

**BEFORE THE UNITED STATES DEPARTMENT
OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE**

In the Matter of :
: Docket Nos.
Milk In the Florida :
: AMS-DA-17-0068; AO-18-0008
Marketing Area :
:

POST-HEARING BRIEF FOR SOUTHEAST MILK, INC.;
DAIRY FARMERS OF AMERICA, INC.; PREMIER MILK, INC.;
LONE STAR MILK PRODUCERS, INC.; AND MARYLAND & VIRGINIA
MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.

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I. INTRODUCTION

This hearing was called on an expedited basis to address the proposal of five cooperative associations marketing milk in the Florida marketing order, 7 C.F.R. §1006 (“Order 6”).

Because of the extraordinary impact of hurricane Irma which battered Florida during September 2017 and caused extraordinary costs to be incurred in marketing farm milk produced for Order 6, the proponents seek temporary amendments to Order 6 to provide partial reimbursement for the extraordinary losses. The proponents wish to sincerely thank the Department for the speed with which this hearing has been called and the commitment to the process demonstrated by the co-presiding officers, USDA Judicial Officer Jensen and Chief Administrative Law Judge McCartney.

Hurricane Irma caused unprecedented interruptions in the normal marketing of milk under Order 6. The never-before-experienced simultaneous closure of all fluid milk processing plants in the state; the dumping of millions of pounds of unprocessed milk; and the resulting depressed pay prices to Order 6 supplying dairy farmers resulting from extraordinary marketing expenses led the proponents to request this hearing and the regulatory relief embodied in their proposal which would increase the minimum price for Class I milk under Order 6 less than one cent per gallon for a limited period of time to allow recovery of some of the losses inflicted by the hurricane.

The cooperative proponents have attempted to present a comprehensive and compelling case through the testimony of four witnesses and the introduction of 25 documentary exhibits for the relief they have requested. However, occasionally in proceedings of this nature the lack of testimony speaks as eloquently to the merits of the proposal as does the affirmative testimony. In

this case the lack of any opposition from any interested and impacted industry participants – those who would bear the costs of the price increases under the proposals – speaks quite clearly to the case for the expedited hurricane damage relief requested.

II. MARKETING IMPACTS OF HURRICANE IRMA, SEPTEMBER 6–15, 2017

The ‘facts on the ground’ during the unprecedented events of hurricane Irma are the critical predicate supporting the requested temporary order amendments. The nature and parameters of the relief requested in the amendments, which are discussed in detail below, are dictated by what occurred during the ten-day period of September 6 to 15, 2017, in Florida as described by the proponent cooperatives at the hearing.

Proponents are five Capper-Volstead cooperative associations whose dairy farmer members produce and market the overwhelming majority of the milk supplying consumers in Order 6. Southeast Milk, Inc. (SMI) is a Capper-Volstead cooperative with approximately 150 dairy farmer members located in six southeastern states. Approximately seventy (70%) percent of SMI’s milk production is on member farms in Florida. SMI members pooled approximately 73% of all producer milk pooled on Order 6 in September 2017. (Wooten Tr. 128¹) Premier Milk, Inc. is a dairy marketing cooperative with members in Florida and southern Georgia. (Pittman Tr. 168-69) It markets all member milk on Order 6. Dairy Farmers of America, Inc. (DFA) is a national dairy cooperative with more than 14,000 members. It markets milk to plants regulated under numerous federal orders, including Order 6. (Hollon Tr. 190, 201) Lone Star Milk Producers, Inc. is also a qualified Capper-Volstead cooperative which has more than 100

¹ References to the transcript of the hearing will be cited as “[witness name] Tr. [page #]”. Exhibits admitted into the hearing record will be referenced as “Exh [number]”.

producer members in several states and which markets milk on Order 6. (Sims Tr. 116) Maryland and Virginia Milk Producers Cooperative Association, Inc., is a qualified dairy cooperative association marketing on Order 6.²

A. The Hurricane Events

Hurricane Irma was the largest, most powerful hurricane ever recorded on the Atlantic Ocean. It wreaked havoc over the state of Florida when it made landfall in the second week of September 2017. Irma was more disruptive than past hurricanes which affected only portions of the state. Hurricane Irma disrupted the entire state. Nearly the entire peninsula of Florida saw at least 5 inches of rainfall, with some areas seeing as much as 11.75 inches of rainfall. The entire state was declared to be under a State of Emergency and local officials in south Florida issued mandatory evacuation orders. Three days after the hurricane hit Florida, September 13, more than one-third of the state's residents and businesses were still without power. (Wooten Tr. 134; Exhs. 18, 21-23)

The Florida Department of Agriculture estimated that agriculture losses from hurricane Irma exceeded \$2.5 billion. On Florida dairy farms, barns and milking parlors were damaged or destroyed, commodity sheds blown away, roofs blown off, fences torn down, and crop land and pastures flooded. In all, structural damage to dairy farms has been estimated to have been in the millions of dollars. (Wooten Tr. 136; Exh. 19)

Many dairy farms missed an entire day or more of milking due to power outages, dangerous wind speeds, and malfunctioning generators. Some dairies milked on generators for a

² The official list of plants and handlers including the proponent cooperative associations acting as handlers is published at http://www.fmmatlanta.com/Plant_List/flacurhandler.pdf. Official notice of that document is requested.

week or more. Because cooling systems were either without power or damaged, milk production fell well below normal levels due to heat stress. During the first 48 hours of the event, SMI south Florida farms lost 25% of their daily milk production as a result. The Florida Department of Agriculture and Consumer Services estimated the value of all lost production to be at least \$7.5 million. (Wooten Tr. 136; Exh. 19)

B. Irma's Impact on Milk Marketing in Florida

Historically, hurricanes in Florida have severely impacted a portion of the state, but left other portions of the peninsula less damaged. In those instances, a storm may have hit south Florida, but left the dairy industry in Central Florida able to continue to operate, thereby allowing dairy producers and their cooperatives to mitigate losses. Hurricane Irma, however, caused all fluid milk processing plants located in Florida to close from one to as many as 5 days. (Wooten Tr. 137; Exh. 24) The disruption in receiving at pool plants supplied by SMI is documented in Exh. 24, showing that 7 plants were closed 2 or more days; 4 plants, 3 or more days; and 3 plants, 4 or more days. DFA could only deliver 3 of 75 scheduled loads to Order 6 plants during the five-day period September 9 to 13. (Hollon Tr. 191, 199) The aggregate reduction in intake at Order 6 pool distributing plants is clearly depicted on hearing Exh. 9 prepared by the market administrator. (Duprey Tr. 22-23; Exh. 9) Deliveries to Order 6 pool distributing plants nearly ceased on September 10 when only 2 plants received any deliveries, an aggregate intake of less than 846,000 pounds, less than $\frac{1}{8}$ of average intake. (Duprey Tr. 22-23; Exh. 24) For the 10-day period of September 6 to September 15, Order 6 pool distributing plants received more than 22 million pounds less than for the succeeding 10-day period, September 16 to 25. (Exh. 24) The loss of 22 million pounds of milk sales to pool distributing plants caused huge financial losses in

the marketing of that milk production.

The unprecedented events of hurricane Irma presented a scenario which caused unprecedented losses to dairy farmers and their cooperatives supplying the Florida market. Hearing testimony from the proponents described in detail the various forms which the economic losses took. In summary, the milk which could not be delivered to the closed pool distributing plants was disposed of one of two ways: The milk was either: (1) dumped – at the farm or at another location – incurring a total loss of value; or (2) marketed to distant, alternative outlets at a significant economic loss due to additional transportation expenses, reduced location value, and/or a severely reduced sale price.

Four proponent witnesses testified to their cooperatives being forced to dump milk, primarily farm milk, but also skim milk from which the cream had been salvaged. (Wooten Tr. 139–140, 148–149; Exh. 25; Sims Tr. 104; Exh. 16; Pittman Tr. 171; Exh. 29; Hollon Tr. 195, 197) The market administrator reported 2,272,824 pounds of milk dumped at the farm during September. (Duprey Tr. 18; Exh. 6) SMI alone dumped nearly 2 million pounds of milk at the farm or at a transport staging location where tanker loads of milk were held as long as possible in hopes of having a market, but then dumped when no longer marketable. (Wooten Tr. 148–51; Exh. 25) Lone Star and DFA both reported the necessity of dumping one or more loads. (Sims Tr. 104; Exh. 16; Hollon Tr. 195, 197) A Premier farm could not be reached due to flooded roads and milk was dumped on the farm. In addition, Premier dumped more than 500,000 pounds of skim milk. (Pittman Tr. 171; Exh. 29)

Milk which would have supplied the Order 6 distributing plants and was not dumped was sold out of state to nonpool manufacturing outlets at severely discounted distress prices or, in

some cases, to other federal order plants at a substantially reduced location value and, in most cases, at significantly greater transportation expense than would have been incurred for delivery to an Order 6 pool plant. (Wooten Tr. 138, 152–153, 164–165; Exhs. 26-27; Sims Tr. 103–105; Exh. 16; Pittman Tr. 173–174; Exh. 29; Hollon Tr. 194–195) The losses on transactions of this nature were testified to by witnesses for four proponent cooperatives and financial detail was provided by witnesses for three cooperatives. (Wooten Tr. 160–161; Exhs. 26-27; Sims Tr. 103–105; Exh. 16; Pittman Tr. 172–174; Exh. 29; Hollon Tr. 194–195) The fact that there were location value losses on the out-of-state sales was clearly shown on Exhibit 7 prepared by the market administrator. (Duprey Tr. 19-21; Exh. 7) That exhibit shows that the Class I differential, i.e., the location value, at the nonpool plants to which Order 6 pool milk was delivered in September was in all cases \$1.80 to \$2.00 less than at the Order 6 plant locations. The distress sales to a nonpool manufacturing plant in Alabama incurred substantial transportation costs and were sold at a price \$7.00 or more less than the minimum federal order class price. (Wooten Tr. 160–161; Exh. 26; Sims Tr. 105; Exh. 16; Pittman Tr. 172–173; Exh. 29) SMI, the largest supplier to Order 6, described in detail how it was able to capture some value on milk by shipping it directly to Southeastern Cheese in Uniontown, Alabama. However, this milk which would have normally returned a Class I price in the Florida market now incurred substantial hauling expense and a distress sales price. (Wooten Tr. 160–164; Exh. 26)

III. LEGAL BASIS FOR THE PROPOSALS AND THE HEARING

A. Sufficiency of Hearing Notice

On December 7, 2017, a Notice of Hearing was placed on public inspection at the Federal Register, announcing this hearing to begin December 12. On the same date, a Supplemental

Notice of Hearing was signed by the Acting Administrator, Agricultural Marketing Service, and placed on public inspection. Both the notice and supplemental notice were published in the Federal Register December 11, 2017, 82 Fed. Reg. 58135-58137. See Hearing Exh. 1. The hearing was convened on December 12, 2017, as provided in the notice and supplemental notice. The hearing continued through noon December 14, 2017, at which time the record was closed. (Tr. 226) All parties appearing on each hearing day were given an opportunity to present testimony and be heard. The hearing, thus, was held fully in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. §553(d)(3); the Agricultural Marketing Agreement Act, 7 U.S.C. §608c(3), §608c(17); and the Department's own Rules of Practice and Procedure Governing Proceedings to Formulate Marketing Agreements and Marketing Orders, 7 C.F.R. §900.4 (requiring that an order amendment hearing be held no less than 3 days after publication of the notice in the Federal Register).

B. Authority for the Proposal

The Agricultural Marketing Agreement Act (AMAA), 7 U.S.C. §601, *et seq.*, provides clear authority for the adoption of Proposal Number 1. 7 U.S.C. §608c(5)(J) indicates that provisions

for milk marketing Orders are authorized where:

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but not limited to -

- (i) providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;
- (ii) handling on specific days quantities of milk that exceed the quantities needed by handlers; and
- (iii) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

Proposal 1 plainly falls within the authorization of this section of the AMAA. As the testimony demonstrates, the funds requested will be paid to qualifying handlers from “the total sums payable by all handlers for milk . . . before computing uniform prices” for “dispos[ing] of milk supplies in excess of quantities needed by handlers,” “handling on specific days quantities of milk that exceed the quantities needed by handlers,” and “transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.” While the specific payments requested here vary somewhat from those authorized by the 2004 amendments to this order (which addressed the marketing losses from the 2003 hurricanes), there should not be any question that they are payments for marketwide services contemplated in 7 U.S.C. §608c(5)(J).

C. Authority for Emergency Action

The Administrative Procedure Act (APA) provides for expedited decisions in on-the-record rulemaking proceedings pursuant to 5 U.S.C §557(b)(2). It authorizes omission of a recommended decision when justified: “[T]his procedure [a recommended decision] may be omitted in a case in which the agency finds on the record that due and timely execution of its

functions imperatively and unavoidably so requires.” This APA provision is also codified in the Department’s rules of practice for federal milk order proceedings at 7 C.F.R. §900.12(d) as follows:

(d) Omission of recommended decision. The procedure provided in this section may be omitted only if the Secretary finds on the basis of the record that due and timely execution of his functions imperatively and unavoidably requires such omission.

Proponents are requesting that the Department invoke these provisions and omit a recommended decision in this proceeding. Support for expedited action was provided by all proponent witnesses (Sims Tr. 113-115; Wooten Tr. 141; Pittman Tr. 172, 179; Hollon Tr. 197) and there was no opposition at the hearing to expedited action being taken.

IV. THE PROPOSALS AND THEIR OPERATION

A. Summary and Overview of the Proposals

The nature of the marketing losses, as described earlier, involve the extraordinary costs of marketing for the best possible return the more than 20 million pounds of deliveries not made to pool distributing plants because of plant closures and interrupted operations during the 10 days of September 6 to September 15, 2017. The proposed order amendments to address these losses involve modification to 7 C.F.R. §1006.60, “Handler’s Value of Milk.” The proposed amendments effectively update, revise, and expand language already existing in the order which provided for reimbursement of certain milk marketing losses that occurred during the hurricane emergency in 2003.

The proposed provisions direct the market administrator of the Florida Order to establish for the 2017 hurricane events a process by which handlers are reimbursed for order-defined marketing losses directly attributable to extraordinary, hurricane-necessitated milk movements

and milk dispositions during September 6 – 15, 2017. These special, short term hurricane cost reimbursements are proposed to be funded through a temporary increase of \$0.09 per hundredweight in the minimum Class I price announced under the Order. Under the proposal, once all the extraordinary costs as defined in the Order language are paid, the increase in the Class I price is eliminated.

B. Costs for Which Reimbursement is Proposed

The extraordinary milk marketing costs experienced by handlers of milk for which the proponents seek reimbursement during hurricane Irma fall into four general categories: (1) extra transportation costs; (2) revenue lost due to the location price applicable at plants to which rerouted milk was delivered, as opposed to the location price applicable at the Florida Order plants to which it would have been delivered; (3) lost value of milk which could not be marketed and had to be dumped under three scenarios: either at the farm, at an off-farm assembly location, or after cream was skimmed and salvaged; and (4) revenue losses due to distress sales to unregulated manufacturing plants at less than the minimum class price at which the handler accounted to the pool. (Sims Tr. 104–105)

The amendatory language which proponents request is set out on hearing Exh. 14 and was explained in detail by Mr. Sims. (Sims Tr. 45–65) This language involves a few clarifying modifications to the language in proposal number 1 in the Notice of Hearing. The limited modifications are requested in order to make the proposed reimbursements fit with the actual milk movements and dispositions, and to adapt the proposal to take into account the regulatory impact of the Order 6 diversion limitations which limited the pricing and pooling of some milk on Order 6.

1. Extraordinary Transportation Costs

Proposed §1006.60 (g)(1) provides the proposed reimbursement for extraordinary transportation costs on milk moved during the hurricane Irma emergency. Proponents offered three modifications to the noticed language for this provision which are: (1) the insertion of the word “additional” between the first and second words of the subsection; (2) deletion of the word “producer” in the only place it appears; and, (3) insertion of the phrase “and the additional cost of transportation on loads of milk moved and then dumped” at the end of the introductory sentence.

The proposed language is thus modified to read:

(g) (1) The additional cost of transportation on loads of milk rerouted from pool distributing plants to plants outside the state of Florida which were rerouted as a result of hurricane Irma, and the additional cost of transportation on loads of milk moved and then dumped. The reimbursement of transportation costs pursuant to this section shall be the actual demonstrated cost of such transportation of bulk milk or the miles of transportation on such loads of bulk milk multiplied by \$3.75 per loaded mile, whichever is less.

The intent of proposed (g)(1) is to reimburse handlers who incurred **extra** costs of hauling milk during the hurricane period when milk had to be delivered to plants located outside the state of Florida, or moved from farms, or from milk plants, and then dumped. The insertion of the word “additional” makes clear that the proponents are requesting reimbursement only when their total cost of moving milk during hurricane Irma exceeded what the handler would have paid or incurred in hauling costs had there been no hurricane disrupting the normal flow of milk. (Sims Tr. 55–59)

After reviewing the data on milk movements, proponents realized that some milk was delivered to pool plants fully regulated on other orders. (Sims Tr. 57–58) Much of this milk

delivered to other pool plants was pooled as producer milk on the other orders and, consequently, under the language in the hearing notice which limited reimbursable volumes to “producer” milk, volumes pooled on other orders would have been excluded from receiving reimbursement for additional transportation because the milk was not producer milk on Order 6. Order 6, like all federal orders, limits the pooling of diversions to nonpool plants based on volumes delivered to pool plants. (Duprey Tr. 34-35; Sims Tr. 57–58; Hollon Tr. 198) As a result, in September due to reduced deliveries of milk to Order 6 pool distributing plants, since all of the Order 6 plants were closed at some point during the hurricane emergency, allowable diversions to nonpool plants were reduced, and handlers were unable to pool on Order 6, all the milk which was involuntarily diverted off to other destinations. (Sims Tr. 57-58; Hollon Tr. 198) To recognize these transactions, the deletion of the word “producer” in the requested amendment language makes clear that milk which would have been pooled on Order 6 but was rerouted to other order plants outside of Florida solely because of the hurricane emergency can be eligible for additional hauling cost reimbursement, even if the milk was not producer milk on the Florida Order in September.

Further review of the hurricane-induced milk movements also revealed that, in addition to milk being dumped at the farm, there were other milk movements which lead to milk being dumped at a total loss. There were, for instance, substantial volumes of milk picked up at farms, moved to an assembly point or staging location and then dumped. (Wooten Tr. 151; Exh. 25) Also, there was farm milk delivered to plants where the cream was skimmed and then the skim milk was dumped. (Pittman Tr. 171; Exh. 29) To recognize any extraordinary hauling costs in these transactions, the inclusion of the final phrase in the opening sentence of the proposed

amendatory language makes clear that any additional hauling costs associated with the eventual dumping of milk are eligible for transportation cost reimbursement.

The (g)(1) language directs the market administrator to use each handler's actual costs of transportation when determining the additional cost of transportation, if any, for reimbursement. In many transactions, contract haulers were used so that the cost of hauling is readily determined from an invoice or transaction-billed document. In some cases, however, the handler used its own equipment for the milk hauling and directly incurred the expense of the additional hauling. In those cases, the handler's actual internal costs would be documented to the market administrator's satisfaction where reimbursement is claimed. In all case, an upper limit of \$3.75 per loaded mile is imposed. Based on the proponents' industry knowledge, \$3.75 per loaded mile should provide a reasonable limit to the cost of transportation which could be reimbursed. (Sims Tr. 58–59)

Mr. Duprey estimated the possible additional hauling costs to be over \$97,000 using the language in the hearing notice and farm to plant mileages. (Duprey Tr. 25-27; Exh. 11) The eligible claims under the proposal, as amended, could ultimately be greater or less than this total by (1) adding volumes of milk which became pooled on Orders 5 or 7, but (2) reducing the claims by any netting of hauling cost savings where applicable. (Sims Tr. 57, 60; Exh. 16)

2. Lost Location Value

Proposed §1006.60 (g)(2) provides for recovery of lost location value on milk sales during the hurricane distress period. As the plants located in Florida closed or slowed their milk receiving in anticipation of the hurricane, their suppliers were required to seek alternate plant outlets for milk outside the state. (Sims Tr. 59–60; Hollon Tr. 192) Any plant outside of the

state of Florida has an effective Class I differential which is less than the Class I differential applicable to any of the plants within Florida. (Sims Tr. 59–60; Duprey Tr. 19–21; Exh. 7) Consequently, handlers delivering to plants located outside of Florida experienced a loss in revenue in comparison to a delivery to a plant located within Florida, whether the outside plants were fully regulated on another Order, or were unregulated. These location value reductions represent a significant loss to the handlers of milk making such dispositions. (Sims Tr. 60; Exh. 16; Hollon Tr. 194; Wooten Tr. 152–153; Exh. 27; Pittman Tr. 173; Exh. 29)

For purposes of computing the location value loss on milk delivered to plants located outside of Florida, proponents support using the Order 6 Class I differential applicable at the plant to which the milk would have been delivered but for the hurricane, as that differential is provided under §1006.52, and as adjusted by the rates provided in §1006.51(b). The Order 6 Class I differential so computed would be compared to the Class I differential as provided under §1005.52, and as adjusted by the rates provided in §1005.51(b) for deliveries to plants located inside the Appalachian Federal Order marketing area; would be compared to the Class I differential as provided under §1007.52, and as adjusted by the rates provided in §1007.51(b) for deliveries to plants located inside the Southeast Federal Order marketing area; and would be compared to the Class I differential as provided under §1006.52, for deliveries to plants located outside either the Appalachian or the Southeast Federal Order marketing areas.

There is one proposed modification to the noticed language in subsection (g)(2) which is the deletion of the word “producer”. (Sims Tr. 59) As in subsection (g)(1), this modification makes clear that losses on milk rerouted to plants outside of Florida are eligible for location loss reimbursement, even if the milk was pooled on another Order.

We would also note that upon review of the marketing data, it became apparent that some marketers of milk did not experience increases in the cost of hauling, but did experience location value losses. It is the intent of the proponents that in such a case, the market administrator would offset any losses in location value by any realized savings on transportation costs. (Sims Tr. 60–61; Exh. 16) The result of this netting-out of losses and savings would be that on a load-by-load basis, the market administrator should ascertain whether there was a hauling cost increase, a location loss, or both, or neither. If a handler on a load experienced a gain or savings under one of these two cost reimbursement categories, the losses on one should be reduced by the gain on the other. This avoids any unwarranted payments which could be considered, in effect, double dipping. (Sims Tr. 60–61)

Mr. Duprey estimated the location value losses at more than \$73,000. (Exh. 11) The ultimate claims under the proposal as modified could differ from this by (1) adding milk pooled on Orders 5 and 7; and (2) offsetting any hauling cost savings. (Sims Tr. 60–61; Exh 16)

3. Lost Value of Dumped Milk

The third type of losses which occurred during hurricane Irma was dumped milk. Witnesses described in detail the conditions which led to milk having to be dumped. (Wooten Tr. 148– 151; Exh. 25; Sims Tr. 61–62, 104; Exh. 16; Pittman Tr. 171; Exh. 29; Hollon Tr. 195, 197) Since dumping milk involves a total loss of value, it is, on a per hundredweight basis, the most costly of the items proposed to be reimbursed. Three types of dumped milk dispositions are eligible for reimbursement under proposal number 1. These are described respectively in subsections (g)(3), (g)(4), and (g)(5), of the proposed amendatory language in the Notice of Hearing.

Dumped milk which is pooled on a handler's Report of Receipts and Utilization is classified in the lowest price class for the month which in September 2017 was Class IV. Dumped milk which is pooled would be accounted for to the pool at the Class IV skim milk and butterfat prices, and the handler pooling the milk would receive payment from the producer-settlement fund at the difference between the announced uniform skim milk and butterfat prices and the Class IV skim milk and butterfat prices, on the respective pounds of each component dumped. However, dumped milk is by definition milk which was not sold in commercial channels, and therefore handlers having to dump milk lost the Class IV value of all of the skim milk and/or butterfat they had to dump. Dumping milk is always a last resort disposition of milk, and proponents seek reimbursement for these losses in milk which had to be dumped due to hurricane Irma.³ Additional transportation costs associated with dumped milk, if incurred, would be reimbursable as provided in (g)(1), as previously discussed.

Mr. Duprey estimated possible claims for dumped milk losses to be about \$395,000. (Exh. 11) This approximates the values documented by Ms. Wooten, Exh. 25, Mr. Pittman, Exh 29, Mr. Sims, Exh. 16, and the testimony of one dumped load noted by Mr. Hollon, Tr. 197.

4. Distressed Milk Sale Losses

The final marketing cost which is proposed to be reimbursable as an extraordinary marketing cost caused by hurricane Irma is revenue lost when milk was sold to unregulated manufacturing plants at less than the announced Class price. Reimbursement for these losses is

³ As an after effect of the hurricane, a handler or handlers have discovered that they dumped loads of milk which did not at the time get included on their September 2017 Report of Receipts and Utilization. We ask the market administrator's indulgence in allowing such handlers to revise their Report of Receipts and Utilization so that these handlers can receive settlement with the Order 6 pool.

provided in §1006.60 (g)(6). Unlike Federal Order-regulated pool plants which must pay the minimum Order announced class and uniform prices, unregulated plants are free to pay whatever the market will bear. Consequently, as profit-maximizing businesses, unregulated plants strive to pay as little as the market will bear. In times of extreme shortages of available processing capacity, such as during a hurricane, handlers desperate for a place to sell their milk can be forced to accept a very deeply discounted price for distressed milk. These price discounts on milk sold to unregulated manufacturing plants during hurricane Irma were substantial, and represent a major portion of the marketing losses experienced by handlers during hurricane Irma.

Proponents offer two modifications to the noticed language in (g)(6) regarding compensation for distress sale losses. Those modifications are: (1) replace the word “lowest” with the word “announced”, and (2) insert the phrase “applicable to the milk as classified by the market administrator” after the words “class price”. The proposed (g)(6) language is now proposed to read:

(6) The difference between the announced class price applicable to the milk as classified by the market administrator for the month of September 2017 and the actual price received for distress milk moved to nonpool plants as a result of hurricane Irma;

The purpose of this modification is to direct the market administrator to calculate losses on distressed sales of milk to unregulated plants at the true classification of the milk, rather than in essence presuming that all milk sold at distressed prices was in the lowest use class. It should be noted that the (g)(6) language as noticed does not include any requirement that the costs for potential reimbursement be limited to producer milk, as defined under the Order. Thus, the modifications deleting the word producer for sections (g)(1) and (g)(2) harmonizes those provisions with the noticed language in (g)(6).

Mr. Duprey estimated the potential claims for distress milk losses at \$80,000 (\$5/cwt under class) to \$160,000 (\$10/cwt under class). The proponents' documented losses of this nature approach \$130,000⁴ with sales prices at between \$7 and \$8 per hundredweight under class. (Exhs. 16; 26; 29)

C. Creation and Administration of the Funds for Cost Reimbursement

Proponents request that the Order's current §1006.60(a) be amended to provide the authority for raising and administering the funds for the cost reimbursements. This section of the order currently contains language which is a vestige of the 2003-04 hurricane hearing provisions. This language needs to be revised for hurricane Irma first by updating the months during which the temporary increase in Class I prices is to be effective, presumably some range of sequential months in calendar year 2018. Proponents are not offering any modifications to this section of the proposal as published in the Notice of Hearing. We would note, however, that the blank regarding the adjustment to the butterfat price should be filled in with the value \$0.0009 per pound. (Sims Tr. 49) The precise beginning and ending months of the temporary increase in Class I prices have been left blank to be determined in the course of administration of the proposal.

The funds are proposed to be raised through an increase in the Class I price. The rate of increase in the Class I price is proposed to be limited to \$0.09 per hundredweight per month, the same amount as applied in 2004. An increase in the minimum Class I price of \$0.09 per hundredweight represents less than \$0.01 per gallon on finished Class I products. The \$0.09 per hundredweight monthly limit is applied in the form of a \$0.09 per hundredweight increase in the

⁴ This total does not include any estimate for DFA.

Order's announced Class I skim milk price, and an increase of \$0.0009 per pound to the announced Class I butterfat price. Further, as was done in 2004, we would request that the market administrator show a separate line item on the monthly Announcement of Advanced Class Prices and monthly Announcement of Class Prices detailing the exact amount of the monthly hurricane add-on to the Class I skim milk and butterfat prices.

The potential number of months for which the price increase would be applicable can be evaluated on the basis of hearing exhibits 11 and 12 presented by Mr. Duprey, which provide an estimated range of impact (Exh. 11) and likely amounts raised per month on the basis of anticipated Class I sales volume with a range of per hundredweight price enhancements. Mr. Sims estimated that a six or seven month period could be likely. (Sims Tr. 75) That would allow for the raising of up to \$1 million or more dollars, depending on Class I sales. The testimony presented by the three proponent witnesses at the hearing which quantified on a preliminary basis certain of their compensable losses under the proposals, with the addition of the \$150,000 estimated DFA losses testified to by Mr. Hollon, would indicate that a six to seven month time period should be sufficient.⁵

The proposed Order language leaves room for the market administrator to balance the amount of funds available for payment of hurricane costs with the actual final amount of those costs. Proponents have every confidence that the market administrator will attempt to collect funds under the temporary Class I price increase as nearly equal to the total reimbursable costs as possible. However, there exists a real possibility that despite the best efforts for forecast

⁵ Losses compensable under the proposal may have been suffered by handlers not testifying at the hearing. Proponents have no way of estimating any such losses or claims, except to note that we believe the proponents represent in the aggregate at least 90% of the producer milk on the order.

revenues and costs, differences in the end may exist, and the proposed Order language gives the market administrator the tools necessary to balance any remaining differences. It is the intent of the proponents that there be no blend price enhancement from the increases in the Class I price. Thus, the market administrators should set the final month's rate so that there are no funds unclaimed. As Mr. Sims testified for the proponents, we would prefer to leave a few dollars "on the table" rather than generate more funds than are needed. (Sims Tr. 52-54, 84) However, if there are any unclaimed funds, they should be returned pro-rata to the handlers who paid in the funds.

Importantly, all reimbursement requires proof satisfactory to the market administrator. For all types of costs and losses, reimbursement is contingent upon the market administrator being satisfied that the cost incurred was necessitated by the hurricane and allowed by the regulation. It is up to the handler to provide information to the Market Administrator's satisfaction that the qualifying criteria have been met. We would expect the Market Administrator's office to draw upon its institutional knowledge base to corroborate, or disqualify, claims presented. (Sims Tr. 69) The party entitled to reimbursement is the handler who incurred the extraordinary costs. We believe that in the overwhelming proportion of cases this is the supplying cooperatives; but the proposal makes clear that any handler with qualifying expenses is entitled to reimbursement.

D. Prudential Considerations

In taking any extraordinary regulatory action, the Secretary is necessarily always careful to be confident that the action is necessary and that it does not open loopholes for misuse or allow unjust enrichment and does not unduly impact small businesses. These criteria are clearly

met with the proposals before the Secretary.

1. Avoidance of Abuse and Unmerited Reimbursement.

Proponents have shaped their proposal to avoid any possibility of unjust enrichment. For instance, they have emphasized that hauling savings offset any reimbursement of unusual hauling expenses incurred or price losses incurred. Also, if any transactions for which reimbursement is sought had captured transportation credits or a higher blend price under Orders 5 or 7 those benefits should be offset against any recovery otherwise applicable. Also, hauling expense recovered must be at the lower of actual cost incurred or the \$3.75 per loaded mile maximum rate. All of these protections are in the interest of making certain that the payment reimbursements are justified.

2. Necessity of Regulatory Relief

The question may be asked: Can these costs not be more readily recouped through commercial transactions in the marketplace, rather than through government action with amendments to the Order? As Mr. Sims testified, there are “real limitations to the effectiveness of [over-order charges] for generating funds” for the use required for the purposes of this hearing. (Sims Tr. 67-69) Among the challenges are assuring - outside of a regulatory system - that all Class I users were paying the additional charge and treated uniformly. Furthermore, “on the flip side there is no real process available in this market for . . . re-pooling those reimbursable costs.” (Sims Tr. 68) Finally, the industry has no arbiter with the ability and assured integrity of the market administrator to administer a private surcharge and re-pooling program which requires defining and verifying reimbursable expenses so that they are “reimbursed equally and equitably across the industry.” (Sims Tr. 69) All things considered, regulatory relief, as proposed, is the

only practicable relief available.⁶

3. Impact on Small Businesses

Without question, the financial losses inflicted by hurricane Irma had a serious impact on all small business dairy farmers supplying the Florida market. The relief requested will, by the same token, be very important to those members of the proponent cooperatives. At the same time, the proposed temporary amendments are unopposed and there is nothing in the hearing record to suggest the adoption of the proposals could have any negative impact, or place any undue regulatory burden on small businesses. Consideration of the interests of small businesses weighs in favor of adoption of the proposals.

4. Less Than Full Compensation

Finally, it cannot be emphasized enough that the reimbursements under this proposal do not come close to making the proponent cooperatives or their large or small dairy farmer members whole for milk marketing revenue losses from the hurricane. The dairy farmers supplying the Florida order lost, we estimate, approximately 8 million pounds of Class I sales in the month of September because Florida consumers, as well as schools and other institutions, could not buy and/or did not buy milk during the hurricane events. Class I sales under Order 6 – comparing September 2017 with September 2016 -- were down nearly 10 million pounds. Even assuming a consumption decline from year to year, the loss in value to the Florida pool at the weighted average differential of \$5.57 testified to by Mr. Duprey (Tr. 25-26, 38-39; Exh. 11)

⁶ The record establishes that there is no commercial insurance contract available – of the type which may have covered storm damage to buildings, for instance – which the cooperatives or dairy farmers could have employed to protect against these losses. (Hollon Tr. 209)

would be more than \$500,000,⁷ a dead weight loss to Florida dairy farmers beyond all recoveries requested in this hearing.

V. CONCLUSION

The proponents are quite aware that while the relief requested in this hearing is not unprecedented, it is not an everyday federal order provision. For that reason, we have tried to underscore the extent to which the proposals have been limited and circumscribed to make certain that no overreaching is involved.

Hurricane Irma caused unprecedented havoc in the Florida dairy industry. The proposal in this hearing will allow for reimbursement of a discrete segment of expenses incurred by the suppliers of raw milk for the benefit of the Florida consuming public. The reimbursement of these extraordinary expenses can be accomplished promptly, fairly, and efficiently by temporarily amending Order 6 to minimally increase the Class I price for several months and utilize the revenues so-generated to directly reimburse cooperatives (and any other eligible handlers) and their producers for the extraordinary expenses which they can document to the Market Administrator.

Proposal 1 is limited, short-term, unopposed, greatly needed and should be promptly adopted.

⁷ Using the prices on Exh. 10, the Class I price at Orlando, with its \$5.40 differential was \$22.11 in September. Therefore, the average price for Class I sales for the month would have been \$22.28, applying the average \$5.57 differential. For September, the Class IV price was \$15.86, a difference of \$6.42 per hundredweight which means a loss of \$513,600 in Class I differential value, assuming an estimated 8,000,000 pounds of lost Class I sales.

The members of the proponent cooperatives express their deep appreciation to the Department for expediting this hearing process and request that Proposal 1 be implemented on an expedited basis.

Respectfully submitted,



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