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May 19, 2005

VIA FEDERAL EXPRESS

Ms. Joyce Dawson
Hearing Clerk
United States Department of Agriculture
Room 1081
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: **Milk in the Mideast Marketing Area; Docket No. AO-166-A72; DA-05-01**

Dear Ms. Dawson:

Please find enclosed four copies of Dean Foods Company's Order 33 Reply Brief in the above-referenced matter.

If you have any questions regarding this submission, please do not hesitate to contact this office.

Respectfully submitted,

Charles M. English, Jr.

CME/dec
Enclosures

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:

MILK IN THE MIDEAST MARKETING AREA	)	**DOCKET NO. AO-166-A72; DA-05-01**

REPLY BRIEF

SUBMITTED BY

DEAN FOODS COMPANY

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Attorneys for Dean Foods Company

May 19, 2005

For its Reply to principal briefs filed in this proceeding, Dean Foods respectfully says the following:

A. ***Allegations of Ex Parte Communications Are Unfounded***

Realizing that there is a derth of evidence favoring their substantive positions, the opponents named in footnote 1 of the "Request for Supplementation of the Public Record of Proceedings by Disclosure of *Ex Parte* Communications" filed by attorney John H. Vetne on April 6, 2005 have apparently taken to the theory that if they sling enough cow manure, something will stick. Throughout these pooling proceedings their arguments have not been directed at solutions, but rather have been focused on all the ways in which they can slow down, end or doom the pending rulemakings already underway including this one.[1] The latest inchoate allegations of *ex parte* communications also fit this mold. If the allegations bear out, which is a difficult proposition to envision since no evidence has been presented to establish that USDA officials were in fact in the room when the alleged communications took place, the opponents are demanding that the Department track down the details and circumstances of these communications and place them on the record.[2] The result of complying with this demand would be delay.

Moreover, it is precisely because the opponents' allegations are inchoate, as described in Dean's principal brief, that the Department must conclude that they are made in furtherance of a

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[1] In its principal brief in this proceeding some of the opponents, White Eagle et al., argued for termination of the proceeding and going back to ground zero by urging the Department to do so because parties who did not submit proposals did not get to have advance discussions with the Department. In addition, various subgroups of the opponents have on numerous occasions throughout these open proceedings urged that the Department to abandon the individual proceedings in favor of starting completely anew under a national hearing. All such requests would result in delay.

[2] While an agency may require a party "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected," the legislative history suggests that this remedy was intended to be invoked only rarely. *PATCO v. FLRA*, 685 F.2d 547, 564 (D.C. Cir. 1982). At a later date, the proceeding might be subject to judicial review and depending on the nature of the communications, they might serve as a basis to void the proceeding, but it certainly would not necessarily follow. *Id.* It is in a very limited circumstance where an *ex parte* communication serves as a basis to void a proceeding. *Id.*

delay tactic and nothing more. If the opponents wanted these allegations to be taken seriously, they necessarily would have to provide evidence, as opposed to conclusory and unsupported allegations, that USDA officials were actually in the room when such communications were made. Thus, it is apparent that the opponents' inchoate allegations are just another attempt to slow down the decision-making process, which notably would give them time to bilk more dollars out of their pool riding and depooling practices.

Beyond the apparent motivations, the Department must also conclude that the allegations of *ex parte* communications are not sustainable under the existing precedent relating to *ex parte* communications. As the Department knows, section 900.16 of the Department's General Regulations was amended in 1977 to implement to the *ex parte* provisions of the Government in the Sunshine amendments to the Administrative Procedure Act (hereafter, APA). (42 Fed. Reg. 10833 (Feb 24 1977). Thus, a review of case law interpreting the APA prohibition *against ex parte* communications as well as the legislative history of the APA is instructive.

The provision for the disclosure of *ex par*te communications serves two distinct interests:

> Disclosure is important in its own right to prevent the appearance of impropriety from **secret communications** in a proceeding that is required to be decided on the record.[3] Disclosure is also important as an instrument of fair decisionmaking; only if a party knows the arguments presented to a decisionmaker can the party respond effectively and ensure that its position is fairly considered. When these interests of openness and opportunity for response are threatened by an *ex parte* communication, the communication must be disclosed.

PATCO v. FLRA, 685 F.2d 547, 563 (D.C. Cir. 1982) (followed by numerous cases including *Electric Power Supply Assoc. v. FERC*, 391 F.3d 1255, 1258 (D.C. Cir. 2004)) (emphasis and footnote added). At its core, therefore, the disclosure requirement is important where

[3] There is also an argument that this proceeding is not subject to the APA rule against *ex parte* communications because it is not a proceeding that Congress has directed to be "on the record." *See Marketing Assistance Program v. Bergland*, 562 F.2d 1305, 1309 (D.C. Cir. 1977).

communications are **made in secret** and where communications involve arguments of which other interested parties are not already on **notice**.[4] Where these interests are not compromised, the precedent is clear, the Agency is under no obligation to delay open proceedings in order to track down and place communications on the record. *PATCO,* 685 F.2d at 563-64.

Importantly, none of the communications alluded to in the opponents' allegations involve secrecy or information/arguments that are not already in the record. First, the presentations specifically cited by the opponents as potentially problematic – including the speech by Gary Hanman at the Dairylea meeting– were made in meetings that were open to all walks of the dairy industry. Thus, any suggestion of secrecy, especially given the fact that members of the trade press are always in attendance at these meetings, is erroneous. Because of the public nature of these statements, even if it were the case that something was said in those speeches that was different or additional to information already in the hearing record, it would not follow that the interested parties would be surprised and unable to respond. But, more importantly, there still remains no evidence that USDA personnel did not do as they generally do as a matter of course and excuse themselves from the room when hearing issues were being discussed. Still further, and not insignificantly, a review of the transcript of the speech by Mr. Hanman reveals what the common sense person knows about these types of publicly attended meetings – nothing was said that had not already been presented to the hearing officer through testimony and briefing. These presentations were clearly just a statement of the positions being taken by the speaker's respective companies, nothing more. As such, it simply cannot be said that the communications alleged somehow could have an impact on the open proceedings.

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[4] Indeed, Congress made clear in legislative history that disclosure is the antidote to secret communications stating "[i]n this way the secret nature of the contact is effectively nullified." Government in the Sunshine Act, P.L. 94-409, 1976 U.S.C.A.A.N. (Leg. History) 2203.

communications would affect any open proceedings and thus a further delay of the decisionmaking process for the purpose of searching and disclosing the details and circumstances of such communications is unnecessary. The Department need not and should not give in to the opponents' obvious and continued delay tactics.

B. ***The Dispute over Evidence is a Red Herring***

Opponents to Proposal 2 correctly point out that proponents of change bear a burden of showing that there is disorderly marketing. As summarized below, proponents have done just that. But opponents then unconvincingly attempt to take the evidentiary issue to a different level – arguing that a proponent must put all of its confidential information in the record or automatically lose on the evidence. There is no such rule of law. One can draw inferences or put in one's own positive evidence when a party properly (and for decades this has been the rule) withholds its confidential business information. Indeed this same information would as it happens be exempt from disclosure under the Freedom of Information Act.

Where opponents fail is when they draw illogical conclusions from their concocted perception of the world. For instance, they point to a confidential business agreement between Dean Foods and Dairy Farmers of America and conclude that as a result no one has access to the market in general or access to Dean Foods' plants.[5] But the record evidence contradicts this conclusion. First, there are over 3,000 independent[6] dairy farmers in this market (one of the largest markets of independent dairy farmers). Tr. 614 [Uther]. Many of these **independent** dairy farmers deliver milk to Dean Foods through Dairy Marketing Services. Tr. 317 and 330

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[5] To the contrary, Dean Foods purchases high quality milk, delivered on a consistent basis at competitive prices. Perhaps the opponents' complaint is that they do not meet these obviously business based criteria.

[6] This term as used by the industry and by the Secretary refers to any producer that does not have a marketing agreement with a qualified Capper-Volstead cooperative.

[Gallagher]. But they are independent. Perhaps the word "independent" is confusing to opponents when they assert that this market is dominated by Dairy Farmers of America and DMS. Webster's New Dictionary (1984 edition) defines (first definition) "independent": "free from the influence, control or determination of another or others; specif., a) free from the rule of another; controlling or governing oneself; self-governing; b) free from influence, persuasion, or bias; objective . . ." These independent dairy farmers serve, in addition to Dean Foods, other fluid milk processors in the Mideast order, including, but not limited to, Smith Dairy Products and its subsidiary Wayne Dairy Products (Tr. 873-874 [Steiner] and Tr. 1044 [Baer]) and Superior Dairy (Tr. 1096 [Soehnlen]).

Notwithstanding the Dean Foods/DFA agreement, Dean Foods receives milk from multiple suppliers (in addition to the independent dairy farmers discussed above) – Foremost (Tr. 633 and 645-647 [Weis], Michigan Milk Producers (Tr. 584-685 [Rasch]) (according to Mr. Rasch, Michigan Milk Producers provides 45-50 million pounds per month to Dean Foods), DFA and DMS (Tr. 317 and 330 [Gallagher]. The Secretary can and should conclude based upon record evidence that Dean Foods purchases milk from multiple suppliers, including significant supplies from non-DFA sources. Dean Foods Brief and Proposed Findings of Fact and Conclusions of Law filed on May 5, 2005, Proposed Finding of Fact # 1 (hereinafter "Dean PFF #____").

Moreover there are at least 11 cooperative associations and federated organizations representing almost 20 total organizations with raw milk on this market. Tr. 802 [Cotterill]. And even White Eagle testified that it is presently not using all eligible diversions. Tr. 933 [Leeman]. So the beef appears to be that they want to divert more in the future.

Reviewing the record, however, there is ample evidence that pooling provisions are still providing significant opportunities for milk to pool and that much of that milk does not actually provide true service to the fluid market. Dean PFF # 20-22. In a market with only 40.7% Class I usage on average in 2004 (Ex. 6, Table 5) (and much of that biased upwards by depooling in March, April, May and December of 2004), what can possibly be the need for milk sometimes being associated with this market from over 600 miles when there is plenty of nearby milk? The answer is self-evident especially when one looks behind that milk pooling and looks to actual milk delivered and the timing of deliveries. Dean PFF # 22a – 22f.

"Facts are stubborn things." John Adams, *'Argument in Defense of the Soldiers in the Boston Massacre Trials,' December 1770.* Since these inconvenient facts get in the way, opponents deliberately attempt to redirect the Secretary's vision to irrelevancies and distractions.

C. *The Continental Milk Proposal for Depooling – the Ultimate Scarlet Letter*

The Continental Milk Proposal, while well intended, goes too far, creating a very real risk of new disorderly marketing on the other side. While Dean Foods deplores depooling, as a fluid milk processor it has no control over it. Under the Continental Milk proposal a dairy farmer who is depooled has no mechanism to return to the pool at all even if that farmer's milk is truly needed in a later month to serve the fluid milk market. This is not just a Scarlet Letter, this is a barrier that prevents reentry of any kind. If adopted, Dean Foods predicts that the Secretary would in short order see situations in which necessary raw milk needed for fluid needs could only be obtained as other source milk, leading to new and unintended consequences. That is why Dean Foods puts support for such a proposal at the bottom of its preference list.

D. ***Depooling Delay Intolerable***

The argument by opponents who argue against a depooling fix now lacks statutory, regulatory or historical foundation. Each federal order stands on its own and the Secretary is required to maintain orderly marketing conditions in each order. There is no evidence that fixing depooling in the most abused orders will have an impact on the other orders not now under consideration. If depooling is economically viable somewhere, closing the door in one order or another will not open the door elsewhere. Moreover, nothing in Part 900 of Title 7 of the Code of Federal Regulations leads one to the conclusion that Orders 30, 32 and 33 should wait for a cure for acknowledged disorderly marketing caused by depooling (Tr. 725 [Leeman]). And the concept runs counter to the long history of the program in which the Secretary has often developed program fixes in one order or another before, if at all, applying the fix nationally (e.g. what is now 7 C.F.R. 1000.76(b) (a.k.a. the "Wichita Option" and (c) (a.k.a. "the California Requirement") were solutions to the partially regulated plant issue developed over time and after the U.S. Supreme Court's decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962).

More recently, many of the same parties now demanding that the Secretary convene some form of national proceeding or otherwise open Orders 5 and 7 to a hearing to address depooling properly were leaders in the efforts to end so-called double-dipping on a state and federal order (Proposal 1 in this proceeding) first in the Upper Midwest and then in the Central Order, even though double dipping could and did occur in other orders. In fact, when DFA objected to a piece-meal solution to double dipping on the same alleged grounds that the issue needed to be

treated nationally, those same parties and the Secretary rejected that delay approach.[7] What is sauce for the goose is indeed sauce for the gander.

The supposition by opponents of swift action is also unfounded in that, to our knowledge, no hearing proposal has yet been submitted for consideration regarding any other order. Moreover, opponents' claim concerning Orders 5 and 7 simply does not hold up for the very reason that those markets have little manufacturing capacity and, in any event, have real and substantial shipping and association requirements that make depooling economically less viable – precisely what proponents of change now advocate here. If anything, Orders 5 and 7 can be said to have already dealt with the issue, leaving Orders 30, 32 and 33 now to catch up.

E. *Amplification* of Position on Transportation Credits

Dean Foods supports the payment of transportation credits on milk moved to fluid plants that is not used to pool other milk. Usually the benefits of pooling additional milk are large enough to offset the losses incurred in making the necessary shipments to distributing plants. Only when all the milk of the handler has been pooled, and additional shipments are made is additional compensation necessary to encourage such shipments. For example, if the shipping percentage for the month is 25 percent, then transportation credits on shipments above 25 percent should be made. If it is a "free ride" month, then any shipments to fluid plants could receive transportation credits.

With such a payment scheme, there would be little concern about encouraging the pooling of distant milk with transportation credits. If the shipments were used to pool milk, then no transportation credits would be paid. If the shipments are not used to pool milk, then transportation credits would be paid. Dean Foods is not concerned whether the milk comes from

[7] Note the Dean Foods position has been consistent, both as to procedure and substance.

nearby or far away, so long as the primary purpose of the shipment is to serve the needs of distributing plants.

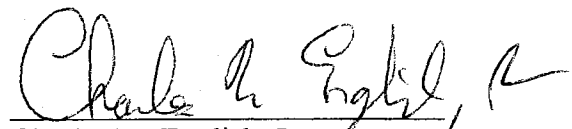
In summary then as to transportation credits Dean Foods takes the following positions:

1. Transportation credits should be paid only on milk actually delivered to distributing plants and could be limited to amounts shipped over the required shipping percentage.
2. Paying transportation credits on distant milk is really not a problem, provided
   - Undelivered distant milk (farms located out of the marketing area) may not pool based upon shipments that receive transportation credits (no diversions)
   - Transportation credits are only paid on milk actually delivered to a distributing plant, whether farm is located in marketing area or not does not matter.
3. If transportation credits are requested, then only milk from farms located in the marketing area can be diverted based upon that shipment.

F. ***Conclusion***

For all of the foregoing reasons and the reasons stated in Dean Foods principal brief, Dean Foods urges immediate adoption of proposals to resolve depooling, limit excessive pooling and reward those actually serving the fluid market with limited transportation credits.

Respectfully submitted,



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