years.

Upon closing the Flemington plant, Johanna indicated that the greatest majority of its milk business was relocated to its Lansdale operation, with the greatest majority of its Class I sales in Order 2. Johanna said there was no change in Class I disposition in either Order 2 or Order 4 by virtue of the movement of that milk. Johanna asserted again that the combining of operations of the two plants at Lansdale was a business decision and not an attempt at manipulating order provisions.

Johanna testified that producers in Pennsylvania's milkshed typically supply large quantities of milk to handlers in both Orders 2 and 4. Further, said Johanna, it is unrealistic to view the Pennsylvania milkshed as somehow geographically linked to the Order 4 market. The overlapping nature of this milkshed between the two

orders, said Johanna, supports Order 2 regulation of a Pennsylvania plant that distributes the majority of its fluid milk within the Order 2 marketing area.

Johanna emphasized that the Lansdale plant is a "designated" Order 2 pool plant, and therefore is relied upon by the performance standards of such designation to provide support for Class I sales within the marketing area. The presence of such plants, said Johanna, supports the blend price which accommodates the large amount of manufacturing milk pooled in the New York-New Jersey order.

No appreciable adverse effect on the Order 4 blend price would result from the inclusion of the Lansdale plant under Order 2, according to Johanna's analysis. The effect on the Order 4 blend price using 1993 averages, said Johanna, amounts to about a three-cent reduction. Johanna also indicated that pooling the milk under Order 4 would have had a slightly smaller reduction in the blend price received by Order 2 producers.

Johanna concluded that any justification for adopting Proposal No. 3 upon a supposed improvement in the blend price by pooling the Lansdale plant under Order 4 fails to account for the effect upon the blend price in Order 2. At most, said Johanna, classification of the plant's milk with one order or the other would represent an insignificant adjustment in the movement, up or down, of blend prices in either order.

Johanna also testified that Proposal No. 3 seems intended to eliminate the applicable location differential as an Order 2 plant. Because of the Lansdale's route distribution in Order 2, the existing location differential is fair, said Johanna. Adoption of Proposal No. 3, according to Johanna, would place them at a competitive disadvantage against other Order 2 handlers competing in the market for fluid sales. Johanna noted that there is a 24.5-cent difference in the location differential in Order 2 between the Lansdale plant's applicable zone (the 71-75 mile zone) and the next nearer zone (the 61-70 mile zone). If Proposal No. 3 is intended to alter the location differentials of Order 2 because of some perceived unfairness, such changes to the Order 2 pricing structure should be addressed through proposed amendments to the New York-New Jersey order and not this proceeding, said Johanna.

Johanna asserted that the 24.5-cent location adjustment between the two zones was properly factored into Order 2's location differential scheme based upon the historical mechanism of transporting distant milk to the urban market through the use of receiving stations. Johanna added that the 24.5-

cent difference equalizes the price, for competitive purposes, of milk brought into the Order 2 market from more distant locations. The witness said that as milk had to be shipped from more distant locations, receiving stations collected the milk from dispersed producers. At the time the Order 2 location differential applicable to the Lansdale operation was adopted, said Johanna, the location adjustment difference was intended to allow handlers to recoup the fixed costs associated with the creation and maintenance of receiving stations. At the same time, Johanna added, the location adjustment difference between zones was intended to not affect any Order 2 plant then in existence.

A witness from Dairylea Cooperative, Inc. (Dairylea), of Syracuse, New York, also testified in opposition to Proposal No. 3. Dairylea is a dairy farmer cooperative comprised of some 2,200 members throughout the northeast of the United States who produce milk regulated under Federal Orders 1, 2, 4, and 36. This witness testified Order 4 provisions currently recognizes its interdependence with Order 2. When there is a dispute over which order a particular plant should be pooled under, Dairylea said, there is recognition by Order 4 provisions of the historical uniqueness of Order 2 in terms of its use of upcountry plants to separate farm milk into skim milk that is shipped hundreds of miles to city bottling plants, while leaving the cream fraction of the raw milk in the up-country plants for processing into Class II or Class III products. Dairylea said this is part of a sound economic system that has developed over many years.

According to Dairylea, adoption of Proposal No. 3 would set up a direct conflict between Order 4 and Order 2 pooling provisions because adopting it would tend to amend the application of Order 2's pooling provisions. Dairylea was of the opinion that Proposal No. 3 appeared to be based solely on the goal of enhancing a single group's economic interest without regard to the potential of injury to another order's system of milk sales that developed over many years.

Opposition testimony was also received from a witness on behalf of Clover Farms Dairy Company (Clover Farms), located in Reading, PA. Clover Farms testified that adoption of Proposal No. 3 would lead to irreconcilable conflict with the provisions of the New York-New Jersey order.

Clover Farms testified that the most basic provisions of any milk marketing order are those that determine which

plants are to be regulated. These provisions, Clover Farms said, often differ from one order to another because they are designed to meet the varying characteristics of the marketing areas involved. According to Clover Farms, because an individual plant serving a diverse market may meet the pooling requirements of more than one Federal order, each order must specify how such a situation is to be resolved. Moreover, said Clover Farms, the resolution as determined by each order involved must lead to the same conclusion, otherwise no guidance will be given either to the Department of Agriculture or to the courts in resolving the conflict.

Clover Farms testified that Proposal No. 3 would eliminate the basis for deciding which order takes precedence when a plant would otherwise be subject to the classification and pricing provisions of both Order 4 and another Federal order. Leaving the determination on which order has the greater volume of Class I milk disposed of on routes in its marketing area from the plant might work, said Clover Farms, provided the other order has a provision that provides the same conclusion. This could not work in the case of Order 4 and Order 2, Clover Farms indicated, because the provisions of the New York-New Jersey order bases the decision on which order has the larger portion of disposition of Class I-A milk, which includes bulk shipments of milk assigned to Class I, in its marketing area. Since Order 4 does not recognize the role of bulk shipments in its calculation, said Clover Farms, adoption of Proposal No. 3 would provide no basis upon which to resolve the conflict between the two orders when a plant meets the pooling provisions of both.

The opposition testimony of the Clover Farms witness was supported in testimony by a witness who testified on behalf of Eastern Milk Producers Cooperative Association, a dairy farmer cooperative having some 2,400 members that ship milk to Orders 1, 2, 4, and 36.

A brief filed by Pennmarva noted that while Johanna agrees that a plant should be pooled under the order in which most Class I sales are made, Johanna provided no evidence to support the claim that fluid milk transfers from the Lansdale plant were in fact distributed on routes in the Order 2 marketing area, thereby meeting a defacto route disposition test. Pennmarva argues here that if, in fact, the Lansdale plant has greater route disposition in Order 2 than it has in Order 4, the adoption of Proposal No. 3 will have no effect on the plant. Pennmarva further argues that even if the plant did not now have

greater route disposition in Order 2, operators of the plant could implement the changes necessary to ensure greater route sales in Order 2.

To illustrate the need for adopting Proposal No. 3, the Pennmarva brief noted that in 1993, the Lansdale plant had 224 millions pounds of Class I disposition in Order 4 and 245 million pounds of Class I disposition in Order 2, for a total of 469 million pounds. Of that 469 million pounds, Pennmarva indicated that at least 10 percent (46.9 million pounds) of its milk was transferred in bulk or packaged form from Lansdale to other plants. According to Pennmarva, Lansdale consequently distributed on routes no more than 198.1 million pounds in the Order 2 marketing area. Thus, Pennmarva claims that the Lansdale plant distributed 198.1 million pounds of Class I milk on routes in Order 2 versus 224 million pounds of Class I milk in Order 4, clearly revealing that there is more route disposition under Order 4. However, because of the yield provision contained in § 1004.7(f)(2), according to Pennmarva, the Lansdale plant is regulated under Order 2.

The Pennmarva brief contends that Johanna's testimony that the Lansdale Class I-A milk transfers were ultimately distributed on routes in Order 2 is in error. Pennmarva noted that the definition of Class I-A milk under Order 2 is "as route disposition in an other order marketing area" as delineated in § 1002.41(a)(1)(ii) of the New York-New Jersey order. Thus, according to Pennmarva, a plant which otherwise qualifies as an Order 2 pool plant can dispose of milk on routes in the Order 4 marketing area, and such dispositions are classified under Order 2 as Class I-A. Pennmarva indicated that once classified as Class I-A, no further distinction is made regarding the ultimate destination of route sales.

The Pennmarva brief also challenged the Johanna witness' assertion that all of its transferred milk was ultimately distributed on routes in the Order 2 marketing area. Pennmarva noted that transfers were made between Lansdale, PA, and Reddington Farms (an Order 2 pool plant) and that market administrator statistics indicate that Reddington Farms enjoyed Class I route disposition in the Order 4 marketing area in every month between 1991 and 1994.

In response to the Clover Farms' testimony that adoption of Proposal No. 3 would lead to irreconcilable conflict with Order 2 and that such conflict would need to be addressed by the Dairy Division, Pennmarva cited an example of how, through administrative

determination, a pooling issue such as this might be handled. The Pennmarva brief asserted that it is within the purview of the Act for proponent cooperatives, which represent volumes in excess of 90 percent of the Order 4 market, to delete provisions which subjugate the order to all other orders and to rely on a route disposition test in determining where a plant should be pooled when it also qualifies for pooling under another order.

According to the Pennmarva brief, orderly marketing within Order 4 should not be hinged on an accommodation to another order. Pennmarva does concede that the interplay of adjoining markets, such as Order 2 and 4, must be considered in maintaining orderly marketing but indicated there is nothing in the record which provides a reason why Order 4 should be subordinated to Order 2 or any other order. This is important, according to Pennmarva, because of the economic hardship brought about through depressed blend prices. Pennmarva indicates that there is no benefit to Order 4 producers from the application of the provisions of § 1004.7(f)(2) and that its elimination will not change the pooling standards of any other Federal order.

In defense of the adequacy of using a route disposition test, the Pennmarva brief cited a recommended decision applicable to another Federal order in which a plant that qualifies under more than one order is regulated under the order which it enjoys the greatest route disposition. This recommended decision indicated that such application normally assured that all handlers having principal sales in a market are subject to the same pricing and other regulatory requirements. Official Notice is taken of the Final Decision (59 FR 26603, published May 23, 1994) for the Southern Michigan marketing area in which no changes were made regarding this issue from the recommended decision. According to Pennmarva, such an example speaks to a fundamental intent of milk marketing orders—to regulate handlers that compete for sales within the specific geographic definition of the marketing area.

A brief filed by Johanna reiterated their opposition to the adoption of Proposal No. 3.

Reply briefs filed by both Pennmarva and Johanna similarly reiterated their positions given in testimony and in submitted briefs. However, Johanna's reply brief takes objection to Pennmarva's suggestion that Johanna should simply effectuate changes in its Lansdale operations so as to convert its bulk shipments of fluid milk to Order 2

into route disposition and thereby preserve the plant as an Order 2 plant under the strictures of § 1004.7(f)(1). According to Johanna, this suggestion does not take into account the impracticality and costs to Johanna of pooling the Lansdale plant to accommodate the packaging requirements of multiple wholesale customers who presently receive bulk shipments from the Lansdale plant for packaging and ultimate route disposition in Order 2.

Johanna also counters the Pennmarva's reference to another rulemaking proceeding and recommended decision involving a pooling issue of a Ultra High Temperature (UHT) plant in another Federal order. While Pennmarva cited this recommended decision as an example of how administrative intervention could be used to determine where a plant should be regulated, Johanna views this recommended decision as providing certainty and orderly conditions for the UHT plant and its producers on where it will be pooled. In this example, Johanna notes that the route disposition test, as a single criteria for pooling, is rejected because of the unique aspects of the marketing conditions faced by the UHT plant. Such uniqueness should also be recognized for the Lansdale plant, said Johanna, because it makes Class I bulk shipments to an order which does not rely solely on a route distribution pooling test.

At issue regarding Proposal No. 3 is where a plant should be pooled and regulated when it meets the pooling standards of more than one order. Both the proponent and opponents to Proposal No. 3 agree that the market in which fluid sales distributed on routes are greatest is where a plant should be regulated. Where a plant should be regulated is a most important feature of all Federal milk orders. The basis upon which a marketing area is determined is founded on the basis of where handlers compete with each other for fluid sales. An important determinant of handlers competing with each other for sales is generally made through a measurement of the route disposition of fluid milk. For the Middle Atlantic marketing area, the order clearly defines route disposition, and its measurement can be made with exacting precision every month. However, the New York-New Jersey marketing order differs from Order 4 in that it provides for the bulk transfers of fluid milk between plants that are classified as Class I-A milk. Order 4 specifically excludes such transfers between plants from meeting its route disposition test.

Opponents of Proposal No. 3 assert, in part, that bulk transfers of Class I-A between plants are an important feature of the Order 2 marketing area because of the market structure that evolved there over time. The basis of providing for bulk transfers of Class I-A milk between plants recognized the market structure and conditions in that order. Opponent witnesses describe "up-country" plants that assemble and separate the skim fraction of producer milk for subsequent transfer to "city" bottling plants for eventual distribution to retail outlets, while leaving the cream fraction in country plants to be further processed into Class II and Class III products, as a unique characteristic of the Order 2 marketplace.

On its face, it is difficult to conclude that adoption of Proposal No. 3 somehow threatens the above described market structure that Order 2 handlers have relied upon for a long period of time. Both the proponent and opponents of Proposal No. 3 recognize and describe similarly the close relationship between Order 2 and Order 4. The record reveals that both orders share, to a significant extent, a common milkshed. The record also reveals that milk movements between orders have been historically equal until the Lansdale plant switched regulation from Order 4 to Order 2. The change in the regulatory and pool status of the Lansdale plant was due to Order 2 allowing for bulk transfers of Class I-A milk as a fluid use which brought the total Class I disposition of the plant to have more milk associated with the New York-New Jersey marketing area than it had with the Middle Atlantic marketing area. This allowance for bulk transfers under the New York-New Jersey order, together with the subordinating language of Order 4, required the regulatory and pool status of the Lansdale plant to shift to Order 2 even if the Lansdale plant may have had more route sales in Order 4.

The Lansdale plant is physically located within the Order 4 marketing area and until recently had historically been pooled as an Order 4 pool distributing plant. Further, the Lansdale plant is clearly a fluid distributing plant that competes with other handlers for fluid sales in Order 4. In the New York-New Jersey order, it seems to enjoy, from the testimony of some opponent witnesses, the status of a distributing plant while at the same time was inferred to be a "country" plant. Nevertheless, Order 2 recognizes the Lansdale plant as a fluid milk distributing plant with the transferring of milk as a secondary operation. This distinction is made here because Order 2 also recognizes processing plants with

manufacturing as a secondary operation. Simply put, the Lansdale plant's primary enterprise is as a fluid distributing plant.

The effect of the New York-New Jersey order provision of allowing for bulk transfers of Class I-A milk and its lack of a route disposition test makes it difficult to determine precisely where the majority of Lansdale's Class I sales take place that includes the bulk transferred milk. The record reveals, in testimony by Johanna, that bulk transfers of Class I-A milk end up eventually as route disposition, although the record does not reveal how much of such milk is distributed on routes within Order 2 or in another marketing area. Pennmarva makes a case from the record evidence that suggests that there is more route disposition in Order 4. In this regard, Johanna's claim that fluid milk transfers from the Lansdale plant were in fact distributed on routes in Order 2 might not be totally accurate on basis of the record evidence. This conclusion is further supported by examining the Order 2 provision of what constitutes Class I-A milk, namely, inclusion of milk distributed on routes in another marketing area. This decision agrees with Pennmarva that a plant which otherwise qualifies as an Order 2 pool plant can dispose of milk on routes in the Order 4 marketing area with such disposition classified as Class I-A, and then once so classified, no further distinction as to the ultimate route disposition is made through the transfer chain.

In summary, a conclusion on the basis of the record of where the greatest route sales of fluid milk are made by Johanna's Lansdale plant cannot be determined. This is problematic because both proponent and opponent witnesses indicate that a plant should be pooled where it enjoys the majority of its Class I disposition, but Order 2 and Order 4 each rely on different forms of measuring this outcome. Due recognition of the regulatory impact on a plant that meets the pooling standards of the New York-New Jersey order is warranted because the plant has met that order's standards. At the same time, Order 4 producers are required by their order to yield to the pricing provisions of another order on the terms of measurement that are not its own.

This decision agrees with an opponent witness' testimony that each marketing order should specify how to resolve differences and conflicts that arise in the regulation and pooling of plants. In this regard, opponents to Proposal No. 3 voiced concern that its adoption would lead to irreconcilable conflict with the provisions of the New

York-New Jersey order. Such conflict probably would not be the case if an identical definition and standard of measurement, that is route disposition, existed for both orders.

In short, adoption of Proposal No. 3 would leave determination of the regulatory and pool status of the Lansdale plant solely to the Order 4 route disposition test. However, adoption of this proposal has the effect of causing a change to the New York-New Jersey order which was not open or noticed in this proceeding. Adoption of Proposal No. 3 provides neither clarity nor a basis, at least with respect to the relationship between Order 4 and Order 2, to determine in which order a plant should be pooled.

The apparent intent of Pennmarva's Proposal No. 3 seems clear and consistent with how milk is regulated and pooled throughout the Federal milk order system. In this regard, Pennmarva is asking that milk distributed on routes be the sole test for determining where a plant should be pooled. Proponents and opponents agree that where a plant has most of its sales is the most appropriate basis for making such a determination. Unfortunately, Proposal No. 3 falls short of being able to accomplish this without causing a change to the New York-New Jersey order.

The Johanna witness testified that, in part, the purpose of Proposal No. 3 appeared intended to eliminate the location differential as an Order 2 plant. This would obviously place Johanna at a competitive disadvantage against other Order 2 handlers competing in the market for fluid sales in the Order 2 marketing area. The witness observed correctly that there is a 24.5-cent difference in the location adjustment in Order 2 between the Lansdale plant's applicable zone (the 71-75 mile zone) and the nearer zone (the 61-70 mile zone). On this point, an examination of the Class I price at the Lansdale location reveals a disparate price difference between being regulated under Order 2 or Order 4. Under the provisions of the Middle Atlantic order, the Class I price applicable at Lansdale is \$0.345 more than what the applicable Class I price would be if it were regulated under the New York-New Jersey order.

This disparate price difference suggests that the Class I price, at least at the Lansdale location, could be better aligned. To the extent that a \$0.345 price difference between the pricing provisions of two adjoining orders may be sufficient to encourage bulk Class I-A milk transfers, that, together with other forms of milk disposition in the New York-New Jersey order, provides the Lansdale plant the economic

incentive to meet the pooling standards and pricing provisions of Order 2. If the Class I price at Lansdale were in better alignment, it is reasonable to suppose that Johanna would likely be indifferent on which order they sought pricing and regulatory status. On the one hand, Landsdale is able to attract an adequate supply of fluid milk at a price lower than what would be applicable if regulated under Order 4. Further, adoption of Proposal No. 3 would likely cause a shift in the regulatory status of the Lansdale plant back to Order 4, causing their cost of milk to increase when they meet the pooling standards of another order. On the other hand, if the Lansdale plant enjoys its greatest route disposition in the Order 4 marketing area, they enjoy a sales advantage against other Order 4 regulated handlers that pay more for their milk.

It is because of the above discussion of this issue that a recommendation for or denial of Proposal No. 3 cannot be made on the basis of this record. Adoption of Proposal No. 3 would have the effect of causing a change to another order which cannot be accomplished without a hearing that includes the other order. Further, the apparent disparate price difference between the pricing provisions of the Middle Atlantic and New York-Jersey orders suggests that the pooling question at issue is perhaps a pricing issue. As such, it is not appropriate to attempt correction of a pricing problem by changing pooling provisions.

Notice is given that the Department expects that interested parties will investigate and offer proposals that address the Class I price alignment structure between Order 2 and Order 4. Other features of marketing order differences, such as that exhibited on the issue regarding Proposal No. 3, should similarly be considered with the view to facilitating more orderly marketing conditions.

Written comments received on the recommended decision from Dairylea and Pennmarva support the conclusions discussed above regarding Proposal No. 3.

b. A second proposal that would eliminate the exemption of a pool plant's regulation under Order 4 when such a plant meets the pool plant definition of another order from the pool plant definition of the order should be adopted. This was proposed by Pennmarva (Proposal No. 2 as published in the hearing notice).

Currently, an Order 4 pool plant can continue to be regulated under the order as a pool plant for two succeeding months after it fails to meet certain

pooling standards, unless it simultaneously meets the pooling provisions of another Federal order. This feature of the order is commonly referred to as the "lock-in" provision.

Pennmarva testified that in the recent past, two Order 4 pool distributing plants changed their status from being regulated under the Middle Atlantic marketing order to the New York-New Jersey marketing order (Order 2). In both cases, Pennmarva said, notice of the change of regulation was provided to cooperative suppliers in a timely fashion so that the appropriate logistical arrangements could be made. According to Pennmarva, an important logistical item attended to was the reassociation of the market's producers whose last shipment to a pool distributing plant was to one of these plants. Pennmarva said accomplishing this task was exacting and time consuming.

Pennmarva testified that there is no requirement or certainty for a handler to give adequate notice to its cooperative suppliers of milk. Further, said Pennmarva, cooperative suppliers have no independent knowledge that a plant may change from regulation under the order to another order. In a worst case scenario, Pennmarva said, a cooperative supplying milk to a handler changing regulation would not discover this change until ten days into the following month. Pennmarva indicated the intent of this proposed amendment is to enhance orderly marketing rather than keeping a plant pooled permanently under Order 4.

Opposition to Proposal No. 2 was voiced by Dairylea. According to Dairylea, Proposal No. 2 has no economic or substantive basis. This witness drew attention to the timely notification to suppliers by the two plants that shifted regulation to the New York-New Jersey order as an indicator of the well-functioning current provision of the order. Thus, Dairylea concluded that the order therefore does not require a modification to address the issue.

In the interest of promoting more orderly marketing conditions, Proposal No. 2 has merit because it mitigates a cooperative's lack of knowledge of a distributing plant's dispositions. Such knowledge is needed in order for the cooperative to know where a plant is pooled or when a plant's pool status may change in any given month. It is reasonable to expect that when a distributing plant does change its regulatory status under the order, producers supplying the plant should have the time to make the business changes and adjustments they deem necessary without the loss of the certainty of where their milk will be

pooled. The record reveals that advance notification was provided to cooperative suppliers prior to changes of where certain plants would be regulated in some instances. This is commendable and speaks well to the interactions between cooperative suppliers of milk and handlers. However, such notification is clearly voluntary when requiring it would offer clear advantages without being burdensome. The merit in requiring advance notification stems from the very real and reasonable need of cooperatives to have such prior knowledge of where their milk will be pooled and priced. Finding out after-the-fact that a plant's regulatory status has changed is tantamount to denying producers access to an intended market. For this reason, the objections by the opposition witness from Dairylea have little merit. It also places an unreasonable economic burden on Order 4 producers because of the order's requirement to re-associate producer milk in the marketing area so that producers may enjoy the benefits from being pooled in Order 4.

Because a decision regarding Proposal No. 3 cannot be made on the basis of this record, the proposed deletion of § 1004.7(a)(4) as proposed by Pennmarva would not accomplish implementing the intent of this proposal (Proposal No. 2). Accordingly, this decision modifies the language of § 1004.7(a)(4) to ensure that the two month "lock-in" provisions (as contained in § 1004.7(a)(3)) will apply to plants that may, in the future, shift regulation to another Federal order or become a nonpool plant.

In written comments to the recommended decision, Pennmarva offered more specific order language that clarifies the terms of the "lock-in" provision. This clarifying language should be reflected in the provisions of § 1004.7(a)(4) so as to insure a two-month "lock-in" refers to consecutive months. Therefore the language of § 1004.7(a)(4) has been modified.

4. Discretionary Authority To Revise Pooling Requirements and Producer Milk Diversion Limits

Two proposals offered by Pennmarva that would provide discretionary authority for the market administrator to revise pooling requirements and producer milk diversion limits should be adopted. Proposal No. 5, as published in the hearing notice, would provide the market administrator the authority to raise or lower the applicable pooling standards for distributing plants, supply plants, and reserve processing plants. Proposal No. 8, as published in the Notice of Hearing,

would similarly provide the market administrator the authority to raise or lower the applicable diversion limits for cooperative associations, federations of cooperative associations, and handlers with non-member milk supplies.

Adoption of these provisions will provide a procedure for the order to be modified in a more responsive manner to changes in marketing conditions than is currently the case. Modification can be made to encourage the shipment of additional supplies of milk for fluid use or to prevent the uneconomic shipments of milk that are in excess of fluid needs.

The order does not currently provide for such discretionary authority for the market administrator to change pooling requirements or diversion limitations. Typically, pooling standards may be temporarily revised or suspended administratively through informal rulemaking by the Department at a petitioner's request. The Department investigates the request and determines the need to temporarily revise or suspend pooling standards. Permanent changes or amendments to Federal order provisions, as in this proceeding, are accomplished through formal rulemaking procedures based on a public hearing.

The pool plant definition of Order 4 currently requires that in meeting pool plant qualification status, a plant must have a Class I disposition of at least 40 percent of its receipts in the months of September through February and 30 percent in the months of March through August. Additionally, at least 15 percent of receipts must be within the marketing area. Any plant that does not meet this criteria for pool plant status can still be a pool plant if at least a specified percentage of its milk receipts are moved during the month to a plant(s) that meets the Class I disposition requirements and volume of route disposition within the marketing area indicated above. The applicable percentage for the months of September through February is 50 percent of receipts; for the months of March through August, the applicable percentage is 40 percent. A reserve processing plant operated by a cooperative association or by a federation of cooperative associations is a pool plant provided, in part, that at least 30 percent of the total milk receipts of member producers during the month is moved to and physically received at a plant that meets the Class I disposition standards.

The producer definition of Order 4 currently provides that dairy farmers can be producers under the order even though their milk is moved from the farm to nonpool plants for

manufacturing purposes rather than to plants for fluid use. Diversion limits apply to handlers marketing dairy farmer's milk such as cooperative associations, federations of cooperatives, and handlers marketing non-member milk. The diversion limit for a cooperative association or a federation of cooperatives is restricted to 50 percent of the volume of milk of all members of a cooperative association or federation delivered to, or diverted from, pool plants during the month. The diversion limit for handlers with non-member milk supplies is restricted to 40 percent of the total of non-member milk for which a pool plant operator is the handler during the month.

Pennmarva testified that granting the market administrator the authority to raise or lower pooling standards and diversion limits will enhance orderly marketing by either encouraging needed milk shipments or preventing the uneconomic movement of milk. Pennmarva indicated that such administrative authority is granted to market administrators in other markets, noting for example that the market administrator in the Upper Midwest marketing area (Order 68) has similar authority.

Before making any revision to the pooling standard or diversion limits established by the order, Pennmarva offered a specific procedure that would govern the conditions under which revisions might be warranted. The procedure offered specifies that the market administrator may increase or decrease the applicable percentages of either the pool plant definition section or the producer definition section of the order (Sections 1004.7 and 1004.12 respectively) if a revision is necessary to encourage needed shipments or to prevent uneconomic shipments of milk. Before making such a finding, the order procedure requires the market administrator to investigate the need for revision either on the market administrator's own initiative, or at the request of interested parties. If the investigation shows that a revision might be appropriate, the proposed order language requires the market administrator to issue a notice stating that a revision is being considered and invite data, views, and arguments on whether a revision is necessary. The procedure also specifies that any request for revisions be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired to be effective.

Pennmarva testified that this amendment would provide for more timely decisions on factors affecting the

pool status of dairy farmers. It was Pennmarva's opinion that the market administrator and staff are fully appraised of the market conditions in the Middle Atlantic market. Such working knowledge, said Pennmarva, can decrease the time and expense needed to respond to a changing market and improve regulatory efficiency.

Pennmarva maintains that this process is superior to the process currently used to affect needed changes in pooling standards and diversion limitations. Pennmarva noted that the Department can effectuate suspension actions of order provisions that remove regulatory language, thus reducing the burden on handlers. However, the witness indicated that deletions of language by informal rulemaking procedures is too limiting to address changes in marketing conditions. Pennmarva said that providing the market administrator with a procedure to make specific percentage changes, either up or down, would be a more flexible way of changing shipping requirements or diversion limits.

Opposition testimony was received from Dairylea for granting such discretionary authority to the market administrator for revising shipping requirements (Proposal No. 5). Dairylea said that while they have significant faith in market administrators, they see no reason to abandon long-term practices of having a public hearing or meeting to discuss the merits of changing applicable shipping standards within an order. Dairylea is of the view that Proposal No. 5 does not provide for a public meeting forum but rather simply written arguments almost after the fact. Dairylea indicated that shipping standards can have a profound economic impact of farmers, cooperatives, processors and consumers, and, in fact, are the very essence of the market order structure. The witness said that changing these standards without public scrutiny in the form of a public meeting or hearing should not be allowed. The witness feared that a simple request for a written response would leave many people out of the discussion and decisionmaking process.

A witness for Clover Farms testified in opposition to both Proposal Nos. 5 and 8. Clover Farms opposes these two proposals unless provision is made for a public forum to aid in the decision making process of the market administrator.

A witness for Eastern Milk Producers Cooperative Association (Eastern) also testified in opposition to Proposal Nos. 5 and 8. Eastern indicated that it makes sense to provide a degree of administrative discretion to the market

administrator to resolve the problems that may arise as a result of changes in supply and demand conditions in the marketplace that would warrant adjustment of shipping percentages. Nevertheless, before such discretion is exercised, Eastern maintained that there be notice to the industry and preferably that there be an opportunity for a public meeting for interested parties to bring evidence in aiding the market administrator to make a proper decision. Eastern noted that the "call" provision of the New York-New Jersey marketing order, which requires the market administrator to conduct a public meeting in setting performance standards on handlers to ensure that the fluid market needs are adequately served, works well. Eastern indicated support for a proposal that would be similar in scope for the Middle Atlantic order.

At issue on the part of those who oppose granting administrative discretion to the market administrator in adjusting shipping requirements and diversion limitations is the lack of a public meeting. Opponents have firm opinions that the public and interested parties should have a greater degree of participation in the decisional process than the proposed administrative proceeding would require. However, opponents take no issue on the ability, impartiality or integrity of the market administrator to make appropriate administrative decisions regarding adjustments to shipping requirements and diversion limits. The issue here is one of procedure.

The informal rulemaking procedure is routinely used for making temporary suspensions or revisions to pool plant shipping requirements and diversion limitations. The procedure of public notice and comment before deciding on the appropriate course of action that is proposed in Proposals Nos. 5 and 8 follow in identical fashion the procedures followed by the Department. This informal rulemaking procedure does not include reliance on public hearings or meetings because of the need for urgent and expeditious action to address rapidly changing market conditions. Nevertheless, any interested party has the opportunity to have their views included in the decision making process.

As the record reveals, such a procedure has been used in the Upper Midwest Marketing Area since 1990. Since the record does not reveal any lack of confidence in the ability of market administrators (who are entrusted with great responsibility in administering the order) to effectively carry out this duty, it is reasonable to

conclude that on the basis of the broad authorities already entrusted to the market administrator to provide for the effective administration of the order, such discretionary authority that would be granted with the adoption of Proposals Nos. 5 and 8 are consistent with those already given. Furthermore, these two proposals have the broad support of producers who represent some 90 percent of the milk associated with the market.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Middle Atlantic order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in a marketing agreement upon which a hearing has been held.

Rulings on Exceptions

No exceptions to the findings and conclusions of the recommended decision were received.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Middle Atlantic marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the Federal Register.

Determination of Producer Approval and Representative Period

May 1995 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Middle Atlantic marketing area is approved or favored by producers, as defined under the terms of the order as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1004

Milk marketing orders.

Dated: September 13, 1995.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

Order Amending the Order Regulating the Handling of Milk in the Middle Atlantic Marketing Area

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Middle

Atlantic marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect the market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative To Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Middle Atlantic marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Administrator, Agricultural Marketing Service, on July 10, 1995, and published in the Federal Register on July 14, 1995 (60 CFR 36239), except for the clarifying change being made to § 1004.7(a)(4), shall be and are the terms and provisions of this order, amending the order, and are set forth in full herein.

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. The authority citation for 7 CFR Part 1004 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 1004.7 is amended by revising paragraphs (a)(1) and (a)(4); revising paragraph (d)(1); and by adding a new paragraph (g), to read as follows:

§ 1004.7 Pool plant.

* * * * *
(a) * * *

(1) Milk received at such plant directly from dairy farmers (excluding milk diverted as producer milk pursuant to § 1004.12, by either the plant operator or by a cooperative association, and also excluding the milk of dairy farmers for other markets) and from a cooperative in its capacity as a handler pursuant to § 1004.9(c); or

* * * * *

(4) A plant's status as an other order plant pursuant to paragraph (f) of this section will become effective beginning the third consecutive month in which a plant is subject to the classification and pricing provisions of another order.

* * * * *

(d) * * *

(1) A reserve processing plant operated by a cooperative association at which milk from dairy farmers is received if the total of fluid milk products (except filled milk) transferred from such cooperative association plant(s) to, and the milk of member producers physically received at, pool plants pursuant to § 1004.7(a) is not less than 25 percent of the total milk of member producers during the month.

* * * * *

(g) The applicable shipping percentage of paragraphs (a) and (b) or (d) of this section may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for revision either on the market administrator's own initiative or at the request of interested parties. If the investigation shows that a revision of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and invite data, views and arguments. Any request for revision of shipping percentages shall be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired effective.

3. Section 1004.12 is amended by revising paragraphs (d)(2)(i) and (d)(2)(ii); and by adding a new paragraph (g), to read as follows:

§ 1004.12 Producer.

* * * * *

(d) * * *

(2) * * *

(i) All of the diversions of milk of members of a cooperative association or a federation of cooperative associations to nonpool plants are for the account of such cooperative association or

federation, and the amount of member milk so diverted does not exceed 55 percent of the volume of milk of all members of such cooperative association or federation delivered to or diverted from pool plants during the month.

(ii) All of the diversions of milk of dairy farmers who are not members of a cooperative association diverting milk for its own account during the month are diversions by a handler in his capacity as the operator of a pool plant from which the quantity of such nonmember milk so diverted does not exceed 45 percent of the total of such nonmember milk for which the pool plant operator is the handler during the month.

* * * * *

(g) The applicable percentages in paragraphs (d)(2)(i) and (d)(2)(ii) may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for revision either on the market administrator's own initiative or at the request of interested parties. If the investigation shows that a revision of the diversion limit percentages might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and invite data, views and arguments. Any request for revision of the diversion limit percentages shall be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired effective.

Appendix to the Proposed Rule

Marketing Agreement Regulating the Handling of Milk in Middle Atlantic Marketing Area

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provision of §§ 1004.1 to 1004.95, all inclusive, of the order regulating the handling of milk in the Middle Atlantic marketing area (7 CFR Part 1004) which is annexed hereto; and

II. The following provisions:

§ 1004.96 Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled

during the month of May 1995, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ 1004.97 Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) _____

(Title) _____

(Address) _____

(Seal)

Attest

[FR Doc. 95-23194 Filed 9-20-95; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 437

[Docket No. EE-RM-95-202]

RIN 1904-AA-74

Voluntary Home Energy Rating System Guidelines

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

ACTION: Rescheduling of public hearing.

SUMMARY: On July 25, 1995 the Department published a proposed rule on Voluntary Home Energy Rating System Guidelines and announced public hearing dates for that rule. Due to possible fiscal restraints, the facilities at the Department of Energy may not be available on October 2, 1995 to host the scheduled public hearing. The Department is rescheduling the public hearing by extending the date by fifteen (15) days. The Voluntary Home Energy Rating Systems Guidelines public hearing is rescheduled for October 17, 1995.

DATES: Oral views, data, and arguments may be presented at the public hearing to be held in Washington, DC, on October 17, 1995. Requests to speak at the hearing must be received by the Department no later than 4:00 p.m., Thursday, October 12, 1995. Ten copies

of statements to be given at the public hearing must be received by the Department no later than 4:00 p.m., Thursday, October 12, 1995. The hearing will begin at 9:00 a.m. on October 17, 1995, and will be held at the U.S. Department of Energy, Forrestal Building, Room 6E-069, 1000 Independence Avenue, SW., Washington, DC 20585. The length of each presentation is limited to twenty (20) minutes or an equal time for all presenters.

ADDRESSES: Oral statements, requests to speak at the hearing and requests for speaker lists are to be submitted to: Voluntary Home Energy Rating System Guidelines (Docket No. EE-RM-95-202), U.S. Department of Energy, Office of Codes and Standards, Buildings Division, EE-432, 1000 Independence Avenue, SW, Rm 1J-018, Washington, DC 20585, (202) 586-7574.

Copies of the transcript of the public hearing and public comments received may be read at the DOE Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6020 between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Robert L. Mackie, PM., U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE-431, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-7892

Diane Dean, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC-72, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9507

SUPPLEMENTARY INFORMATION: The Department published a Notice of Proposed Rulemaking (NOPR) on July 25, 1995, entitled "Voluntary Home Energy Rating System Guidelines" (10 CFR Part 437).

Issued in Washington, DC September 14, 1995.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 95-23480 Filed 9-20-95; 8:45 am]

BILLING CODE 6450-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064-AB69

Definition of Qualified Financial Contracts

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC or Corporation) is publishing for notice and public comment a proposed rule defining spot and other short-term foreign exchange agreements and repurchase agreements on qualified foreign government securities to be "qualified financial contracts" (QFCs) under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.* (FDI Act). In the interest of providing a measure of protection to the financial markets, the FDI Act provides special rules for the treatment of QFCs held by an insured depository institution in default for which the FDIC is appointed conservator or receiver. The FDIC believes that the market's use of these agreements to obtain liquidity in order to manage financial risk indicates that they should be included as QFCs. Promulgation of the proposed regulation to include spot and other short-term foreign exchange contracts and repurchase agreements on qualified foreign government securities within the definition of QFC is not intended to exclude other agreements that may otherwise qualify to be QFCs.

DATES: Comments must be received by November 20, 1995.

ADDRESSES: Send comments to Jerry L. Langley, Executive Secretary, FDIC, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand-delivered to Room 400, 1776 F Street, N.W., Washington, D.C. 20429 on business days between 8:30 a.m. and 5 p.m. [FAX number: (202) 898-3838; Internet: comments@fdic.gov]. Comments will be available for inspection or photocopying at the FDIC's Reading Room, Room 7118, 550 17th Street, N.W., Washington, D.C. 20429, between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Sharon Powers Sivertsen, Assistant General Counsel, Legal Division, (202) 736-0112; Keith A. Ligon, Senior Counsel, Legal Division, (202) 736-0160; or Christine M. Bradley, Attorney, Legal Division, (202) 736-0106, FDIC,