Proposed Rules

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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 1007

[Docket No. AO–366–A37; AO–388–A9, et al.; DA–95–22]

Milk in the Carolina and Certain Other Marketing Areas; Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document recommends adoption of proposed amendments that would modify certain location adjustments under the Southeast Federal milk marketing order. The recommended decision denies a proposal to provide a fluid milk surcharge during the period of November 1995 through March 1996 and a transportation credit on bulk milk purchased for 6 Federal milk orders in the Southeastern United States. The recommendations are based on the record of a public hearing held in Atlanta, Georgia, on September 19, 1995.

DATES: Comments are due on or before January 26, 1996.

ADDRESSES: Comments (four copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Nicholas Memoli, Marketing Specialist, Order Formulation Branch, USDA/AMS/Dairy Division, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 690–1932.

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 proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed amendments would promote orderly marketing of milk by producers and regulated handlers.

The amendments to the rules proposed herein have been reviewed under Executive Order 12778, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would 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 August 11, 1995; published August 17, 1995 (60 FR 42815).

Supplemental Notice of Hearing: Issued September 8, 1995; published September 13, 1995 (60 FR 47495).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreements and the orders regulating the handling of milk in the 7 Federal milk marketing areas in the Southeastern United States. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 30th day after publication of this decision in the Federal Register. Four copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendments set forth below are based on the record of a public hearing held at Atlanta, Georgia, on September 19, 1995, pursuant to a notice of hearing issued August 11, 1995 (60 FR 42815), and a supplemental notice of hearing issued September 8, 1995 (60 FR 47495).

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

1. Whether the location adjustment at Hammond, Louisiana, should be increased by 7 cents under Order 7.

2. Whether the location adjustment at Mobile, Alabama, should be reduced by 7 cents under Order 7.

3. Whether a transportation credit for supplemental milk should be adopted for Orders 5, 6, 7, 11, 12 and 13.[1]

4. Whether a fluid milk surcharge should be provided on a temporary basis for Orders 5, 6, 7, 11, 12, and 13.

5. Whether emergency marketing conditions in the 6 regulated areas warrant the omission of a recommended decision and the opportunity to file written exceptions thereto.

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. Whether the Location Adjustment at Hammond, Louisiana, Should be Increased by 7 Cents Under Order 7

The location adjustment in the portion of Tangipahoa Parish,

[1] The Louisville-Lexington-Evansville order was dropped from Proposals 4 and 5, as contained in the hearing notice, at the hearing.

Louisiana, south of State Highway 16, should be increased from plus 50 cents to plus 57 cents. The 7-cent price increase applies to both Class I prices applicable to handlers and blend prices applicable to producers. However, for the sake of simplicity, the price increase is discussed in terms of the Class I differential.

The vice-president of fluid milk marketing and economic analysis for Mid-America Dairymen, Inc. (Mid-Am), proposed the 7-cent higher location adjustment at Hammond, Louisiana, which is located in the southern portion of Tangipahoa Parish. He stated that the 7-cent location adjustment increase would provide a $3.65 Class I differential price at Hammond, the same price applicable at Baton Rouge and New Orleans.

The representative explained that Mid-Am is a cooperative owned by approximately 18,000 dairy farmers and a major supplier of distributing plants pooled on the Southeast Federal milk marketing order (Order 7). He testified that in southeast Louisiana Mid-Am has a full supply agreement with 5 of the 6 plants in the New Orleans/Baton Rouge/Hammond area and a partial supply agreement with the 6th plant. In August 1995, he indicated, Mid-Am represented 55.9 percent of both the Class I sales and total producer milk pooled on Order 7.

The Mid-Am representative stated that the final decision for the Southeast order that was issued on May 3, 1995 (60 FR 25014), established a price of $3.58 at Hammond and a price of $3.65 at Baton Rouge and New Orleans, Louisiana. The representative argued that the 7-cent difference in price provides a competitive sales advantage to the plant located in Hammond while its ability to procure milk is no different than plants located in Baton Rouge.

According to the Mid-Am representative, the milk supply for plants in Hammond and Baton Rouge comes from direct-ship milk produced in Louisiana's ''Florida parishes'' (i.e., Tangipahoa, Washington, St. Tammany, St. Helena, Livingston, East Feliciana, and East Baton Rouge). He contended that the 7-cent lower price at Hammond is not justified since the per hundredweight rate paid to local milk haulers who deliver milk to Baton Rouge and Hammond is the same. He elaborated further that the rate per hundredweight that is charged producers in the Florida parishes is the same whether the producer's milk is delivered to Hammond or Baton Rouge or even New Orleans. Thus, he asserted, competing handlers in the New Orleans/Hammond/Baton Rouge area should have the same Class I differential price because the cost of procuring milk at each of these locations is the same.

The assistant operations manager for Fleming Dairy, which operates two distributing plants in the Southern United States, testified in support of the proposal to equalize Class I prices adjusted for location at Hammond, Baton Rouge, and New Orleans, Louisiana. Alternatively, the witness stated, Fleming would support a 7-cent price reduction at Baton Rouge and New Orleans, which also would equalize the Class I differential prices at these locations. He testified that equal and uniform Class I differential prices are justified for these locations for competitive reasons.

The Fleming witness indicated that 100 percent of the raw milk supply delivered to its distributing plant in Baker, Louisiana,[2] is produced by dairy farmers located within 45 miles of the plant. He stated that a higher Class I price at one location compared to another suggests a greater shortage or need to attract milk from distant supply areas. However, the witness indicated, southern Louisiana has an abundant supply of milk available and has had to regularly transfer milk to Florida during short production months to supplement Florida's raw milk requirements. Additionally, he argued, handlers located in Hammond should not have a competitive advantage over Baton Rouge handlers because both locations are approximately the same distance to New Orleans, the primary population center of southern Louisiana.

According to the Fleming witness, the Secretary's Final Decision issued May 3, 1995, justifying the lower price in Hammond compared to Baton Rouge or New Orleans was based on mistaken conclusions of facts and miscommunications within the newly enlarged cooperative association (Mid-Am). The witness also stated that marketing conditions in the Southern United States have changed since the merger hearing was held in 1993. He explained that a single farmer-owned cooperative now controls the milk supply for southern Louisiana, as opposed to three or four competing cooperatives which previously supplied this area. Accordingly, he agreed with Mid-Am that the difference in price for these locations is not justified because there is no freight difference in supplying New Orleans, Hammond, and Baton Rouge with raw milk. Thus, he urged the Secretary to correct the price disparity at Hammond immediately.

Fleming reiterated support for the 7-cent location adjustment increase at Hammond, Louisiana, in its post-hearing brief. Gold Star Dairy, Inc. (Gold Star), Little Rock, Arkansas, also supported the proposed 7-cent location adjustment increase at Hammond in a post-hearing brief. Gold Star stated that the 7-cent increase will correct an unintended inequity problem in the Southeast order. There was no opposition to the proposed increase at the hearing or in post-hearing briefs.

The proposed 7-cent higher location adjustment in the southern portion of Tangipahoa Parish should be adopted to provide the same prices at pool distributing plants located at Hammond and Baton Rouge, Louisiana. These plants are located within a major production area of the market and procure their milk supplies from the same nearby farms. As a result, the rates paid to haulers to transport milk to Hammond compared to Baton Rouge are the same because the mileage from producers' farms to the various plants is essentially the same. Thus, the value of producer milk delivered to Hammond should be no less than the value of such milk delivered to Baton Rouge. Therefore, the southern portion of Tangipahoa Parish should be moved to Zone 12, as proposed, to provide a 7-cent higher price at Hammond.

2. Whether the Location Adjustment at Mobile, Alabama, Should be Reduced by 7 Cents Under Order 7

The location adjustment at Mobile, Alabama, should be reduced from plus 57 cents to plus 50 cents.

A witness appearing on behalf of Barber Pure Milk Company (Barber) and Dairy Fresh Corporation (Dairy Fresh) proposed the 7-cent reduction in the location adjustment at Mobile, Alabama. The witness stated that Barber and Dairy Fresh operate pool distributing plants under Order 7. He said the Barber plant at Mobile and the Dairy Fresh plant at Prichard, Alabama, are located within 20 miles of the Mobile City Hall and handle approximately 8.5 to 9.5 million pounds of milk per month.

The witness for Barber and Dairy Fresh contended that the Southeast order, which became effective July 1, 1995, established pricing zones that created cost inequities for the Barber Mobile plant and the Dairy Fresh Prichard plant with other Order 7 pool plant handlers. He argued that the final decision lowered the Class I price adjusted for location for Barber and Dairy Fresh competitors while the price at Mobile remained unchanged at $3.65.

[2] Baker is 10 miles north of Baton Rouge. Both Baker and Baton Rouge are in East Baton Rouge Parish, which is within Zone 12 of the marketing area.

He claimed that the 7-cent difference is a substantial amount and that Barber and Dairy Fresh cannot continue to operate as viable business entities with the current pricing situation. The proposed $3.58 Class I differential price is the price applicable for most of Barber and Dairy Fresh's competitors and is sufficient to attract an adequate supply of milk to the Mobile area, he asserted.

The Barber/Dairy Fresh witness also indicated that the market structure in the Southeastern United States had changed since the merger hearing was held in 1993. He stated that several plants had closed or changed ownership and that one new large state-of-the-art Class I plant had recently opened. Several cooperatives serving the Southeast marketing area at the time of the hearing have now joined Mid-Am, resulting in Mid-Am being the major supply organization in the market, he added.

The witness explained that one key change that has occurred since the 1993 merger hearing is that Barber now receives its entire milk supply from Mid-Am and approximately 2.8 million pounds are for its Mobile plant. He added that Dairy Fresh purchases about 92 percent of its milk from nonmembers and the remainder from Mid-Am. The milk supply for both plants is from producers located in the same general area, he said, while the Class I distribution area of the Mobile and Prichard plants is primarily along the Gulf Coast stretching west from Mobile to Hancock County, Mississippi, east from Mobile to Tallahassee, Florida, and northeast from Mobile to Montgomery County, Alabama. The witness argued that the proposed price change is needed to equalize prices between Mobile-area handlers and handlers located in the Upper Florida order. He urged the Department to lower the location adjustment by 7 cents at Mobile, Alabama, thus changing the location adjustment from a plus 57 cents to a plus 50 cents.

A post-hearing brief filed on behalf of Barber and Dairy Fresh reiterated their support for the proposed 7-cent lower location adjustment. The brief pointed out that witnesses at the hearing testified that 7 cents per hundredweight is a significant amount for Class I milk. The handlers asserted that the adoption of the proposal would align the Mobile price with the price applicable in the northern portion of the Upper Florida order.

At the hearing and in its post-hearing brief, Gold Star opposed the 7-cent lower location adjustment at Mobile, Alabama, but presented no testimony or evidence to support its position. There was no other opposition testimony.

The location adjustment at Mobile, Alabama, should be reduced by 7 cents to provide a price of $3.58 by eliminating the Zone 12 island around Mobile in what is otherwise a Zone 11 region. The city of Mobile, Alabama, is within Mobile County, which is in Zone 11 of the Southeast order. Unlike the rest of Mobile County, the 20-mile radius area surrounding the city of Mobile is now part of Zone 12, which is priced 7 cents above Zone 11.

The record of this hearing indicates that changes in procurement patterns have occurred since the 1993 hearing and that the original reason for placing the Mobile handlers in the 7-cent higher pricing zone—i.e., to insure the two Mobile handlers of an adequate supply of milk—is no longer an over-riding consideration. The record of this hearing indicates that the Barber plant at Mobile now has a full supply contract with Mid-America Dairymen, Inc., thereby eliminating any concern that the handler had about obtaining an adequate supply of milk.

Although the Dairy Fresh plant at Prichard still receives a majority of its milk from nonmember producers, there was no testimony at the hearing from any cooperative association representative or any nonmember producer and no post-hearing briefs to indicate that the plant would not be able to maintain its milk supply with the proposed 7-cent lower Class I price. Accordingly, it must be concluded that no valid purpose is served by pricing the Mobile area at its current $3.65 Class I differential price. A 7-cent lower price at Mobile will properly align the prices at Mobile with the Florida panhandle, which has a Class I differential price of $3.58, as well as with counties directly east and west of Mobile, which are also priced at $3.58. Most importantly, the record indicated that the lower price at Mobile would not jeopardize the supply of milk at the Barber or Dairy Fresh plants.

3. Whether a Temporary Transportation Credit for Supplemental Milk Should be Adopted for Orders 5, 6, 7, 11, 12, and 13

The proposed amendment to provide a transportation credit for bulk milk received by transfer from a plant regulated under another Federal order for Orders 5, 6, 7, 11, 12, and 13 during the period of July 1995 through February 1996 should be denied. The cooperatives withdrew their pre-hearing request to amend the Louisville-Lexington-Evansville Federal milk marketing order.

The transportation credit was proposed by the Dairy Cooperative Marketing Association, Inc. (DCMA), whose members include Arkansas Dairy Cooperative, Associated Milk Producers, Inc., Carolina-Virginia Milk Producers, Inc., Cooperative Milk Producers, Inc., Florida Dairy Farmers Association, Inc., Mid-America Dairymen, Inc., and Tampa Independent Dairy Farmers Association, Inc. These cooperatives represent the vast majority of milk pooled in the 6 marketing areas.

A spokesman for DCMA testified that a shortage of milk in the Southeast has been brought about by lower prices, rising costs, and extreme weather conditions in most areas of the Southeast. According to the spokesman, many factors, including extreme heat and drought conditions, contributed to the decline in milk production in the Southeast. He indicated that milk production in Florida declined by 15 percent or more during 1995. During August 1995, he noted, producer milk pooled on the 6 Federal milk orders was down approximately 15 million pounds from volumes pooled during August 1994 in comparable Federal orders.

The DCMA spokesman stated that the percentage of producer milk allocated to Class I under the 6 orders has increased, while total producer milk pooled under the orders has decreased. During July and August 1995, the spokesman indicated, the pounds of milk purchased as transfers from other Federal order plants exceeded 30 and 74 million, respectively.

According to the witness, current milk production of producers pooled on the 6 southeastern orders will be insufficient to meet fluid requirements. He argued that the current Federal order minimum Class I price structure has not and will not attract an adequate supply of locally-produced milk. Some handlers and/or cooperatives, he complained, will incur the cost of obtaining needed supplemental supplies from distant marketing areas. Additionally, he claimed, those producers who are responsible for supplying the needs of the market will pay the cost of bringing in supplemental milk. This will result in such producers not receiving uniform prices for their milk, he said.

The DCMA spokesman stated that the proposal would provide a temporary transportation credit to handlers who purchase supplemental milk allocated to Class I use from plants regulated under other Federal milk marketing orders. Milk received on a requested Class II or III basis or milk that is simply allocated to Class II or III would not receive the transportation credit, he

said. He explained that the rate of the hauling credit would be 3.9 cents per hundredweight per 10 miles, based on the distance between the shipping and receiving plants, less any positive difference between the Class I differential applicable at the receiving plant and the Class I differential applicable at the shipping plant. The rate of 3.9 cents per hundredweight per 10 miles is reflective of the actual cost of hauling milk, he claimed.

The DCMA spokesman testified that the transportation credit should be made effective beginning July 1, 1995, and extend through February 29, 1996. Applying the transportation credit retroactively is appropriate, he argued, because of the substantial amount of supplemental milk purchased during the months of July and August. However, he recommended that the amount of money deducted from the pool for transportation credits each month be limited to 150 percent of the funds generated by the proposed Class I price surcharge for the month. This approach would spread the price-reducing impact of the transportation credits over the proposed 7-month period. DCMA reiterated its position in a post-hearing brief.

The marketing specialist of the Southern Region of Associated Milk Producers, Inc. (AMPI), testified in support of the DCMA's proposed transportation credits for emergency relief. According to the representative, AMPI's Southern Region represents approximately 3,000 Grade A dairy farmers located throughout the Southwest United States, with the greatest concentration of milk production in Texas and New Mexico. He indicated that AMPI also now has a substantial quantity of producer milk marketed on the Southeast order each month that was associated with the former Central Arkansas Federal milk order (Order 108).

The AMPI representative stated that AMPI assisted in supplying supplemental milk to the Southeast during the extreme milk shortage. He testified that from August 23 through September 10 AMPI delivered 10 loads of milk per day to Schepps Dairy, Dallas, Texas, to allow Mid-Am to reroute an equivalent amount of milk to southeastern handlers from the Mid-Am reload facility in Sulphur Springs, Texas. A total of 193 loads of milk were delivered to Schepps, he noted.

The AMPI spokesman stated that AMPI supplied approximately 8.8 million pounds of supplemental milk during July and August, which includes milk delivered to Schepps, as well as milk transferred directly into the Southeast marketing area. He said that AMPI charged the purchasing handler or cooperative $2.00 per hundredweight for this service and that the buyer paid the freight charge.

A representative for Fleming Dairy (Fleming), Nashville, Tennessee, testified in support of the proposed transportation credit, but recommended certain modifications. He agreed with the testimony of DCMA that the Southeast had suffered an unusual milk supply crisis since early August and that it would be equitable to provide a method to reimburse those who have served the market by incurring extraordinary costs to bring supplemental milk into the region from distant supply markets. He said that Fleming is supplied primarily by independent producers, but receives supplemental supplies from Mid-Am. During the last week of August, he indicated, Fleming obtained milk supplies from the New Mexico-West Texas and Upper Midwest marketing areas to meet its fluid demand due to the insufficient supply of locally-produced milk.

According to the Fleming representative, some additional supplemental milk may be required through October, but the period of greatest crisis and demand is now over. Thus, he stated, Fleming would favor a transportation credit through the month of October.

The Fleming spokesman testified that supplemental shipments of milk in late summer and fall are a recurring feature of the southeastern marketing areas, and transportation credits in some form would be justified as a permanent feature of the orders for the months of July through October. However, he recommended that the transportation credit only apply for distances that exceed 100 miles. He said the Secretary should determine whether the proposed 3.9-cent rate is justified.

The Fleming representative also observed that this is the first year in which there has been a significant need for supplemental milk in the southeast region from the north-central region since the adoption of Class III–A pricing. The witness stated that the transportation credit should not be granted to a handler or cooperative association that has any milk assigned to Class III–A during the same period of time. In addition, he said, Class III–A pricing should be suspended for the Southeast region and neighboring marketing areas in the northeast and north-central regions when there is a clear demand for milk for Class I use that is not being met. Class III–A , he stressed, was adopted to permit the orderly disposition of excess milk when another use for the milk was not available, not as a bargaining lever to extract high give-up costs when the need for fluid milk is great.

Fleming's post-hearing brief reiterated its qualified support for transportation credits. The brief stated that transportation credits for past services of marketwide benefit are consistent with the 1985 amendments to the Agricultural Marketing Agreement Act. The transportation credits, Fleming contended, are necessarily retroactive because the application for credit comes only after a service has been rendered.

The president of Southern Belle Dairy (Southern Belle) Somerset, Kentucky, testified in opposition to the proposed transportation credit. The representative stated that Southern Belle is a pool plant regulated under the Tennessee Valley Federal milk order. He explained that Southern Belle receives its milk supply from Southeastern Graded Milk Producers, Milk Marketing, Inc., and Mid-America Dairymen, Inc. He said Southern Belle also receives supplemental milk supplies from Armour Foods.

According to the Southern Belle representative, during the crisis period Southern Belle purchased 2 loads of milk in Buffalo, New York, at a give-up charge of $5.50 per hundredweight. He said that, under the DCMA proposal, Southern Belle would receive a transportation credit of approximately $1,500, but claimed that the proposed 5-cent per hundredweight surcharge to pay for the transportation credits would force Southern Belle to pay an amount far in excess of its $1,500 credit.

In a post-hearing brief, Southern Belle reiterated its opposition to the retroactive application of the transportation credit but did not support or oppose the prospective issuance of the credit for supplemental milk purchased during months of very short production. The brief also argued that the record evidence shows that the ''crisis'' was due to Mid-Am's inability to properly manage its sales of milk and to recover adequate over-order premiums to cover the costs of purchasing supplemental milk supplies. Finally, Southern Belle argued that the retroactive application of the proposed transportation credit would encourage cooperatives to request relief for a problem that no longer exists.

The general manager of Gold Star Dairy (Gold Star), Little Rock, Arkansas, also testified in opposition to the proposed transportation credit at the hearing. In its post-hearing brief, Gold Star opposed any retroactive application of the transportation credit but did not

support or oppose the issuance of the credit for Class I milk purchased during months of very short production.

Gold Star contended that there is no record evidence to support DCMA'S argument that supplemental milk would be needed beyond October. According to Gold Star's brief, the last year of shipments into the southeast region from Wisconsin was in 1992, a year in which shipments began in mid-August and extended to October. The brief also argued that shipments from Wisconsin in 1995 probably have peaked already and that no shipments will likely be needed after October.

Gold Star and Southern Belle argued that the Secretary does not have the authority to issue rules that would have a retroactive effect. Moreover, even if he did, they contend, such authority would invite the post-crisis demand for modifications of the rules to alleviate problems that may no longer exist.

A brief filed on behalf of Land-O-Sun Dairies, Inc. (Land-O-Sun), opposed the proposed transportation credit. Land-O-Sun stated that it operates pool plants regulated under Orders 5 and 11 in Spartanburg, South Carolina, and Kingsport, Tennessee, respectively. The handler also indicated it operates an Order 5 partially regulated plant in Portsmouth, Virginia.

Land-O-Sun argued that the Secretary lacks the authority to grant rules regarding transportation credits that would have a retroactive effect absent the expressed statutory language. According to Land-O-Sun, the Department of Health and Human Services (HHS) issued a rule in 1984 which applied to a cost reimbursement calculation method and tried to recoup costs that were incurred prior to the effective date of the 1984 rule. However, Land-O-Sun noted, in the case of *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988), the Supreme Court invalidated the retroactive feature of the HHS rule.

Land-O-Sun contends that the Agricultural Marketing Agreement Act, as amended, is wholly silent on the issue of retroactive powers vested in the Secretary. It argues that in 1986 the Secretary did not have the authority to implement retroactively the Class I differentials mandated by the 1985 Farm Bill and, by the same token, does not now have the authority to implement the proposed transportation credits retroactively.

Land-O-Sun argues that even if the Secretary had the authority to impose the retroactive transportation credits, he should deny this request because the problem should have been addressed through private business agreements. The Land-O-Sun brief states that the proposed credit penalizes both handlers who procured their own supplies and producers not involved in bringing in supplemental supplies. Finally, Land-O-Sun stated that there is significant competition between Order 5 plants and plants located in Florida, Georgia, Tennessee, Virginia, and Kentucky and that the 5-cent higher surcharge for Order 5 compared to Orders 7 and 11 would place Order 5 handlers at a competitive disadvantage.

Milkco, Inc. (Milkco), a fully regulated handler under Order 5, filed a post-hearing brief in opposition to the proposed transportation credit because of its retroactive effect. Milkco stated that if a transportation credit is granted, it should apply to the same months that an emergency fluid milk surcharge would be applicable.

After carefully evaluating the record evidence and the post-hearing briefs, we must conclude that during the summer of 1995 there was a need for supplemental milk for Class I use in all of the 6 orders and that this need was particularly acute for the Carolina and 3 Florida orders. Furthermore, the record clearly shows that the burden of bringing in supplemental milk to satisfy fluid milk demand fell, almost exclusively, on the cooperative associations supplying these markets. The record also shows that during the months of July and August 1995 over-order charges were either non-existent or—where they did exist—appeared to be inadequate to compensate the cooperatives for the costs which they incurred.

It may be true, as opponents argue, that price adjustments should not be made to compensate for prior marketing costs. Any pool plant operator that obtained milk on a direct-shipped basis—at whatever cost it had to pay—during July through September of 1995 would not be eligible for a credit under the DCMA proposal; yet the handler would now be asked to pay a higher Class I price to subsidize someone else's supplemental milk expense.

Opponents argued that the Secretary lacks the authority to retroactively apply the proposals. Ultimately, this question can only be clarified in a court of law. However, in this proceeding the threshold question of whether or not the proposals are supported by the record precludes any subsequent debate concerning their legality.

While the record clearly showed that a great deal of milk was brought into the 6 markets, it lacked comparable data for earlier years from which to measure the magnitude of this year's problem. As can be seen in Table 1, for example, there was clearly much more bulk milk imported to the Carolina and Florida markets for Class I use in August of 1995 compared to August 1993, but this picture is less clear in comparing the bulk imports for the Southeast market in August 1995 compared to August 1994, and the comparison is virtually impossible for the Tennessee Valley market because of the restrictions on the data. Also, while the record data unequivocally demonstrated a significant drop in production for some of the markets involved in this proceeding, it was less demonstrative for some of the other markets involved. For example, while producer receipts in the Southeastern Florida market were down by 8.5 percent in July (compared to July 1994), they were up by 19 percent during July 1995 in the Tennessee Valley market. Similarly, in August 1995 producer receipts were down (compared to a year earlier) in 4 of the 6 markets, but they were up by 4 percent in Order 7 and by 2 percent in Order 11.

TABLE 1.—MILLIONS OF POUNDS OF BULK FLUID MILK PRODUCTS FROM OTHER ORDER PLANTS

[Not Requested for Class II or III Use, July–August, 1993–1995]

	7/93	8/93	7/94	8/94	7/95	8/95
Order 5	2.3	1.8	R	R	1.7	12.3
Orders 6, 12, and 13	2.4	17.3	R	15.8	16.3	32.9
Order 7	4.1	12.3	6.9	27.6	10.5	29.7
Order 11	.8	R	0	R	R	5.2

R = Data restricted. Less than 3 handlers involved.

The record also was lacking in detail with respect to cooperatives' over-order charges. In the Florida markets, where such charges were in effect during the summer months, there is no indication how much, if any, of the premium is supposed to cover the cost of bringing supplemental milk to the market. It was also unclear how this year's transportation and give-up costs compared to prior years.

A transportation credit, with or without an accompanying surcharge, might have merit in these seasonally-deficit markets where no other means exist to recoup costs of servicing the market. However, the specific proposals under consideration in this proceeding are not supported by the weight of evidence in the record.

4. Whether a Fluid Milk Surcharge Should be Provided on a Temporary Basis for Orders 5, 6, 7, 11, 12, and 13

The proposal to impose a Class I surcharge in each of the 6 orders to pay for the proposed transportation credits should not be adopted.

A spokesman for DCMA proposed a fluid milk surcharge for the 6 Federal milk marketing orders for the period of November 1, 1995, through March 31, 1996. The spokesman requested that the proposed amendment not be considered for the Louisville-Lexington-Evansville Federal milk order. The DCMA spokesman estimated that a temporary fluid milk surcharge would generate enough money to fund the out-of-pocket transportation costs incurred by handlers during the period of July 1, 1995, through March 31, 1996. This money would be returned to dairy farmers through the blend price by the added specified rate to the Class I differential for each order, he stated.

The representative testified that DCMA's revised proposal would provide a fluid milk surcharge of 5 cents per hundredweight for Orders 7 and 11, 10 cents per hundredweight for Order 5, 20 cents per hundredweight for Order 6, 25 cents for Order 12, and 30 cents for Order 13.

According to the DCMA representative, these proposed temporary surcharges are designed to help assure that an adequate supply of milk will be made available to meet the fluid needs of the 6 orders. The representative proposed that the fluid milk surcharge for each order become effective November 1, 1995, and extend through March 1996. The November 1 effective date is needed to provide adequate advance notice, he stated.

The assistant operations manager for Fleming testified in support of the proposed fluid milk surcharge. He stated that Fleming favors a surcharge to offset the cost of the transportation credit for the extraordinary supplemental milk costs incurred by cooperatives during the months of July through October, but said that the surcharge and the transportation credit should be coordinated for each market. Fleming reiterated its qualified support for the proposed fluid milk surcharge in its post-hearing brief.

The controller of Coburg Dairy (Coburg), an Order 5 pool plant located in North Charleston, South Carolina, testified in support of the proposed fluid milk surcharge at a rate of 10 cents per hundredweight for Order 5. The witness indicated that Coburg purchases its raw milk supply from Edisto Milk Producers Association, a cooperative which purchases raw milk from Carolina Virginia Milk Producers Association and, on the spot market, from brokers. He stated that Coburg has distribution throughout South Carolina, southeastern Georgia, and parts of North Carolina.

The director of milk procurement and marketing for Dean Foods Company (Dean Foods) testified in opposition to DCMA's proposed fluid milk surcharge. According to the witness, Dean Foods is the largest fluid milk processor in the United States and owns and operates plants in Kentucky, Florida, and Athens, Tennessee.

The witness for Dean Foods stated that weather conditions in the southeast region caused milk supply shortages in the region in late August and early September. As a result, he indicated, supplemental milk was purchased from outside the region. The witness claimed that there has been and continues to be a shortage of milk in portions of the southeast region and that Dean Foods had adjusted its bottling schedule to accommodate the temporary shortage. However, he said, the Dean Foods plant at Athens, Tennessee, currently has an adequate supply of milk available to meet the plant's needs.

According to the witness, Dean Foods and other processors in the State of Florida agreed in June to accept a 73-cent per hundredweight increase in over-order premiums to help producers recover some of the costs for transporting supplemental milk into the region. Dean Dairies in Florida has agreed to a 40-cent increase for the month of October, he indicated. The witness also testified that processors in Florida have been paying from $1.00 to $1.75 per hundredweight in over-order premiums. Additionally, he stated, Dean Foods, Athens, Tennessee, agreed to 15-cent and 20-cent per hundredweight increases in over-order premiums for the months of September and October, respectively.

The witness for Dean Foods stressed that negotiations between buyers and sellers of milk remain the best mechanism to recover the costs associated with purchasing supplemental milk. He argued that the Federal Order system was not designed to remedy short-term aberrations in the market or provide relief to cooperatives for poor business decisions.

The general manager for Gold Star also testified in opposition to the proposed fluid milk surcharge for the 6 Federal milk marketing orders. The witness indicated that Gold Star is a handler regulated under the Southeast order but that a significant portion of its sales are in the Texas marketing area. If the surcharge were imposed, Gold Star would be at a competitive disadvantage compared to handlers regulated under the Texas order, he claimed, because those handlers would not be subject to the surcharge. These arguments were reiterated in Gold Star's post-hearing brief.

The representatives of Gold Star and Southern Belle claimed that the proposed fluid milk surcharge would have an impact on each handler's fluid milk sales. The representatives argued that in an industry where most sales are determined on fractions of a cent per gallon, the handlers would not be able to pass the cost on to its customers in areas where its competing handlers would not be subject to the surcharge. The Southern Belle representative stated that Southern Belle competes with handlers located in Ohio, Kentucky, West Virginia, Indiana, and Virginia, all of whom would not be subject to the surcharge.

Southern Belle also filed a post-hearing brief in opposition to the proposed fluid milk surcharge. Southern Belle stated that the crisis, if there was one, is now over for the Tennessee Valley marketing area. Southern Belle also indicated that it acquired its own supplemental milk without the assistance of cooperatives and no longer needs any supplemental milk. The handler added that it should not be required to pay an additional amount for its milk to compensate producers or cooperatives for services that it did not receive and will not need.

Tillamook County Creamy Association (Tillamook), a cooperative association located in Tillamook, Oregon, opposed the proposed fluid milk surcharge at the hearing and in its post-hearing brief. Tillamook contended that the continued existence of Class III-A pricing was and is a major contributing factor to any perceived

problem of production and delivery of Grade A milk into the Southeast during the past summer.

Tillamook indicated that the amount of milk allocated to Class III-A in Orders 5, 11, and 46 was about 1.4 million pounds in August 1995 compared to 270 thousand pounds in August 1994, and further noted that Federal Order 7 had approximately 2.1 million pounds of milk allocated to Class III-A in August 1995. Additionally, Tillamook pointed out that record data indicates that while handlers and cooperatives located in the Southeast were purchasing supplemental milk supplies from as far as Minnesota and El Paso, significant volumes of milk were being allocated to Class III-A in Federal Orders 4 (Middle Atlantic marketing area), 33 (Ohio Valley marketing area), 36 (Eastern Ohio-Western Pennsylvania marketing area), 40 (Southern Michigan marketing area), and 126 (Texas marketing area).

Tillamook recommended that the Secretary suspend Class III-A pricing nationwide to free up milk needed for fluid use in the Southeast and to continue uniform pricing throughout the Federal order program. The cooperative claimed that the fluid milk surcharge benefits a small portion of the dairy industry, while the suspension or alteration of Class III-A on an emergency basis would increase all dairy farmers' income. Therefore, Tillamook urged the Secretary to deny the proposed fluid milk surcharge and grant relief on Class III-A immediately.

In a post-hearing brief, Milkco opposed the revised proposal for a fluid milk surcharge for the 6 Federal milk orders, specifically the 10-cent surcharge for Order 5. Milkco indicated that it has approximately 44.5 percent of its total Class I sales in the Southeast and Tennessee Valley marketing areas. It stated that the proposed amendment would require it to pay 5 cents per hundredweight more than handlers regulated under Orders 7 and 11. Accordingly, Milkco contended, the amount of the surcharge should be the same for Orders 5, 7, and 11.

The Agricultural Marketing Agreement Act, as amended, clearly authorizes the Secretary to include provisions for payments to handlers that provide facilities to furnish additional supplies of milk needed by the market, but the Act does not provide for an automatic increase in the Class I price to offset such payments. If there had been a stronger record supporting adoption of the proposed transportation credit, the balance might have weighed in favor of taking the action for a temporary period of time. However, the evidence presented by the handler opposition to the proposals, in conjunction with the lack of clarity in the record concerning the magnitude of the problem and any needed increase in Class I prices, leads us to conclude that the transportation credit should not be adopted and, consequently, the Class I surcharge to pay for the transportation credit need not and should not be adopted either.

5. Whether Emergency Marketing Conditions in the 6 Regulated Areas Warrant the Omission of a Recommended Decision and the Opportunity to File Written Exceptions Thereto

Proponents of Proposals 1–2 and 4–5 requested that the Secretary handle these issues on an expedited basis by omitting a recommended decision and the opportunity to file exceptions thereto.

The request for emergency treatment is denied. In view of the denial of Proposals 4 and 5, no benefit would be gained in omitting a recommended decision. In fact, the interests of proponents would be furthered by providing them with an opportunity to file exceptions to this recommended decision.

Although proponents of Proposals 1 and 2 also requested emergency consideration of their proposals at the hearing and no objections were expressed either at the hearing or in post-hearing briefs, interested parties were not notified of the possible expedited handling of these proposals in the hearing notice that was issued. In view of this, and in conjunction with the normal handling of Proposals 4 and 5, the request for emergency treatment with respect to Proposals 1 and 2 also is denied.

Non-material Issue: Correction to § 1007.50(d). Paragraph (d) of Section 50 of the Southeast order should be corrected to reflect the appropriate order language. The changes resulting from the 27-market Class III-A proceeding (DA–91–13) and included in the December 31, 1993, Federal Register at 58 FR 63286 were adopted by reference at 60 FR 25036 in the final decision for the Southeast order. However, in the process of preparing the final decision and final order for the Southeast marketing area, the revised language in § 1007.50(d) was inadvertently overlooked.

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 orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the Southeast tentative marketing agreement and order:

(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 aforesaid 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.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Southeast marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1007

Milk marketing orders.

For the reasons set forth in the preamble, the following provisions in 7 CFR part 1007, are proposed to be amended as follows:

PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

1. The authority citation for 7 CFR part 1007 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 1007.2 [Amended]

2. In § 1007.2, *Zone 11*, the words ''(more than 20 miles from the Mobile city hall)'' are removed following the word ''Mobile'' and the words ''(north of State Highway 16)'' are added following the word ''Tangipahoa''.

3. In § 1007.2, *Zone 12*, the words ''Alabama counties: Mobile (within 20 miles of the Mobile city hall).'' are removed and the words ''Tangipahoa (south of State Highway 16)'' are added following the word ''St. Mary,''.

§ 1007.50 [Amended]

4. In § 1007.50(d), the words ''value per hundredweight of 3.5 percent milk and rounded to the nearest cent, and subject to the adjustments set forth in paragraph (c) of this section for the applicable month'' are removed and the words ''times 35 and rounded to the nearest cent'' are added in their place.

Dated: December 18, 1995.

Lon Hatamiya,

Administrator.

[FR Doc. 95–31272 Filed 12–26–95; 8:45 am]

BILLING CODE 3410–02–P

Rural Utilities Service

7 CFR Part 1755

Telecommunications Program—Postloan Engineering Service Contract

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service (RUS), successor to the Rural Electrification Administration (REA), hereby proposes to amend its contract for the procurement of postloan engineering services for telecommunications systems. This action would codify the terms and conditions of the agreement to be executed between RUS telecommunications borrowers and consulting engineering firms hired to design and oversee construction of telecommunications facilities financed with RUS financing assistance. Several years have passed since these regulations were last amended and changes in common contract language have occurred. These amendments would allow contracts to be more consistent with common practice.

DATES: Written comments must be received by RUS or carry a postmark or equivalent by January 26, 1996.

ADDRESSES: Written comments should be addressed to Mr. Orren E. Cameron, III, Director, Telecommunications Standards Division, Rural Utilities Service, U.S. Department of Agriculture, Ag Box 1598, 14th and Independence Ave., SW, Washington, DC 20250–1598. RUS requires a signed original and 3 copies of all comments (7 CFR 1700.30 (e)). Comments will be available for public inspection during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Mr. Orren E. Cameron III, Director, Telecommunications Standards Division, Rural Utilities Service, U.S. Department of Agriculture, Ag Box 1598, Washington, DC 20250–1598, telephone number (202) 720–8663.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by OMB.

Executive Order 12778

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If adopted, this proposed rule will not: (1) Preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule; (2) Have any retroactive effect; and (3) Require administrative proceedings before parties may file suit challenging the provisions of this rule.

Regulatory Flexibility Act Certification

The Administrator of RUS has determined that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) does not apply to this rule.

Information Collection and Recordkeeping Requirements

The reporting and recordkeeping requirements contained in the proposed rule were approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) under control number 0572–0059.

Send questions or comments regarding this burden or any other aspect of these collections of information, including suggestions for reducing the burden, to F. Lamont Heppe, Jr., Deputy Director, Program Support Staff, Rural Utilities Service, Ag Box 1522, Washington, DC 20250–1522.

National Environmental Policy Act Certification

RUS has determined that this proposed rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Catalog of Federal Domestic Assistance

The program described by this proposed rule is listed in the Catalog of Federal Domestic Assistance Programs under 10.851, Rural Telephone Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402–9325.

Executive Order 12372

This proposed rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation. A Notice of Final Rule entitled Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts RUS loans and loan guarantees to governmental and nongovernmental entities from coverage under this Order.

National Performance Review

This regulatory action is being taken as part of the National Performance Review program to eliminate unnecessary regulations and improve those that remain in force.

Background

Pursuant to 7 CFR part 1753, subpart B, RUS telecommunications borrowers must use a contract to procure engineering services for design and construction of facilities which qualify as ''major'' under that part. The contract required is the RUS Form 217, Postloan Engineering Services Contract.

The Form 217 contract was developed by REA (predecessor to RUS) to meet the specific requirements of rural telecommunications borrowers, and to meet the objectives of the RE Act. It contains provisions to facilitate the use of RUS-required contract forms for the procurement of outside plant, central office equipment, special transmission equipment, and exchange switching equipment buildings. Most of the past