List of Subjects in 7 CFR Part 927

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 927 is proposed to be amended as follows:

PART 927—WINTER PEARS GROWN IN OREGON AND WASHINGTON

1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 927.236 [Amended]

2. Section 927.236 is proposed to be amended by removing the words ''July 1, 1997,'' and adding in their place the words ''July 1, 1998,'' and by removing ''$0.44'' and adding in its place ''$0.49.''

Dated: July 15, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 98–19389 Filed 7–20–98; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005, 1007, and 1046

[Docket No. AO–338–A9, et al.; DA–96–08]

Milk in the Carolina and Certain Other Marketing Areas; Final Decision and Order To Terminate Proceeding on Proposed Amendments to Marketing Agreements and Orders

7 CFR part	Marketing area	Docket No.
1005 ..	Carolina	AO–388–A9.
1007 ..	Southeast	AO–366–A38.
1046 ..	Louisville-Lexington-Evansville.	AO–123–A67.

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final decision and termination of proceeding.

SUMMARY: This document denies proposed amendments to 3 Federal milk orders in the Southeastern United States and terminates the rulemaking proceeding. The proposals involve deductions from the minimum uniform price to producers and the definition of ''producer'' specified in each of the orders. The decision to deny the proposals is based upon 2 public hearings, and upon comments and exceptions filed in response to a subsequent recommended decision issued by the Department.

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

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.

This partial final decision denies the proposed amendments to the Carolina, Southeast, and Louisville-Lexington-Evansville Federal milk orders,[1] and terminates this rulemaking proceeding.

Small Business Consideration

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities. The Act seeks to ensure that, within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $500,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $500,000 per year criterion was used to establish a production guideline of 326,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

The milk of approximately 7,600 producers is pooled on the Carolina, Southeast, and Louisville-Lexington-Evansville milk orders. Of these producers, 97 percent produce below the 326,000-pound production guideline and are considered to be small businesses.

There are 48 handlers operating pool plants under the 3 orders. Of these handlers, 22 have fewer than 500 employees and qualify as small businesses.

The Agricultural Marketing Service has determined, as set forth in the recommended decision, that neither the denial, nor the adoption, of proposed amendments involving deductions from the minimum payments to producers will have a significant economic impact on a substantial number of small entities under current marketing conditions. Dairy farmers are presently receiving the minimum order prices and should continue to do so given the current level of over-order premiums now in effect. Similarly, neither adoption nor denial of the proposed amendments will have any effect on handlers' costs under the orders because, currently, handlers are voluntarily paying producer prices in excess of the minimum prices specified in the orders. Furthermore, for the long term, the issue of deductions from minimum payments will be considered as part of the Federal order reform in connection with the Federal Agriculture Improvement and Reform Act of 1996 which requires an examination of the Federal milk order system. The concerns of small businesses will be addressed throughout the review process.

Additionally, neither the denial nor the adoption of the proposal to modify the definition of ''producer'' under the 3 orders will have a significant economic impact on a substantial number of small entities. Standards already exist in the 3 orders to assure an adequate association by producers in meeting the fluid milk needs of the markets. The denial of the proposal to incorporate additional producer qualification standards maintains the existing regulatory burden, and will not place any additional responsibilities on handlers operating under the orders.

Prior Documents in This Proceeding

Notice of Hearing: Issued May 1, 1996; published May 3, 1996 (61 FR 19861).

Tentative Partial Final Decision: Issued July 12, 1996; published July 18, 1996 (61 FR 37628).

Interim Amendment of Orders: Issued August 2, 1996; published August 9, 1996 (61 FR 41488).

Extension of Time for Filing Comments to the Tentative Decision: Issued August 16, 1996; published August 23, 1996 (61 FR 43474).

Extension of Time for Filing Comments to the Tentative Decision: Issued October 18, 1996; published October 25, 1996 (61 FR 55229).

Notice of Reopened Hearing: Issued November 19, 1996; published November 25, 1996 (61 FR 59843).

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[1] The Tennessee Valley Federal milk order, an order involved in this rulemaking proceeding, was terminated as of October 1, 1997.

Partial Final Decision: Issued May 12, 1997; published May 20, 1997 (62 FR 27525).

Order Amending the Orders: Issued July 17, 1997; published July 23, 1997 (62 FR 39738).

Partial Recommended Decision: Issued July 17, 1997; published July 23, 1997 (62 FR 39470).

Preliminary Statement

Public hearings were held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. The hearings were 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 (7 CFR Part 900), in Charlotte, North Carolina, on May 15–16, 1996, and in Atlanta, Georgia, on December 17–18, 1996. Notice of the initial hearing was issued on May 1, 1996, and published May 3, 1996 (61 FR 19861).

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

1. Transportation credits for supplemental bulk milk received for Class I use.

2. Deductions from the minimum uniform price to producers.

3. Whether emergency marketing conditions in the 4 regulated marketing areas warrant the omission of a recommended decision with respect to Issue No. 1 and the opportunity to file written exceptions thereto.

4. The definition of producer.

An interim order amending the orders with regard to transportation credits was issued on August 2, 1996, and published August 9, 1996 (61 FR 41488). The interim amendments became effective on August 10, 1996.

The Department reopened the hearing to hear additional evidence regarding the transportation credit issue and also to hear a related ''producer'' definition proposal. This hearing was held on December 17–18, 1996, in Atlanta, Georgia, following the notice of such reopened hearing issued on November 19, 1996, and published in the **Federal Register** on November 25, 1996 (61 FR 59843).

Interested parties were given until June 17, 1996, to file post-hearing briefs regarding the deductions from the minimum price proposal as published in the **Federal Register** and as modified at the hearing. Regarding the additional proposal concerning the definition of a ''producer'' heard at the reopened hearing, interested parties were given until February 7, 1997, to file post-hearing briefs.

A partial recommended decision involving minimum payments to producers and the ''producer'' definition was issued on July 17, 1997, and published in the **Federal Register** on July 23, 1997 (62 FR 39470).

Issue 1 was discussed in a separate partial final decision issued on May 12, 1997 (62 FR 27525). Issue 3 was discussed in the tentative partial final decision, and is now moot.

Following the final decision issued on May 12, 1997, producers were polled in each of the 4 markets involved in this proceeding to ascertain whether producers approved of the orders, as amended. An insufficient vote was obtained for the Tennessee Valley order, as amended. Consequently, that order was terminated effective October 1, 1997.

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:

Material Issue # 2—Deductions From the Minimum Uniform Price to Producers

A proposal by Hunter Farms and Milkco, Inc., which seeks to clarify the minimum payment to producers for Federal milk marketing orders 1005, 1007, and 1046, should be denied. Under the proposal, a handler (except a cooperative acting in its capacity as a handler pursuant to paragraph 9(b) or 9(c)) may not reduce its obligations to producers or cooperatives by permitting producers or cooperatives to provide services which are the responsibility of the handler. According to the proposal, such services include: (1) Preparation of producer payroll; (2) conduct of screening tests of tanker loads of milk required by duly constituted regulatory authorities before milk may be transferred to the plant's holding tanks and any other tanker load tests required to establish the quantity and quality of milk received; and (3) any services for processing or marketing of raw milk or marketing of packaged milk by the handler.

A Brief Summary of Testimony and Briefs Resulting From the May 15–16, 1996 Hearing

The Vice President of Hunter Farms (Hunter), which operates plants regulated under Order 5 at High Point and Charlotte, North Carolina, testified that Hunter purchases milk from Piedmont Milk Sales, Carolina-Virginia Milk Producers Association (CVMPA), Mid-America Dairymen, Inc. (Mid-Am),[2] and Cooperative Milk Producers Association. The witness explained that CVMPA and Mid-Am are cooperative associations, while Piedmont Milk Sales is a marketing agent handling the milk of independent producers. Due to competitive marketing conditions in the Southeast in late 1994 and early 1995, handlers were able to purchase milk supplies at Federal order minimum prices without any over-order premiums being charged. As a result of the absence of over-order premiums, Hunter received underpayment notices from the market administrator on milk that it had received from Piedmont Milk Sales. The underlying question was who must pay for certain services associated with the receipt of milk at regulated plants. Hunter argued that during the period of December 1994 through September 1995, competing handlers who received milk from cooperative associations at the minimum order price did not fully compensate the cooperatives for similar services that were provided.

Despite the fact that over-order premiums returned to the Carolina market, Hunter contends, the problem of what constitutes a minimum payment to producers should be clarified in the event that premiums may be reduced or disappear entirely in the future. For this reason, according to the proponent, it is important to resolve this issue.

In the event that this situation is not rectified, according to Hunter, a loss of milk sales and lower prices to producers will be evident. Hunter stated that current policy is discriminatory and unfair. Furthermore, Hunter stated that all would benefit from a clarification of the rules defining Federal order minimum prices.

Milkco Inc. (Milkco), a fluid milk processing plant located in Asheville, North Carolina, regulated under Order 5, receives milk from cooperative associations as well as independent producers marketing their milk through Piedmont Milk Sales. Milkco supported Hunter's position and stated that Milkco also received underpayment notices from the market administrator for the December 1994 through October 1995 period on milk received from independent dairy farmers, but did not receive underpayment notices on milk received under the same or similar conditions from cooperative associations.

[2] Mid-America Dairymen, Inc., Western Dairymen Cooperative, Milk Marketing Inc., and Associated Milk Producers, Inc., Southern Region, merged to form ''Dairy Farmers of America'' effective January 1, 1998.

A witness representing Hunter and Milkco described the categories that should be defined as a handler responsibility, including preparation of a producer payroll, the testing of incoming tanker loads of milk, and any costs associated with processing raw milk or marketing milk in bulk or packaged form. The witness stressed that the thrust of the proposal is to ensure equality in the cost of milk among regulated handlers. According to the witness, current administrative practice in this area requires handlers receiving milk from independent producers to absorb the cost of a variety of services which are provided at no extra charge to handlers receiving milk from cooperative associations and result in an inequitable situation.

The General Manager of Carolina-Virginia Milk Producers Association or CVMPA offered qualified support for the Hunter-Milkco proposal. He said that from a philosophical point of view CVMPA would agree that if producers provide the services specified by the proponents—plus any additional services that are provided to a handler by a cooperative association—handlers should be charged the costs associated with these services. He said that, with these modifications, CVMPA could support the proposal. Additionally, CVMPA suggested expanding the proposed list of handlers' responsibilities to include tanker washing and tagging, supplying milk to handlers on an irregular delivery schedule, field work, disposing of surplus milk during months when the supply is above local needs, and importing supplemental milk for Class I use during periods of short production.

Additional testimony was also offered by a representative of Mid-America Dairymen, Inc. (Mid-Am) involving Hunter's proposal. Mid-Am objected to hearing the proposal and also to the narrowness of Hunter-Milkco's proposal. Mid-Am argued that the issue of minimum payments to producers is national in scope and should not be limited to the orders involved in this proceeding. It suggested that the issue be addressed by the Secretary within the context of the Federal order reform as required by the 1996 Farm Bill on a national basis. In addition, the Mid-Am representative objected to the proposal on grounds of lack of notice to interested parties.

The administrative law judge presiding over the hearing overruled Mid-Am's objection to hearing the proposal, noting that the Secretary had given interested parties the minimum 3-day notice requirement specified in 7 CFR 900.4(a). He also indicated that this proposal was being considered on a non-emergency basis and that, accordingly, interested parties had more than adequate time to brief it, discuss it, and consider it.

Briefs were submitted by interested parties both in support of and in opposition to this proposal. Proponents, Hunter and Milkco, submitted a brief in support of their proposal, emphasizing the points made on the hearing record. Hunter and Milkco maintain that uniform applicability in the treatment of handlers is essential, and any lack of uniformity is in violation of the Agricultural Marketing Agreement Act, as amended. According to the proponents, issuance of underpayment notices only on that milk which was received from independent producers who contracted with a specific marketing agency does not promote uniformity and is discriminatory.

Hunter and Milkco's brief also addresses the objections made by Mid-Am to this proposal. The proponents maintain that Mid-Am's objection to their proposal based on grounds of lack of notice is unfounded because the notice given was adequate. In addition, Hunter and Milkco argue that the suggestion by Mid-Am that this proposal be considered on a national basis is unjustified. Proponents maintain that the problem which has prompted this proposal is specific to the Federal order under consideration, and no evidence was presented to show that this problem exists in other regions of the United States.

Fleming Companies, Inc. (Fleming),[3] also filed a brief in support of this proposal. Fleming states that ''* * * To the extent such services primarily benefit producers, it is appropriate that producers be authorized to contract for such services, and to allow a deduction for the reasonable value of such services.'' Fleming also expressed concern that without the clarification offered by the proposal, equity among member producers and non-member producers may be jeopardized and price uniformity may not be maintained if cooperative associations are able to assume the cost of producer-oriented services, while handlers receiving independent milk are not permitted to make a deduction for these services even if authorized by the producer.

A brief filed by Mid-America Dairymen, Inc., reiterated the cooperative's strong opposition to the proposal and its position that this issue should be addressed on a national basis in the context of Federal order reform. Furthermore, Mid-Am states that it is clear that the costs for butterfat testing are borne by all producers, and the costs of testing milk in tankers for antibiotics are borne by all handlers regardless of their source of supply. According to Mid-Am, no confusion exists as to who is responsible for these tests and, therefore, they should not be included in the proposed amendments.

The Kroger Co. states in its brief that proposal 2 is worthy of study and should be considered by the Secretary for all Federal milk marketing orders within the context of Federal milk order reform.

Summary of the Partial Recommended Decision Issued July 17, 1997

The Department issued a partial recommended decision on July 17, 1997 (62 FR 39470), which recommended denial of Hunter/Milkco's proposal to amend the 4 southeastern milk orders. On the basis of the testimony heard and the briefs filed, the Department determined that the issue should be addressed in the context of Federal order reform.

Under orders, the Department explained, payment for milk received from producers may not be less than the uniform price as announced each month by the market administrator, except to producers who receive payment from their cooperative association. The Department stated a cooperative association under the authorizing legislation may blend the net proceeds of its sales of milk for payment to its member producers. However, payments to a producer by a handler, the Department asserted, can be reduced to reflect ''proper deductions authorized in writing by the producer.'' Historically, it noted, such deductions from minimum milk prices of only two basic types have been permitted.

The Department indicated that the two types of deductions permitted are (1) payments that are made by a handler on behalf of the producer to creditors of the producer, and (2) payments that are obligations of the producer in the production of milk and the transportation costs for delivery to the handler's plant. Accordingly, the Department stated, handlers are not required to make payments to creditors on behalf of producers but are permitted to do so if the deductions are proper and authorized. It stated such permission recognizes that handlers frequently make payments to producers' creditors as a service to the producers. Thus, the Department concluded, the term ''proper'' is included to prevent

[3] During summer 1997, the dairy operations of Fleming was acquired by Suiza Foods. The fluid milk processing business of Fleming has been reorganized and is now Country Delite Farms, Inc.

unwarranted deductions from minimum prices for milk.

The Department went on to state that the authorization by a producer of a certain deduction may not be proper and thus disallowed by the market administrator. Additionally, it indicated, producers cannot give up their rights to receive the uniform price by a deduction that is not of the two types described above.

The Department concluded that there were extensive conceptual differences among market participants concerning what constitutes minimum prices to producers. The decision stated that the lack of evidence and conflicting opinions made it extremely difficult to delineate in Federal milk orders those services which are the responsibility of handlers and those which lie within the domain of producers. Furthermore, even if a decision could be reached on this point it would be very difficult to establish uniform rates for the services suggested by the various parties on the basis of the record before the Department. The Department, therefore, concluded that the proposal should be denied and the matter considered in the Federal order reform proceeding where nationwide input and a more extensive evidentiary record could be obtained.

The decision stated that the underpayment problem which Milkco and Hunter experienced has been rendered moot with the return of over-order premiums. Although these premiums could again disappear, bringing the uniform pricing issue to the fore once again, the Department anticipates this is not likely to happen in the near future. Nevertheless, the decision stated, if this should happen, proponents could request relief through other means pending final resolution of this matter.

Exceptions to the Partial Recommended Decision

Hunter and Milkco, Inc., filed an exception to the Department's partial recommended decision and urged adoption of their proposal. These handlers stated that their proposal would specify the responsibility of all handlers with respect to producer milk and thereby rectify any inconsistency that may currently exist in order language concerning this issue.

Hunter and Milkco also stated that any disagreement within the industry concerning which services are the responsibility of the handler is secondary to the issue under review and does not warrant the denial of their proposal. The handlers contend that the central principle surrounding this issue is uniformity in the treatment of handlers purchasing milk supplies from cooperatives or independent producers. The precise list of services is of secondary importance, they state, and industry disagreement concerning these services should not prevent the Department from embracing the central thrust of their proposal.

Conclusion

The Milkco/Hunter's minimum payment proposal should be denied. It is the Department's determination that the Hunter/Milkco proposal would not have solved the handler equity problem but instead would have created a host of additional problems.

Proponents would have us specify that certain services, are a handler's responsibilities and, therefore, should be at handler's expense. Thus, if a cooperative association were providing one of these services for a handler, the cooperative association would be required to bill the handler for this service. However, the Department cannot adopt order provisions without substantial record evidence. The record contains little evidence as to which specific services should be included and even that evidence is conflicting. Furthermore, neither proponents, nor any other participant, provided guidance in the record concerning the cost of these services, which, we suspect, vary considerably from organization to organization.

In addition, the Department is engaged in congresionally regulated order consolidation [4] in which greater uniformity in order provisions is a stated goal. The record in this proceeding demonstrates no basis why the minimum payments provisions should be different in just these three orders. Instead, it appears that the provisions should be based upon the same considerations, and should not differ from one order to another. This issue regarding minimum payments to producers should, therefore, be considered as part of the Federal order reform. Thus, for the reasons stated above, the record evidence of the public hearing and the comments and exceptions received in response to the partial recommended decision do not support adoption of the Milkco/Hunter proposal.

[4] The 1996 Farm Bill requires the Secretary of Agriculture to merge the existing 33 Federal milk orders (currently 31 orders) into no more than 14, and no less than 10, milk orders by April 1, 1999. A proposed rule was issued on January 23, 1998, and published in the **Federal Register** on January 30, 1998 (63 FR 4802). Interested parties had until April 30, 1998, to file comments. A discussion of minimum payments to producers is included in the proposed rule (63 FR 4942).

Material Issue #4—Definition of Producer

A proposal to modify the definition of producer for Federal milk orders 5, 7, and 46 should also be denied on the basis of the testimony and evidence received at the reopened hearing. Mid-America Dairymen, Inc. (Mid-Am), Carolina-Virginia Milk Producers Association (CVMPA), and Maryland-Virginia Milk Producers Association, proponents of the proposal, stated that the objective of the proposal is to further define producer qualification to minimize the pooling of milk not historically associated with these 3 southeastern markets.

A Brief Summary of Testimony and Briefs Resulting From the December 17–18, 1996 Hearing

A spokesman for the proponents offered testimony explaining that base-excess plans (included in each of the orders at the time of the reopened hearing, but terminated from each order effective January 1, 1997, as a result of the expiration of legislative authority to include such plans in Federal milk orders) have substantially removed the incentive for a dairy farmer who was associated with another market during the base-building months to become a producer under one of these orders during the base-paying months. He expressed concern that with the elimination of such plans, no provisions would exist to prevent a dairy farmer from pooling any milk diverted or delivered within limits to pool plants under the orders during the former base-paying months.

The witness stated that the proposed provisions for the orders will exclude from the producer definition, during the flush production months of February through May, any dairy farmer who delivered more than 40 percent of his or her milk to plants as other than ''producer milk'' during the months of August through November. The proposed provisions, according to the witness, are designed to restrict those producers not normally associated with such orders from pooling their milk during the flush production months when it is not needed to supply fluid needs if they have not pooled such milk during the prior short months when supplies were needed.

In addition, the spokesman stated that for the purpose of determining the percentage of a producer's milk that was pooled during the prior August through November period, deliveries to plants as producer milk under the orders should be considered deliveries under the applicable order. He testified that this

proviso is necessary to accommodate: (1) The historical shifting of producers between the orders; (2) the shifting of pool distributing plants; and (3) the shifting of producer milk due to the opening and closing of pool plants in the orders' area.

The witness also testified that the proposal, as found in the notice of hearing, should be modified to define the classification of the milk received and specify the pricing of the milk as classified in each of the orders. According to the spokesman, the changes to the order language would require the receiving handler to pay into the pool the difference between the Class I price and the Class III price.

Regarding the administrative costs associated with the relevant proposal, the witness contended that there should be no noticeable difference between costs associated with the producer qualification proposal and costs associated with the base-excess plan. In conclusion, the spokesman testified that the adoption of such proposal is necessary to foster orderly marketing in the area and protect producer pools of the southeastern orders involved in this proceeding.

A representative of CVMPA testified that CVMPA fully supports the producer qualification proposal to make sure that high Class I utilization markets in the Southeast do not carry surplus from other surrounding markets resulting in low Class I utilization rates during the flush months of production. He maintained that the proposal benefits producers, processors, and consumers by maintaining fluid supplies, while encouraging the survival of local producers.

A representative from Associated Milk Producers, Inc. (AMPI), Southern Region, a cooperative association representing over 2,500 dairy farmers in the South and Southwest, testified in opposition to Mid-Am's proposal to modify the producer definition of the orders. The witness also maintained that such proposal is not related to the issue of transportation credits, and should, therefore, not be included in the reopened hearing.

According to the spokesman, the current producer pooling requirements under Order 7 are more restrictive than the proposed producer qualification requirements; thus, the proposal actually constructs an additional layer of unnecessary pooling requirements. The witness claimed that no handlers are currently abusing the order by diverting the maximum amount allowable under the provisions of Order 7; otherwise, he argued, such a high percentage of Class I utilization would not be maintained.

AMPI's witness also testified that it is apparent that the proponents intend to replace the base-excess plans in the orders involved in this proceeding. However, such an alternative is not viable, he argued, because sufficient protection for local producers already exists. While acknowledging the existence of such ''dairy farmers for other market'' provisions in other Federal orders, the spokesman testified that the Southeast markets will not benefit from such a provision. If the proposal is nevertheless adopted, he said, AMPI recommends a modification to the proposal such that milk imported from outside the marketing area that is received at a fully or ly regulated plant during any month of the year must be allocated to Class I and the handler of origin must be compensated at the receiving plant's Class I price.

Another AMPI representative testified that administration of Mid-Am's proposal would create additional costs and place a more serious burden on the cooperative. According to the witness, additional time and resources would be necessary to adapt AMPI's procedures to the new provision, including greater technical and manual assistance.

A representative of Piedmont Milk Sales testified that Piedmont supports the concept that a producer must make his milk available to the Class I market when it is needed in the fall or short period in order to be allowed to pool his milk in the same market during the spring or flush months. He contended that such a limitation assures that the producer who receives the blend price enhanced by the Class I value in those markets has actually earned it.

A spokesman for Fleming Dairy, which operates pool distributing plants in Nashville, Tennessee, and Baker, Louisiana, testified in support of Mid-Am's proposal, but suggested that the producer qualification period should be July through November, rather than August through November.

Additionally, a representative of Barber Pure Milk Co., a pool plant operator in Birmingham, Alabama, and Dairy Fresh Corporation, a pool plant operator in Greensboro, Alabama, testified in support of Mid-Am's producer qualification proposal. He suggested that any milk which is delivered directly from the farm and is received at a pool plant should qualify as producer milk, but any milk which is diverted should not.

Select Milk Producers submitted a brief in opposition to the proposed changes in the producer definition. According to Select, a similar proposal was introduced during the Southeast merger proceedings and was subsequently denied due to the lack of justification for such a provision. Select's brief indicated that the pooling standards and diversion limitations provided in the orders give the market administrator enough flexibility to prevent distant milk from being associated with the markets; therefore, a ''dairy farmer for other markets'' provision is not needed in these orders.

A brief filed on behalf of AMPI argued that the ''dairy farmer for other markets'' proposal submitted by Mid-Am and CVMPA and heard at the reopened hearing was in violation of the rules of practice and procedure governing the proceedings of marketing agreements and orders. AMPI maintains that this proposal does not qualify as an issue related to transportation credits, and therefore, should not have been discussed at the reopened hearing. Additionally, AMPI argued that the hearing record lacks the necessary evidence that would support adoption of such proposal. While reiterating its opposition to the additional work associated with implementation of the proposal as testified to at the reopened hearing, AMPI's brief also opposed the notion that in Mid-Am and CVMPA's proposal determination of a producer's eligibility would not only be dependent upon the amount of milk pooled under the order in which the producer is seeking producer status, but also upon the volume of milk pooled by that producer for the subject months in all of the orders involved in this proceeding. According to AMPI, there is no justification or evidence which supports the proposed ''dairy farmer for other markets'' provision.

CVMPA, one of the proponents of the producer qualification proposal, filed a brief in support of its proposal reiterating the arguments presented during the reopened hearing. In its brief, CVMPA pointed out that its proposal would not create a barrier to entry into these markets as was testified to by a representative of AMPI. CVMPA argued that such a proposal would actually encourage milk to be pooled when local supplies are inadequate to meet Class I needs. While acknowledging that diversion limitations and producer touch-base provisions currently in effect under the subject orders do provide limited Class I utilization protection for the markets, CVMPA argued that these limitations are insufficient to protect producers who have pooled their milk during the fall months from being displaced by producers entering those markets during the spring flush months in order to take advantage of the high

Class I utilization percentages reflected in the high blend prices of these southeastern markets.

CVMPA also addressed the argument made by AMPI that the proposal would create an additional administrative burden for both the market administrators' offices and reporting handlers. According to CVMPA, no additional work would be created by the proposal, and the administration of the proposed provision would be easier than that associated with the former base-paying plans. CVMPA also expanded the proposal to allow a producer to qualify as a producer in the spring if his/her farm had not delivered Grade A milk from such farm during the previous August through November period. Furthermore, CVMPA stated that the producer's eligibility should be based upon the proportion of Grade A milk delivered from the farm in the previous fall in order to prevent a producer who is converting from Grade B to Grade A or a producer who lost his/her Grade A permit from being penalized.

A brief was also filed by Mid-Am in support of the proposal to modify the producer definition. In addition to reiterating the arguments testified to during the reopened hearing, Mid-Am's brief stated that the proposed producer qualification provisions are necessary to foster orderly marketing in the area and also to protect the producer pools of the orders involved in this proceeding. In its brief, Mid-Am also contends that the only opposition to the proposal testified to during the hearing was made by AMPI, which would be prevented from rotating their producers' milk in order to receive transportation credits. Mid-Am requests that the proposed provisions be implemented at the earliest possible date. No exceptions were received in response to the partial recommended decision.

Conclusion

The record of the reopened hearing does not clearly demonstrate the need to amend the producer definition of Orders 5, 7, and 46. Current safeguards exist to ensure that sufficient supplies of milk are made available for fluid use without the unwarranted pooling of additional supplies of milk that are not associated with serving the fluid market.

Proponents of this proposal believe that the termination of seasonal base plans will create disorderly marketing conditions in the 3 orders. However, the testimony and evidence received at the December 17–18, 1996, hearing do not sufficiently support this argument. According to the proponents, the termination of seasonal base plans, effective January 1, 1997, removes the incentive for producers to pool their milk during the short months when milk is needed in the Southeast because they will no longer receive the higher base prices for their milk during the following flush months. While it is feared by the proponents that the termination will open up the 3 Southeast markets to those producers not normally associated with such markets, but who seek to take advantage of the high Class I utilization rates, the record was unconvincing in its need for modification of the producer definition for this reason.

It is apparent that the proposal was initiated in response to the elimination of seasonal base plans in Federal milk orders. In other words, the proposed modification of the producer definition is intended to fill the void left by the removal of the base-excess plans. However, changing the producer definition should not be compared to the incorporation of base plans in the orders. Base plans are instituted in order to level out production throughout the year so that adequate milk supplies are ensured during the short production months, while discouraging surplus supplies in the flush production months. The base plans also did have the effect of preventing producers not normally associated with a market from entering such market during the flush production months because they would have received the low, excess price for their milk. Nevertheless, the removal of base plans does not by itself necessitate amending the orders.

The orders currently have strict pooling requirements. For example, as was testified to at the reopened hearing by AMPI's spokesman, the pooling requirements for Order 7 specify that a producer's milk must be received at least 4 days at a pool plant to be eligible to be pooled during the months of December through June. Additionally, there is a 50 percent diversion limitation in Order 7 to nonpool plants for those same months. The Carolina order has diversion limitations for cooperative associations during most months of 25 percent of the total quantity of producer milk. The order also maintains pooling requirements specifying how many days a month producer milk must be received at pool plants. The Louisville-Lexington-Evansville order specifies a diversion limitation based upon the number of days that a producer's milk is diverted during a month. The evidence in this proceeding is insufficient to conclude that the current pooling standards will not recognize the seasonally varying needs for milk for fluid use. The creation of additional producer pooling standards is unnecessary and unwarranted on the basis of the record herein and, therefore, the proposal should be denied.

To the extent that the suggested findings and conclusions filed by interested parties on either issue 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.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Determination

The findings and conclusions of this partial final decision do not require any changes in the regulatory provisions of the three respective orders regulating the handling of milk in the Carolina, Southeast, and Louisville-Lexington-Evansville marketing areas.

Termination Order

In view of the foregoing, it is hereby determined that the proceeding with respect to proposed amendments to the three specified marketing orders should be and is hereby terminated.

List of Subjects in 7 CFR Parts 1005, 1007, and 1046

Milk marketing orders.

The authority citation for 7 CFR Parts 1005, 1007, and 1046 of Title 7, chapter X continues to read as follows:

Authority: 7 U.S.C. 601–674.

Dated: July 16, 1998.

Michael V. Dunn,

Assistant Secretary, Marketing & Regulatory Programs.

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