UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:

PROPOSED AMENDMENTS TO THE	)	DOCKET NOS.: AO-166-A77;
MIDEAST FEDERAL MILK ORDER	)	DA-08-06

BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUBMITTED BY

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I. INTRODUCTION

This Brief, together with its Proposed Findings of Fact and Conclusions of Law, is submitted on behalf of Dean Foods Company, National Dairy Holdings LLC ("NDH") and Prairie Farms, Inc. All three entities endorse almost all of this Brief and the positions taken here (Prairie Farms does not endorse the concept of lowering Class I differentials in the Northern part of the Order).

This matter comes before the Secretary upon the request by some dairy farmer cooperatives for a temporary, emergency Class I (fluid milk) price increase for some areas in the Mideast milk marketing order. The self-styled emergency request for temporary Class I price adjustments is based substantially on the fact that USDA adopted changes for the Southeastern markets effective May 1 of this year. Although there is no real data available for what has actually happened since May 1 in and among the various federal milk orders, Proponents demand Class I price increases that would put the southern tier of the Mideast order ("Order 33") in a heretofore unique federal milk order position because, if adopted, there will quite clearly be higher Class I differentials north and west of points south and east. The Proponents claim that this is necessary because "the Southeastern Orders are now better able to attract milk from reserve regions such as Order 33 into their markets and away from the local Mideast Order." Ex. 12. Unfortunately, both for the Proponents and the hearing Record, there is no actual evidence of this purported fact. The hearing was called too quickly, and despite two requests the hearing record closed before real evidence could be made available for the Record. An effort to reopen the hearing by Motion filed after the hearing was closed was denied on October 2, 2008.

Leaving aside the fact that the Secretary is being asked to increase prices "*in a reserve supply area*" (when the standard for establishing a price is based upon a price that is high enough, but not higher, to bring forth an adequate supply of milk (7 U.S.C. § 602(2) (2008)), the claim of an Emergency cannot be proved until after the evidence is examined; however, despite

repeated reasonable requests to continue or reopen the hearing in order to capture that needed evidence, Proponents are not interested in carrying their burden of producing evidence, much less the different and distinct burden of persuasion as Proponents of "a new and different Rule or Order." 5 U.S.C. § 556(d); *Director, Office of Workers' Comp. Programs, DOL v. Greenwich Collieries*, 512 U.S. 267 (1994) (holding that proponents of Rule or Order must both produce evidence and carry the burden of persuasion). Opponents carry no burden since they have not advocated a result based upon the limited Hearing Notice different from the present Rule. This is to say that if the Opponents had not shown up at all, the Proponents would still have their burdens of production and persuasion. The proposal cannot be adopted legally given the present posture of the proceeding.

Beyond this fatal procedural misstep lies the fact that Proponents have not justified, and the Secretary has not renounced in a way that satisfies established legal standards, deviation from the Secretary's prior precedent establishing a national price surface for Class I differentials. Ignoring this glaring issue, as was done with the southeastern orders proceeding, is not going to make it go away. And federal courts of appeal have recently roundly criticized and vacated agencies' actions for this kind of inaction in the face of past precedent. *Westar Energy, Inc. v. FERC*, 473 F.3d 1239 (D.C. Cir. 2007); *Huntington Hosp. v. Thompson*, 319 F.3d 74 (2nd Cir. 2002).

The proposal also fails because, except for inter market alignment purposes, Proponents and the Secretary can point to no instance in the 70 years of this program in which Class I differentials have been increased in a market which as a whole has more than an adequate supply of milk. Either the Mideast marketing area is a reserve area (Proponents and USDA argued and so found in the southeastern orders proceeding) or it is not. Having found that it is a reserve supply area, the Secretary cannot find otherwise now without creating another inconsistency. And the Proponents go way out of their way to avoid inter market alignment issues in

sequestering the lower tier of the Mideast market from the remainder of the federal order system. Again this is fatal because unlike the Secretary's decision in 1999 during Federal Order Reform, this hearing record does not "consider the feasibility or impact of a local or regional issue on a national basis." 64 Fed. Reg. 16026, 16109 (April 2, 1999).

For these and the other reasons discussed below, the proposal should be denied and the proceeding terminated. At a minimum, the hearing should be reopened in order to cure, at least, the fatal procedure posture of this proceeding.

II. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 5 U.S.C. § 557(c), Dean, NDH and Prairie Farms request that the Secretary examine each proposed finding of fact and conclusion of law contained herein and rule specifically and individually on them as required by § 557(c).

A. The United States Supreme Court in 1994 Clarifies that Proponents Carry Both Burden of Production and the Burden of Persuasion – Proponents have done neither.

Unfortunately the Record of this Proceeding is so weak and incomplete that it is necessary to revisit and examine basic principles of administrative law because Proponents failed utterly to meet their burdens of proof under 5 U.S.C. § 556(d).

1. The "Burden of Production" Has Not Been Made

The phrase "Burden of Production" refers to the requirement that the proponent of a Rule or Order must come forward with evidence to support its claim. Until 1994, many courts and authorities believed that this was the only burden imposed on Proponents of administrative rules. These authorities concluded that the Burden of Persuasion was not necessarily imposed on Proponents of rules such Proponents here. *See Northwestern Elec. Co. v. Federal Power Comm'n*, 134 F.2d 740, 743 (9th Cir. 1943), *aff'd*, 321 U.S. 119 (1944). These authorities concluded that Proponents only had the Burden of Production. *Id.* But leaving aside the

discussion below that Proponents' burden is now clearly broader than that, all authorities agreed even before 1994 that Proponents have to at least come forward with evidence to support their claims. In this proceeding involving whether or not to *change by way of increasing* the existing Class I differentials, the Burden of Production means that the Proponents (and not the Opponents) cannot simply assert that there is an emergency and then rely on that purported emergency to refuse to permit the hearing record to receive the needed evidence supporting the claim for a new Rule or Order.

A major reason for requesting the hearing as found in Exhibit 12 (Request for Hearing submitted by Proponents attorney) was the Secretary's emergency changes to the Class I differentials and transportation credit schemes in the Southeast. Tr. 284-285:

> Q: Would you say that the recent changes that have been put in effect in Appalachian in terms of increasing differentials are some of the biggest factors if proposing these changes in the Mideast Order?
>
> A: Yes. That is a large factor.

However, that new Rule was not implemented until May 1 of this year and thus the impacts of that change in the Appalachian Order is simply unknown. USDA data, especially the kind of excellent data produced by the Market Administrators' offices that is so often relied upon by parties and the Secretary, cannot and is not produced and made available to the public instantaneously. Much of this valuable data works its way through assembly and review and is not published until some months after the month for which the data was actually produced. With an implementation date of May 1 for the Class I changes made to the two southeastern orders, this Record does not even have complete data of this valuable nature for the month of May, let alone June and thereafter. Most importantly, a semi-annual study of milk marketing published by the Central Order Market Administrator for May and December has not yet been released. In the normal course it is released in early September for the month of May. This data would reveal

what, if any, changes are actually occurring as a result of the Southeastern market amendments. Tr. 407-408. But the point is that without the data, the Secretary cannot make a reasoned decision. Proponents did not even make the effort to explain how this purported shift impacted the local market, other than to say that it had. However, recent data published by Dairy Market News (official notice requested) on October 3 reveals that just the opposite is happening generally -- significantly less milk is being shipped in to that region this year than last:

EAST FLUID MILK AND CREAM REVIEW

SPOT SHIPMENTS OF GRADE A MILK INTO OR OUT OF FLORIDA
AND OTHER SOUTHEASTERN STATES

	THIS WEEK		LAST WEEK		LAST YEAR	
	IN	OUT	IN	OUT	IN	OUT
FLORIDA	76	0	66	0	118	0
SOUTHEAST STATES	135	0	198	0	260	0

Dairy Market News, October 3, 2008. This pattern generally holds true for the past month's reports.

On October 10, the day this Brief was due, a new even more dramatic report was issued showing even less milk being shipped into the Southeast (official notice requested):

EAST FLUID MILK AND CREAM REVIEW

SPOT SHIPMENTS OF GRADE A MILK INTO OR OUT OF FLORIDA
AND OTHER SOUTHEASTERN STATES

	THIS WEEK		LAST WEEK		LAST YEAR	
	IN	OUT	IN	OUT	IN	OUT
FLORIDA	48	0	76	0	140	0
SOUTHEAST STATES	119	0	135	0	301	0

The assumption, because that ultimately is all it is, by Proponents that the Southeast markets would pull more milk has just not proven out to be correct. Thus, Proponents have not even met their Burden of Production.

Since the Hearing Record closed before the data regarding specific market usage was available, the Secretary is deprived of that evidence, but not because of the Opponents who

sought and still seek to remedy this Proponent-inflicted wound. Dean, NDH, and Prairie Farms urged the Secretary to keep the Record open until that evidence would in the normal course become available in September (we do note that as of October 10, that data has not been released as in past years). Proponents opposed this approach citing the "Emergency" (which has yet to be proved) for the proposition that the Record needed to be closed. But this is the ultimate boot-strap argument in that leaving the Record open is actually the only way to know whether as Proponents hypothesize that actual and meaningful quantities of milk have been drawn away from the Mideast to serve the southeastern markets. There could be any number of reasons why Proponents wish to deprive the Record of this information.

Since Proponents carry the Burden of Production, the Secretary can and should draw inferences given the state of the general economy (at best fair), milk prices in general (high), per capita milk consumption (flat at best), and whether or not alternative milk supplies from the northeast or southwest more likely flow to the Southeastern United States. But the fact remains that the Proponents have not produced the necessary evidence (a party's obligation to come forward with evidence to support its claim). *Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. at 272 (*citing* J. Thayer, Evidence at the Common Law 355-384 (1898)).

2. Proponents did not Carry their Burden of Persuasion

As discussed at length in *Greenwich* Collieries, the Administrative Procedure Act's Burden of Proof requirement under 5 U.S.C. § 556(d) requires that Proponents not only produce evidence in support of their claim, but also they must carry the day with the Burden of Persuasion. *Office of Workers' Comp. Programs v. Greenwich Collieries*, supra, 512 U.S. at 276. The term Burden of Persuasion means that the person advocating a rule must *prove* the need for the rule. The *Opponents need not prove anything*, and if the Agency is in doubt, the Proponents do not carry their burden and the Rule must be rejected. *Id.* at 281.

This discussion is especially important because the United States Supreme Court clarified in 1994 that agencies cannot decide in favor of rules unless the proponent does carry its burden of proof. *Id.* Moreover, in this case, the Proponents have put on a very weak case. Whatever the Agency thinks of the alternatives (which were not allowed to be Noticed for hearing because the Secretary so determined that no alternatives could be heard – Tr. 405), the Agency must determine solely whether the Proponents have carried their burden. Opponents submit that they have not.

Proponents may not rely on hypothesis and conjecture when the actual facts would be available but for the rush to judgment. Simply calling the situation an emergency (isn't this argument, if true, equally valid throughout the federal order system on a national scale?) does not mean that the Proponents can dispense with their burden of coming forward with actual evidence supporting their hypothesis when such evidence is or would be available absent the assertion that there is an emergency and we cannot wait for the evidence. No case law supports the proposition that a unilateral assertion of emergency justifies avoiding the burdens of proof under 5 U.S.C. § 556(d). In fact, the express exemptions the emergency rulemaking permits are very limited and, since they are a creature of regulation, cannot subvert the statutory requirements of 5 U.S.C. § 556(d): (1) Notice of Hearing must provide 15 days notice unless shorter time determined by Administrator (7 C.F.R. § 900.4(a)); and (2) a Recommended Decision is required unless the Secretary finds "that due and timely execution of his functions imperatively and unavoidably requires such omission" (7 C.F.R. § 900.12(d)). Indeed, "urgency" has been expressly rejected by the U.S. District Court for the District of Columbia as a reason to excuse following APA rules. *Carnation v. Butz*, 372 F. Supp. 883, 889 (D.D.C. 1974) ("Whatever the need for urgent action might have been, it was an insufficient reason for abandoning the requirements of notice and hearing in view of § 8c(17)...."). So to the claim of emergency does not cut off the usual requirements to provide evidence for this Record. On that score, Black's Law Dictionary defines

evidence as "something that tends to prove an alleged fact." *Black's Law Dictionary*, 8th ed. (2004).

With the briefing schedule set in October, there is nothing that has prevented the Secretary from permitting relevant data that normally would already have been produced to be introduced into the Record – except the circular logic that the Emergency, not yet proved, prevents the Secretary from examining the real evidence. Thus, whether or not the Secretary agrees it is an emergency doesn't really matter because if it is an emergency, then the only changes are procedural changes freeing up the Secretary to hold the hearing more quickly, render a decision more quickly and implement a decision more quickly. The Decision must still be based on Record Evidence and the Emergency status has no substantive impact on the adoption of a Rule.

Much was made at the Hearing that the proposal is for a "temporary" Class I price increase. The use of temporary similarly is of no import since the rule is permanent until it is changed in that there is no sun-set provision. Moreover, Proponents and the Secretary cannot point to any authority that waives the evidentiary burden rules *imposed* by the APA as clarified by the United States Supreme Court in *Greenwich Collieries*. All of this use of "temporary" or "emergency" terminology merely masks the fact that there is no evidence to support the proposed change.

Proponents requested data in September, 2007 (while the southeastern orders proceeding was still pending) (Ex. 13, Tr. 96), then made their request for Hearing in June (Exhibit 12), then received their hearing in August. Somehow September, 2007 to June, 2008 there was not enough of an emergency to request the hearing. But now waiting a short time so that the Record may receive real data from May especially and preferably June through August is deemed by Proponents and the Secretary's delegates inappropriate because of this purported emergency. The only real loser here is the hearing Record – and thus a valid decision cannot be rendered.

Most importantly, Opponents do not bear the Burden of Persuasion even as they do not carry the Burden of Production either.

3. The Record Evidence Does Not Support the Proposal

Beyond the limited evidence available for this Record and the fact that the Secretary is being asked (again) to abandon the nationally coordinated price surface found in Federal Order Reform (discussed in Part B below), the Record evidence is thin at best and subject to outright results oriented manipulation a worst. A critical exhibit (Exhibit 5) created by the Market Administrator at the request of Proponents, defines so-called Available Milk for the Mideast market. The definition is Proponent driven and ignores alternative milk supplies based upon arbitrary lines regardless of whether the milk is actually available or not and regardless of whether other close milk supplies are available.

For instance, milk in and around Wooster is deemed to be available to Mideast plants in the eastern section of the market even though according to these same Proponents, Wooster was "the reserve supply" area for the southeastern markets. 73 Fed. Reg. 11194, 11205, c.3 (February 29, 2008). Now, that milk is more available to plants in the eastern Ohio market than to the southwestern area of the same marketing area even though it is supposed to be available to the Southeast. By so defining the market for individual market areas, the proposal is results driven. If because Wooster milk is not really available to Wooster area plants because it is the reserve supply for southeastern order markets, then the analysis of that milk as available in the Mideast vs. milk available to plants in the southwestern portion of the Ohio market becomes entirely an arbitrary exercise in whether the milk is available or not. This is but one example of why the Proponents' definition of available supply is suspect, and at least arbitrary.

Moreover, Exhibit 12, and its attachments, creates a new hazard for the Proponents. As described in a separate motion to reopen this proceeding, Exhibit 5 data of Available Milk and

Exhibit 12 submitted in order to support the hearing notice have different volumes (30% different) for Available Milk. The answer in the oppositions filed by Proponents and the Office of General Counsel that Exhibit 12 was not sworn testimony is of no moment. First, did the Secretary rely on that submission that is Exhibit 12 to call the Hearing? Yes. Second, the fact that is different, even if not sworn, shows that how one calculates Available Milk is quite obviously arbitrary or even mathematically suspect. Whether sworn to or not, the Record now has two different sets of numbers (one used by Proponents to justify the hearing call and one now put into evidence to justify a result). How much more arbitrary can this purported calculation be? Regardless, the differences in data for Exhibits 12 and 5 clearly raise substantial issues of just how arbitrary the Available Milk calculation actually is. By denying the Motion to Reopen, the Secretary has prevented any understanding of just how arbitrary that calculation is or can be. The uncontroverted fact remains that it is arbitrary.

Second, Proponents admit that the Mideast order is a reserve supply area (indeed Proponents relied upon Wooster, Ohio being the reserve supply for Southeast), and yet now want an increased Class I price in a market that is simultaneously a reserve supply. Since the Agricultural Marketing Agreements Act (AMAA) calls for setting prices high enough (but no higher) than are necessary to bring forth an adequate supply of milk, the Secretary has logically said that reserve supply areas should be areas with lower, not higher prices. Thus in the 1999 Final Decision for Federal Order Reform (discussed at some length below), the Secretary concluded that areas with reserve supply (nine areas) should establish a Class I price difference over surplus milk products of $1.60, all to support current supply and demand conditions. 64 Fed. Reg. at 16110. This point is consistent with the alternative proposal to lower prices in the upper tier of the Mideast Market to match this reserve supply concept. Proponents ignore all of this (even though they want to eat their cake and have it too by calling Wooster a Reserve Supply area one day, but really not another day) in demanding a price increase in one portion of the

market. The prices already bring forth for this market a growing supply of reserve milk. Higher prices cannot be justified under the AMAA.

Consistent with the fact that Proponents ignore that this market is a reserve supply for the southeastern order areas, they insist on increasing the Class I prices within the southwestern tier of the Mideast market. The proposed result would be higher Class I differentials in this tier of Mideast market than in northwestern tier of the southeastern markets. Traditional, long-standing USDA policy is to "stair-step" milk from reserve supply areas to where the milk is needed in order to achieve efficient movements of milk. This stair step approach means that the Secretary's nationally coordinated pricing scheme does not have price spikes in the middle of it – that is Proponents can point to no history or Federal Order Reform nationally coordinate price result that results in a higher Class I differential price to the north and west (for plants east of the Mississippi) that are higher than prices to the south and east.

This is logical because a price spike of this nature would logically create an economic incentive to stop the shipment of milk at the higher priced location to the north rather than encouraging the milk to move to where it is needed farther away. This could further create uneconomic movements of milk by drawing milk north and west since milk south and east does not actually receive transportation credits. Proponents ignored this issue, but one must acknowledge the possibility that producers south and east, who are ineligible for transportation credits, would likely look for the highest price. Establishing higher Class I differentials to the closer areas north and west may well draw milk "backwards." Tr. 291.

But the proposal supported by Proponents achieves that very result – a price spike for plants in southern Indiana, Ohio and West Virginia. In order to avoid this rather obvious problem (yet another example of glossing over USDA precedent), Proponents attempt to sidestep this argument by pointing to the existence transportation payments, pools and credits. However, as the questions by USDA's federal milk market order specialist astutely make clear, the

economics and purposes of transportation credits are different from Class I differentials. Tr. 281-282. Unlike Class I prices which are shared across the pool, transportation payments are direct incentives to deliver milk to individual Class I milk processing plants. Opponents expressly request that the Secretary either not use the transportation credit funds issue in this analysis because of this critical difference or that the Secretary instead expressly find that Class I differentials and transportation credits are different both in purpose and scope as well as in economic impact on those paying and those receiving the credits. Thus, the term "effective Class I differential" used (to Opponents' knowledge for the first time in this proceeding) is of no moment. A Class I differential must be compared to a Class I differential, not to some hybrid in another market that carries a different purpose and economic impact.

As discussed in Part C below, there are alternatives that exist that are not merely viable, but superior in light of Proponents' failure to come forward with produced evidence and their inability to carry separately their Burden of Persuasion. Whether or not those options can actually be adopted as a result of the existing notice of hearing is of no moment especially in light of Proponents' failure to meet their Burden of Production. The Secretary should instead terminate this proceeding or reopen it with additional proposals permitted.

Finally, none of the actual evidence goes to the purported emergency that has yet to be established. Every processor testified that they are actually receiving milk both before and after the May 1 effective date for the changes in the southeastern orders that spurred the request for hearing (Exhibit 12). But even more telling is the reference in Exhibit 12 to Jasper and Newton counties showing that 80% of the milk produced there is pooled on another federal order. That was true before and after May 1, so the question is so what? This is the ultimate bootstrap argument. We already know because Proponents "told us" and because the Secretary so found in the southeastern orders decision that the Mideast Order serves as the Reserve Supply for the southeastern orders. This was equally true in May 2007 when the Proponents demanded

emergency action in the southeast. But the emergency then was the Southeast. Now the emergency is in the Mideast because the Proponents say so. If this kind of argument holds water then the distinction between emergency and non-emergency action truly has lost all significance. At a minimum, more is needed to call all of this an emergency.

B. <u>The Proponents Cannot have the Secretary Lawfully Ignore Precedent.</u>

Opponents admit to some frustration that their arguments in the Southeast regarding a national price surface based upon the Secretary's pronouncement in 1999 that the price surface ***must*** be considered from a national, as well as local or regional perspective, has been ignored. *See* 64 Fed. Reg. 16026, 16109, c.1. This frustration is a legal problem because the Secretary is not permitted to ignore his prior precedent without a logical explanation that is not merely whim. It is not up to the Courts (or the parties) to infer what the Secretary's position is regarding his straight line precedent from Federal Order Reform in 1999. There the Secretary went out of his way to adopt a national Class I pricing surface, saying that such a national surface was necessary. Now without explanation there is quite clearly abandonment of the national price surface. It is not enough to say that markets are aligned (and Opponents here maintain that they are not) because alignment was only one element of the Class I pricing surface adopted. By definition you cannot have a nationally coordinated price surface if the Secretary reverts to Order-by-Order Class I pricing. The following are some (not intended to be exclusive) listing of quotations from the Final Decision in 1999 adopting a nationally coordinated price surface along with parenthetical discussion analyzing those statements in the form of precedent:

> This decision adopts a Class I pricing structure that provides incentives for greater structural efficiencies in the assembly and shipment of milk and dairy products. In conjunction with other reforms discussed in this decision, the adopted Class I price structure provides the necessary changes needed to improve milk pricing in the consolidated markets.

64 Fed. Reg. at 16108, c.1 (Class I pricing structure is interwoven with other federal order

provisions and provides "changes needed to improve milk pricing" in all markets).

> The adopted Class I pricing structure utilizes USDSS model results adjusted for all known plant locations and establishes differential levels that will generate sufficient revenue to assure an adequate supply of milk while maintaining equity among handlers in the minimum prices they pay for milk bought from dairy farmers.

Id. (maintaining handler equity is a separate factor from the national structure).

> The reform effort provides the opportunity to consider and establish a nationally coordinated Class I pricing surface that uses location adjustments to the differential levels to price milk for fluid use in every county in the United States.

Id. (the opportunity to consider and establish a nationally coordinated Class I pricing surface was critical to Federal Order Reform).

> Several factors were considered in selecting a replacement for the current Class I price structure that served to form the criteria used to examine options. First, a Class I price structure must be considered from a national, as well as a local or regional, perspective. Many comments from industry addressed Class I pricing issues from a local or regional perspective in the development of options presented in the PR. These comments provided valuable information about particular markets but generally did not consider the feasibility or impact of a local or regional issue on a national basis. While remaining mindful of local and regional concerns, USDA has also evaluated alternative Class I pricing structures from a national perspective, as should be expected, given the national concerns expressed about milk pricing.

Id. at 16109, c.2. The term used is "must" with respect to national prospective; the Secretary didn't say "ordinarily" or except for "emergency" or "temporary" (whatever that is without a sunset provision) a national pricing surface will be considered. The Secretary used the absolute mandatory term "must". Now the Proponents would have the Secretary abandon that without so much as "by your leave" explanation. There is nothing in the Record to support this abandonment.

> Finally, a Class I price structure must meet the requirements of the AMAA. The broad tenet of the AMAA is to establish and maintain orderly marketing conditions. For the Federal milk order program, this is achieved primarily through classified pricing and pooling. With regard to pricing, it is recognized that the objective of the AMAA is to stabilize the marketplace with minimum prices, not to set market prices. The pricing criterion of the AMAA, section 608c(18), requires prices that are reflective of economic conditions affecting supply and demand for milk and its products. In this regard, consideration was given to whether the proposed prices would generate sufficient revenue for producers necessary to maintain an adequate supply of milk. Equally important, the prices need to provide equity to handlers with regard to raw product costs as required by section 608c(5) of the AMAA.

Id. at 16109, c.3 (maintaining handler equity is a separate factor from the national structure).

> But some changes are needed to assure that this program remains viable to serve the needs of the dairy industry and the public well into the 21st century.

Id. at 16117, c.3 (Federal Order Reform changed Class I differential structures from strictly local and regional, to be also nationally coordinated in order to serve the public in the 21st Century). Thus, the Secretary adequately explained throughout pages 16108 to 16118 why he was altering course and adopting a nationally coordinated pricing structure in 1999. Just 8 and 9 years later the Secretary who said this would provide long term viability for the federal order program is being asked to abandon those changes for the 21st Century and return to strictly local and regional pricing based upon 20th Century concepts. But turning back the clock requires an explanation not provided in this or the prior Southeast record.

> The adopted class I pricing structure will establish Class I milk prices that will result in a sufficient supply of milk for the national system of reformed and consolidated milk orders.

Id. at 16118, c.2 (a sufficient supply of milk is also dependent on national price structure).

> As discussed earlier, it is important and appropriate that the Class I price structure recognize all uses of milk. The classified pricing system of the Federal milk order program will continue to value fluid milk in the highest-priced class. The higher-priced classification encourages all milk to first satisfy Class I needs and the adopted Class I pricing structure accomplishes this.

> Additionally, it continues to consider the cost of moving milk from an alternate location for Class I use, a consideration important to both Option 1A and Option 1B supporters. This is reflected in its aligned structure, recognizing that in supplying milk for manufactured products, demand for manufactured products influences a market's ability to procure milk for Class I needs. In this way, the adopted Class I pricing structure appropriately considers all uses of milk as a national Class I pricing structure.

Id. at 16118, c.3 (Class I pricing structure on national basis also takes into consideration all class prices of milk; this is something else ignored by Proponents' presentations here and in the southeastern markets).

Moreover, in Federal Order Reform, in discussing the establishment of Order 33 in its present form, the Secretary noted the following: "The only population centers of the marketing area that do not appear to have adequate supplies of nearby milk are Indianapolis and Cincinnati, in the southern portion of the area." *Id.* at 16066, c.3. This means that USDA in adopting the nationally coordinated price surface already knew that the markets now deemed by Proponents to require new, higher Class I differentials were, within Order 33, more deficit than others. Nonetheless, the existing pricing relationships were found to be equitable between and among handlers both within this market and without. Thus, Proponents cannot say that anything has changed from the time of Federal Order Reform. Since no changes have been demonstrated in this Record and since the Secretary already took the milk population/production issue into account, no one can point to a factual change in milk production/population as a reason to change the regulation as required under *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

More recently, some of the Proponents here requested that the Secretary adopt transportation credits within the Mideast Order because of allegations, like those made in this proceeding, that servicing the Southern tier caused them to incur unrecovered costs. Just two years ago, in 2006, the Secretary also rejected this effort:

> Due to the lack of data detailing the total cost of procuring supplemental supplies of milk and an estimate of the annual revenue generated by the transportation credit, no finding can be made that Proposal 9 should be adopted. Of particular concern is the possibility that the credit could be applicable to current and customary supply arrangements. This would result in a producer financed hauling subsidy on a year-round basis that is not related to any supplemental supplies or marketwide services.
>
> . . .
>
> The proponents' testimony throughout the proceeding stressed that they are unable to recoup their transportation costs from the marketplace. However, the evidence does not support these assertions. Both DFA and MMPA witnesses revealed that they are able to charge Class I handlers adequate over-order premiums to cover their transportation costs.
>
> . . .
>
> This final decision continues to find that government intervention through the adoption of the proposed year-round transportation credit provision is not warranted. The record of this proceeding does reveal that additional costs can be recouped in the marketplace without such intervention.

71 Fed. Reg. 54172, 54184, c.3 – 54185, c.1 (September 13, 2006). Proponents in that case considered, but rejected, the option of increasing Class I differentials in some parts of the market because "changing the Class I price surface would have been very difficult and concluded that providing for transportation credits would be a satisfactory alternative to pricing problems. 71 Fed. Reg. at 54184, c.1-2. Having been turned down on transportation credits, some of the same Proponents who previously acknowledged the difficulty in changing Class I differentials, now seek that very result. And yet, they no longer think it is difficult. But it is for all the reasons stated in this Brief. Moreover, what has changed factually since 2005? Nothing, or at the minimum, nothing demonstrated in this Record. Thus, Proponents cannot justify altering Agency action when there is no change in circumstances that resulted in turning down a similar proposal based upon identical facts.

But it isn't just Opponents who should be heard here. The Courts routinely (especially in the last several years) excoriate agencies for setting a precedent in a Rule or Adjudication (it

makes no difference in the case law) and then disregarding that precedent. The Secretary adopted a precedent (Class I price surface *must* be national), but now does just that and ignores it. These cases clearly establish that the Secretary must articulate the rationale for departing from that precedent. Ignoring it does not work. The Southeast decision provides no direct rationale for doing what was done. That is, the Decision does not say why and how what was done justifies departing from the precedent. The D.C. Circuit clearly requires more of the Secretary. This argument is much more than merely that the Secretary fails to meet the requirements of reasonable rulemaking set forth in the *Motor Vehicle Mfrs.* case. There is a whole line of cases from D.C. Circuit and others that refuse to countenance this kind of Agency action – but again the fault lies not with the Secretary but with the Proponents in attempting to circumvent nationally coordinated price structure issues. Indeed, please recall that the Proponents' own rationale for requiring emergency action in the Mideast is that the Secretary followed the Proponents' down the regional, not national, road in the southeastern orders. Now repairs are claimed to be necessary in the Mideast because of the changes in the Southeast. Leaving aside the fact that Opponents in the Mideast warned of this very result in the southeastern orders proceeding if a nationally coordinated price surface was abandoned, given the Secretary's own assertion that prices must be coordinated nationally in 1999, one cannot resist the obvious – "Duh!"

Perhaps Proponents are unaware of the recent line of cases holding agencies most strictly to account for failing to follow (and in many instances a proclivity simply to ignore) past precedent, all to the agencies' peril. In *Huntington Hosp. v. Thompson*, 319 F.3d 74, 75 (2nd Cir. 2002), the Secretary of Health and Human Services did not simply change a regulation without adequate explanation *á la Motor Veh. Mfrs.*, the Secretary ignored his own interpretation of the underlying statutory authority in adopting a different rationale for a regulation. In holding that the regulation adopted was invalid, the Court said that this "is the very meaning of the

arbitrary and capricious standard." *Id. (citing Indep. Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996)). In *Ramaprakash v. Federal Aviation Admin.*, 346 F.3d 1121, 1122-23 (D.C. Cir. 2003), an airline pilot who had engaged in otherwise license disqualifying personal actions, nonetheless had his license suspension reversed because the Agency ignored its own precedent regarding when it could bring the suspension action. In *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 320-21 (D.C. Cir. 2006), the Agency made multiple findings regarding its own jurisdiction that ignored past precedent. The Court reversed the Agency's findings. In *Westar Energy, supra*, 473 F.3d at 257-59, the D.C. Circuit invalidated as being arbitrary and capricious FERC's disparate administrative treatment of different providers without providing any explanation; while some providers were granted leeway in filing deadlines, the Petitioner in *Westar Energy* was held to strict rules. *See, also, Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003) (reversing Agency action because Court could not determine whether Agency had found a way to distinguish a seemingly inconsistent case); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003) (reversing Agency decision that was inconsistent with two prior precedents and U.S. Attorney General commentary); and *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177 (D.C. Cir. 2004) (reversing Agency decision that did not discuss and distinguish past precedents).

Unfortunately with this weak record, the Secretary is unlikely to be able to articulate why he should depart from that precedent regarding nationally coordinated Class I price surface. Indeed there is no evidence in this Record that justifies it. That circles back to the Proponents' failure to produce evidence and to persuade. That is not the Secretary's fault. But it is not the Secretary's job to like Hercules clean up these Augean Stables. The mess is just too big and should be abandoned instead.

C. The Economics and Alternatives

The rush to judgment has left the Record depleted of information to meet either the Burden of Production or the Burden of Persuasion. Proponents also rely upon a new term – "Available Milk." While the term, definition and its calculation are suspect, the illustration to make it has merit. The Record clearly demonstrates that the Mideast order has an ample supply of milk. Thus, to make their case the Proponents has to subdivide the order and coin a term in an attempt to show a need for change. In doing so, the Proponents provide for the Record a persuasive argument that the Mideast Order is a collection of three orders. While the evidence in this Record lacks the rigor used in Federal Order Reform, the demonstration shows it has potential to meet all the criteria provided enough time to fully vet and consider. While the Proponents attempted to leverage these differences as a rationale for the Secretary to raise Class I differentials in the Southern tier, this is an action that will expose plants to lost business and cost consumers money. Tr. 545-554 and 565-572. Such results are inconsistent with the AMAA, which calls for setting prices high enough (but no higher) than are necessary to bring forth an adequate supply of milk. 7 U.S.C. § 602(2) (2008). The Secretary has an obligation to explore order reconfiguration through another hearing. Such an exploration could improve the marketing conditions, reduce any perceived disorderly marketing and not harm consumers. It is expected that Proponents will continue urging that the Secretary rush to judgment; however, ignoring real and realistic alternatives that would not raise prices is not an exemption from formal rulemaking provided for under emergency proceedings if correcting any disorderly market conditions could be achieved. *Carnation, supra.*, 372 F. Supp. at 889. Opponents do not believe the present Record contains evidence of an emergency.

To build the case for the Secretary to take seriously alternative proposals for another proceeding, Dean Foods prepared, in a rush, Exhibit 22, which since the close of the hearing has been corrected for transposition and other excel spreadsheet errors; the spreadsheet in excel

format has been timely shared with the parties as a spreadsheet rather than a Portable Document Format ("PDF") document to permit the Secretary and all interested Parties to examine and use the same model. Exhibit 22 was designed to provide for the Secretary a simplistic view of what three separate orders could look like based on the data available to the record. Such work could be done at a more detailed level by the Market Administrator's office, but would require greater time than was made available in this hearing process. Tr. 407-4-8. Exhibit 22 attempts to recreate the Class I demand by marketplace following the lines provided in the Cooperatives' data request.

To summarize Dean Foods' testimony, after Class I demand is determined, the model then allocates the Order Class II, III, and IV milk according to the Available Milk. Even though it is built upon a suspect, and manipulated, definition of Available Milk, the model gets at the idea that higher utilization areas should have lower diversions than lower utilization areas. The results of Exhibit 22 are summarized below:

		Blend		South over
	South	Northwest	Northeast	Northwest
Jan-07	$ 14.87	$ 13.89	$ 14.19	$ 0.98
Apr-07	$ 16.47	$ 15.93	$ 16.14	$ 0.54
May-07	$ 17.72	$ 17.48	$ 17.61	$ 0.24
Jun-07	$ 19.80	$ 19.74	$ 19.84	$ 0.06
Aug-07	$ 23.15	$ 21.78	$ 21.96	$ 1.37
Nov-07	$ 22.74	$ 21.10	$ 21.38	$ 1.64
Jan-08	$ 21.88	$ 20.19	$ 20.52	$ 1.69
Apr-08	$ 19.12	$ 17.24	$ 17.70	$ 1.88
May-08	$ 18.04	$ 17.18	$ 17.62	$ 0.86
Jun-08	$ 19.29	$ 18.49	$ 18.93	$ 0.79

The point of the illustration is the that breaking up the Mideast Order into three orders would provide three different blend prices to move milk from where it is located to where it is needed. The highest price would typically be the Southeast (June-07 is the anomaly but would have been more than corrected by the existing Class I differential structure). This would strengthen the attractiveness of milk deliveries to that market by changing the distribution of funds rather than changing the price handlers are required to pay.

In the Proponents' argument for the need for price increases, the focus was on the increases in the diesel price. In looking at reported diesel prices as was used in Exhibit 12 page 32 – 34, the national price for a gallon of diesel is now down to $3.875/gal (http://tonto.eia.doe.gov/dnav/pet/pet_pri_gnd_a_epd2d_pte_cpgal_w.htm) (official notice requested). One has to go back to March 17, 2008 to find a lower price, nearly three months prior to the Proponents' request. Looking at heating oil futures, which has a high correlation with diesel prices, would suggest that the diesel prices will continue to head lower. So to the degree the Proponents were arguing for an emergency it seems the real emergency is around the fact that given enough time their facts will change just as is occurring today. But the so-called emergency is clearly less today than in August. This lack of facts further highlights Proponents' failure to meet the Burden of Persuasion. It also should encourage the Secretary that there is time for facts that apply to current (since the Southeast change was purported to have caused the problem) conditions to be admitted into this Record together with an expanded hearing notice issued to consider breaking the Mideast Order into multiple orders.

Clearly the Secretary has the right and duty to reject the proposal and this Brief has offered ample reasoning for such action. In testimony offered by Dean Foods several alternatives were also offered. It is the belief of the Opponents that reopening the hearing using a new and expanded hearing notice to consider breaking the Mideast Order into multiple orders would be the best action the Secretary could take. A hearing to consider breaking the Mideast Order into multiple orders is preferred over the Secretary's rejection of the Proponents' proposal. After consideration of the Secretary's option to reject the proposal, Dean Foods and NDH would support the Secretary's action to recognize the change in the marketplace, mainly milk supplies have grown and are now more surplus in the northern portion than when Federal Order reform occurred (milk supply and demand balance is not something unique to the northern tier of the Mideast order, which further suggests the real solution is a national evaluation). While Prairie

Farms does not support this specific proposal, the other parties of this Brief recommend adoption of the Alternative to Proposal 1 offered by Dean Foods. Tr. 403-404. This is the only point where those named in this Brief are not in full agreement.

While it is never popular to talk about reducing dairy farmer revenue, there is a point where a market must be balanced. Farmers do not like commodity prices, specifically cheese, butter, dry whey, or NFDM to go down. However, there is a point where there is more supply than demand and the market corrects by moving prices lower. This marketplace has the same problem only it is regional in nature. Just as lower commodity prices signal dairy farmers to decrease production and invite consumers to increase consumption, so too we need the same signal in the northern areas of the Mideast Order. While the Secretary's staff correctly questioned dairy producers' receptiveness to this, it would likely be viewed more favorably than the alternative, no FMMO. Having no FMMO would eliminate the sharing of low powder returns. These values would disproportionally be borne by the producers who invested in these facilities, mainly the cooperatives. This unpopular action is consistent with market conditions, is a better alterative for dairy farmers, and would require an appropriate act of leadership on the part of the Secretary in balancing supply and demand with an eye toward keeping prices no higher than necessary.

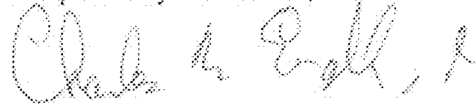
IV. CONCLUSION

In reversing an agency action which like the one requested here ignored the agency's own past precedent, the Circuit Judge, now Chief Justice, Roberts opened his Opinion with the following perfectly apt discussion:

> Learned Hand once remarked that agencies tend to 'fall into grooves . . . and when they get into grooves, then God save you to get them out.' Judge Hand never met the National Transportation Safety Board.

Ramaprakash, 346 F.3d at 1122 (citation omitted) (reversing suspension of pilot's certificate on the grounds for driving under the influence of alcohol because the agency failed to adequately explain its departures from its own precedent). Opponents here urge the Secretary not to fall into a grove (ignoring and refusing to maintain Federal Order Reform requirement of a national Class I price surface). Opponents support a national price surface and urge a return to that reasoned rulemaking. But this proposal is just another ditch and God save the dairy industry if we get stuck in it. Dean, NDH and Prairie Farms urge the Secretary to reject the Proposal and terminate the proceeding.

Respectfully submitted,



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