

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

**In the Matter of** :  
**Milk In The Northeast** : **Docket Nos.:**  
**Marketing Area** : **AO-14-A70;**  
: **DA-02-01**  
:

**COMMENTS AND EXCEPTIONS OF THE ASSOCIATION OF DAIRY  
COOPERATIVES IN THE NORTHEAST (ADCNE) UPON THE  
RECOMMENDED DECISION**

**Date: May 24, 2004**

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## **I. INTRODUCTION**

These comments and exceptions are filed on behalf of the Association of Dairy Cooperatives in the Northeast (ADCNE). ADCNE supports in part and takes exception in part to the Recommended Decision published by the Administrator of the Agricultural Marketing Service on March 25, 2004, at 69 Fed. Reg. 15562.

We will address the material issues on the record in the order in which they were addressed in the Recommended Decision: (1) Reporting and payment dates; (2) Pooling standards for the Marketing Order; and (3) Marketwide service payments.

## **II. REPORTING AND PAYMENT DATES**

\_\_\_\_\_ADCNE supports in part and takes exception in part to the Recommended Decision's proposed amendments to the Order with respect to reporting and payment dates.

There were three proposals which addressed reporting and payment dates: Proposal 1 submitted by New York State Dairy Foods, Inc., (NYSDF); Proposal 4 submitted by the Market Administrator, ADCNE, and NYSDF; and Proposal 12 submitted by the Market Administrator. ADCNE supports the recommended adoptions of proposals 4 and 12. These proposals, as the testimony at the hearing established, make necessary changes in certain details of the reporting and payment date sequence of the Order. The changes, while they will involve some occasional delay in payment to producers, are necessary simply to assure feasible administration of the Market Order pool. For these reasons, and as stated at the hearing, ADCNE supports those amendments and the recommended adoption of them.

ADCNE, however, opposes and takes exception to the recommended adoption of Proposal 1 which would delay the payment to producers in Order 1, requiring them to extend further credit to handlers. There are five discrete aspects to the changes recommended under Proposal 1. Four of those five changes are linked directly to the recommended change in the date on which monthly handler reports must be filed with the Market Administrator. Currently, the Order provides that handler reports are due on the 9<sup>th</sup> day of the month. The Recommended Decision moves this date back one day to the 10<sup>th</sup> day of the month. In the sequence of pooling, price calculation, and pool payments, this change necessarily requires that the dates for three other events be adjusted. Consequently, the date for announcing the producer price differential and statistical uniform price is recommended to be postponed from the 13<sup>th</sup> to the 14<sup>th</sup>; the date for handler payments to the producer settlement fund is recommended to be postponed from the 15<sup>th</sup> until no later than two days after the announcement of the PPD (unless on a weekend or holiday when the payment can be made the next business day); and, the date when final payments are to be made to producers, currently the 16<sup>th</sup>, is revised to be no later than the day after the required payment from the producer settlement fund unless that day is on a weekend or holiday when the payment can be the next business day.

The premise for changing this sequence of reports and payment dates is that Order 1 handlers cannot compile accurate reports for filing by the 9<sup>th</sup> day of the month. ADCNE, as it did at the hearing, opposes and takes exception to this sequential delay in reporting and payment to producers. We do not believe that the record establishes that handlers in the Northeast are unable to file handler reports on or before the 9<sup>th</sup> of the month, a date which is already the latest date for

filing handler reports in the Federal Order system.<sup>1</sup> We do not believe the necessary showing has been made to justify extending the time for reporting in Order 1 beyond the 9th.

The testimony concerning handler difficulty in compiling accurate reports by the 9<sup>th</sup> establishes, at the most, that the industry has been working diligently to comply with the advent of multiple component pricing and the reporting which it requires. Handlers as well as their suppliers have been grappling with this challenge. In our view, a permanent change in the Order should not be made absent a showing that it will be permanently impossible to timely file reports on the 9<sup>th</sup>. No such showing was attempted. Consequently, the Order should not be amended and an exception is taken to the recommendation that it be amended in this respect. The delays in the dates subsequent to the reporting date are simply dominos in the amendatory process which is initiated by delaying the initial report date and do not stand on their own.

While the handlers' proposal was put forth on the superficial basis of administrative need, the bottom-line issue with respect to reporting and payment dates is: who will carry the capital required to finance the dairy industry in Order 1. Every delay in reporting and payment by handlers means that producers, individually and in the aggregate, are required to carry that much more operating capital in their business enterprise to account for the delay in payment for their milk production. The value of all milk in the pool in the Northeast was \$317,822,000 for the most current month, April 2004, according to the Market Administrator's Bulletin. In a 30-day month, that means that the value of each day's milk production in the Order exceeds \$10 million. Consequently, a single day's delay in reporting and payment means that the producers will need

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<sup>1</sup> The majority of orders in the system require reports on the 7<sup>th</sup> of the month (Orders 5, 6, 7, 32, 33, and 131); Order 126 requires reports on the 8<sup>th</sup>; and three orders, including Order 1, currently require reports on the 9<sup>th</sup> (Orders 30, 124 and 1).

approximately \$10 million more in operating capital and the handler side of the industry will be relieved of the same amount. This is not a small issue for the industry and delays being promulgated in payments to producers should not be adopted absent a compelling showing that the existing reporting and payment dates simply can never be met.

The showing made was far short of this. There was no showing that any reporting inaccuracies were such that the proper valuation of the pool was impaired in any respect. There was no showing that any difficulties in timely reporting led to the inability by the Market Administrator to announce accurate prices on the present days provided for in the Order. There was no showing that any of these difficulties in reporting led to inaccurate payments to producers or late payments to producers. Consequently, while there was much hand-wringing by handlers about the administrative work imposed upon them by the Order, there was not a showing that the work could not be done.

In making the recommended changes to the reporting and payment dates, the Administrator seems to have been swayed in part by the fact that many handlers are small businesses. Lost in the equation is the fact that dairy farmers are also small businesses and in a greater proportion than are the handlers. The economic impact of delays in payments upon farmers are certainly greater, proportionately, than upon handlers, many of whom are very large enterprises. The small business concern falls more on producers than on handlers and consequently it provides no basis for the adoption in the handlers' Proposal 1.

The fifth and final aspect of proposal 1, the proposed postponement of the partial payment date to producers, stands alone as wholly without any reasoned justification by any evidence in the record. The proposed change in partial payment date from the 26<sup>th</sup> of the month to the last day of the month (or even later if the last day is a Saturday, Sunday, or holiday) has

nothing to do with the alleged problems relating to reporting dates or any other administrative challenges facing handlers. The requested, and now recommended, postponement of the date for partial payment is nothing more than a financial “freebie” for handlers. Moving the date of partial payment by 4-7 days means that handlers would be shifting \$40 million to \$70 million of capital from their balance sheets to the balance sheets of their raw milk suppliers, dairy farmers. The purported justifications for this change, as recited in the Recommended Decision, are completely without any basis. The handlers’ primary reason for requesting this delay in payment was that they wish to return to the payment dates under predecessor orders. The apparent adoption of this justification by the Administrator leaves us asking: Is that all that is necessary to change post-reform orders to prior - more desirable features? We would think not. However, that seems to be the approach of the Recommended Decision.<sup>2</sup>

The Recommended Decision says that the change in partial payment dates is “a conforming change reducing the number of days between partial and final payments to producers.” (69 Fed. Reg. 15563). This is certainly a new invocation of the concept of “conforming” change. Conforming changes generally are those required to be made in the order when a substantive change is adopted in one place and implicates language in another portion of the order. There is absolutely no other order language change which requires the date of partial payments to producers to be deferred. There is only the contention of the handlers’ witness that making partial payments “on or before the last day of the month” would “conform more closely with the dates previously set in the respective pre-reform orders.” (69 Fed. Reg. 15565 Col.2) ADCNE does not believe that retrospective “conformity” should provide any justification for

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<sup>2</sup> A quite different standard was applied to the ADCNE proposals for re-institution of a form of marketwide service payments, which existed pre-reform in Order 2.

deferring payment to producers.

The only other rationale which is indicated in the Recommended Decision for changing the date for partial payment is the testimony of a handler that “adjusting these payment date provisions would improve the cash flow of dairy farmers.” This contention borders on the ludicrous. Can anyone honestly contend with a straight face that delaying the receipt of payment for one’s production or labor for 4-7 days each month improves one’s “cash flow?” Perhaps the handlers would want to delay the date that they receive payment on all their accounts from 4-7 days to increase their cash flow. Sales on “net 10 days” could be made within 14-17 days; and payments on 30-day accounts could be made from 34-37 days. This would improve handlers’ cash flow in the same way that delaying the monthly partial payment to producers by that same number of days would improve producers’ cash flow.

There is the additional suggestion in the record that delaying partial payment to producers would improve the “spacing” (69 Fed. Red. 15565 Col. 2) of payments and that that is the basis for the change in the payment dates. There is nothing in the Agricultural Marketing Agreement Act or any other federal law or regulation that requires the two payments to dairy farmers each month to be equally “spaced.” This is a truly specious reason for conferring upon handlers the economic benefit of delaying payment to producers.

Finally, any additional extension of credit to handlers increases all dairy farmers’ exposure to potential bankruptcies and the accompanying financial losses. The recent Parmalat bankruptcy appears to have been a massive “dodged bullet” for Order 1 producers. If the Recommended Decision is made final, all future credit-risk bullets will be that much larger. There is no record justification for further credit from producers to handlers.

ADCNE take exception to the recommended adoption of Proposal 1. In particular,

ADCNE opposes the gratuitous change in the date for partial payment for milk deliveries from the 26<sup>th</sup> to until the end of the month or later.

### **III. POOLING STANDARDS**

ADCNE supports the Recommended Decisions, proposed changes, and performance standards for supply plants under Order 1.

ADCNE also supports the Recommended Decision's proposed changes in the producer milk definition in Order 1.

ADCNE does not oppose the Recommended Decision's proposed changes in definition for distributing plant units.

### **IV. MARKETWIDE SERVICE PAYMENTS**

ADCNE takes exception to the Recommended Decision's refusal to adopt Proposal 7 for marketwide service payments. The decision does not represent a reasoned analysis of the record evidence and is an arbitrary and capricious departure from the Department's previous approach to consideration of marketwide service payment provisions. We will discuss five issues raised by the Recommended Decision, after reviewing the ADCNE evidence in support of Proposal 7.

#### **A. Summary of the ADCNE case for marketwide services payments.**

Order 1 is the largest Class I market in the federal order system. About 50% of the market's Class I milk is supplied by dedicated independent producer supplies which the Class I handlers purchase 365 days per year for their Class I needs. About 90% of the remainder of the order's Class I needs are supplied by the ADCNE cooperatives which absorb the huge daily and seasonal fluctuations in Class I demand by the distributing plants at great expense to their



producer members. The benefits of balancing the Class I market are shared marketwide by all producers on the order and include: (1) allowing the regular Class I suppliers a year round market; (2) creating a marketing environment which allows all producers over order premiums; (3) enabling the most orderly marketing for all uses by maximizing the efficiency of Class I supplies; and assuring that consumers always have the milk they need on the store shelves thereby maximizing Class I use and the order's blend price.<sup>3</sup> Proposal 7 would spread a portion of the cost of Class I balancing to all producers in the market, as authorized by the AMAA, 7 U.S.C. § 608c(5)(J).

The ADCNE case did not rely upon unsupported assertions, as implied by the Administrator. It was built upon extensive documentation of: (1) the fluctuations in daily and seasonal demand for Class I in Order 1 (E.g. Exh. 14<sup>4</sup>, Figures 1–4); (2) the dedication of the independent milk to Class I usage year round (Exh. 5, Table 1 and Appendix 15); (3) the seasonal and daily fluctuations in Class I demand serviced by the ADCNE cooperatives (Exh. 17, Tables 1-A, 1-B, and 2); (4) the maintenance of facilities and marketing programs for absorbing milk when it is not needed for the Class I market, and making it available for Class I when needed (E.g. Exh. 5, Appendix 14; Exh. 19, Figures 1–6; Exh. 14, Table 2); (5) the minimum, necessary costs which any supplier will incur in balancing the demands of the Class I market (Ling Study, Exh. 12); and (6) proprietary information documenting costs of plant operations and capacity utilization to support the lowest-cost balancing data, as documented in the Ling study (Exhs. 14,

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<sup>3</sup> Marketwide benefits were described by ADCNE witnesses including Bob Wellington at TR. 527.

<sup>4</sup> Exhibits are cited without voluminous transcript references to the sponsoring witness (Gallagher, Schad, Wellington, or Dr. Ling) and his testimony. Each exhibit was described and explained in detail at the hearing.

17, and 19). Furthermore, the ADCNE post-hearing brief addressed in detail all of the contentions of the opponents with respect to proposal 7 (Post hearing Brief and Proposed Findings Submitted on Behalf of ADCNE, at pp. 41–48).

The ADCNE case must be evaluated on the basis of the statute which authorizes marketwide services payments. The AMAA in 7 U.S.C. 608c(5)(J) authorizes order provisions:

**(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.

(Emphasis supplied)

Plainly, the Class I balancing which Proposal 7 addresses involves services of marketwide benefit as described in the statutory language which is highlighted above. The issue is whether the Recommended Decision is true to the statute and to the hearing record in the rejection of ADCNE proposal 7.

B. Comments upon, and exceptions to, the Recommended Decision's rationale.

In rejecting Proposal 7, the Recommended Decision essentially adopted the positions of the opponents of the Proposal without expressly rejecting the fundamental premise advanced in

support of the proposal: **That Class I balancing services, which are services of marketwide benefit, should be paid for by all who benefit from the services, as the AMAA authorizes.**

We will discuss our exceptions to the Recommended Decision in five (5 ) respects.

1. Record evidence was not properly weighed and non-record evidence was emphasized. The Recommended Decision places undue emphasis upon evidence not in the record and inexplicably depreciates testimony in the record. Federal milk market order rule-making decision are on-the-record decisions which must be made upon the evidence produced at the hearing, presented under oath and subject to cross-examination. The “position” which parties take in support or opposition to proposals is a relevant fact, but certainly of an order different than record data and evidence of actual marketing conditions. In this context, the Recommended Decision’s apparent focus upon the post-hearing change in “position” of Agri-Mark is quite misplaced. Agri-Mark in its post-hearing brief relied upon events<sup>5</sup> not part of the hearing record to state concerns with the adoption of the marketwide service payments. It is questionable whether this statement of position should be considered at all since it is not a part of the record. However, given that it is explicitly based on non-record “information” it certainly should not be given any weight.<sup>6</sup>

Moreover, the Recommended Decision’s repeated notation of Agri-Mark’s change in position seems to be linked with a reading of the ADCNE testimony which minimizes the on-the-record testimony of the ADCNE witnesses. Robert Wellington, an employee of Agri-Mark,

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<sup>5</sup> Furthermore, the feared events, relating to the structure of handler mergers, have not occurred. Agri-Mark has not lost market access, its customer relationship, or its ability to pool milk.

<sup>6</sup> Land O’Lakes, which stated a “neutral” position in post-hearing briefs is no longer neutral and now fully endorses the ADCNE position in support of Proposal 7.

testified at the hearing **on behalf of ADCNE**, not as a witness for Agri-Mark as the Recommended Decision reported (although Agri-Mark is one of the ADCNE members). In the same fashion, Edward Gallagher, an employee of Dairylea Cooperative Inc., testified at the hearing on behalf of ADCNE; and Dennis Schad, a Land O'Lakes employee, also testified at the hearing on behalf of ADCNE. The Recommend Decision inaccurately characterizes these witnesses as appearing respectively “representing Agri-Mark” “for Dairylea” and “appearing on behalf of LOL.” This mis-depiction of the witnesses appears to have depreciated the Administrator’s consideration of the comprehensive testimony given by each of these witnesses, which was given on behalf of the ADCNE cooperatives which collectively represent more than 65% of the milk on the order.

It is the Department’s duty and obligation to decide these matters on the basis of the facts in the hearing record. See 5 U.S.C. § 556(e)(“The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the **exclusive record for decision**. . .”)(emphasis supplied) The fact of parties’ support or opposition to proposals should, of course, be taken into account for the interests shown. However, the non-record position of parties is certainly quite subsidiary to hearing record data concerning marketing conditions which is the ground upon which hearing proposals must be decided. When the data **in the hearing record** is considered, Proposal 7 should be adopted.

2. Proponents’ cost data. The second issue which we do not believe was appropriately considered by the Recommended Decision was the data concerning cooperative balancing costs. At multiple points in the Recommended Decision, ADCNE is chastised for insufficiently documenting or revealing plant operating costs of balancing. Each of the witnesses testifying for ADCNE, however, testified to the cost of operating balancing plants or providing

balancing services and each testified that such costs were greater than the lowest-cost-model presented by Dr. Ling. The Recommended Decision seems to have completely overlooked the fact that Dr. Ling's model was a lowest cost, Class I market-balancing model which was intended to be such in substantial part because the Department in other marketwide service payment hearings has indicated a preference to reimburse handlers for marketwide services at less than actual cost.<sup>7</sup> The fact that the Ling costs are less than actual cost was corroborated by no less than three witnesses presenting cost data from four separate cooperative organizations. For instance, Dairylea and DFA's balancing costs were detailed in part in Hearing Exhibit 19, Table 3. Agri-Mark's costs of operating its butter powder plant were discussed by Mr. Wellington. See Exh. 14 Table 2 and Figures 5 and 6) Land O'Lakes' cost of operating its balancing plant at Carlisle was discussed by Dennis Schad. See Exh. 17, Tables 4 and 5.

The Recommended Decision appears to reject - without specifically saying so - the concept articulated by each of the ADCNE expert witnesses that the Ling study is a study, which **both isolates and quantifies** the costs of balancing the Class I market. Both the isolation and the quantification of these costs is important. The record is crystal clear that it is not possible to balance the Northeast Order at a level of efficiency which the Ling study utilizes for several clear reasons. First, balancing operations in the Northeast are not carried out at three (or four) modern, efficient plants as the Ling study assumes. The actual plants in the area are less modern, less efficient, and not capable of the operating efficiencies embedded in the Ling study. Furthermore, a substantial portion of balancing in the Northeast is done with plant capacity other than butter powder capacity. As multiple witnesses testified, butter powder is the **least cost** means of

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<sup>7</sup> See, e.g., 53 Fed. Reg. 39444 (October 7, 1988)(Amendments to the Texas Marketing Order)(Adopts a "partial reimbursement of hauling costs from the order's marketwide pool.")

balancing. Cheese capacity is more expensive and, therefore, more costly to use for balancing. Again, this underscores that the Ling study is a low cost alternative. Furthermore, Ling **isolates** the costs of Class I balancing from other balancing functions, such as seasonal balancing of the “excess” reserves noted in Dr. Ling’s study. As ADCNE witnesses testified, isolating Class I balancing costs in their operations is a very problematical chore.

The Recommended Decision inaccurately contends that “actual costs, together with the profitability or lack of profitability of these butter powder plants, are never adequately addressed.” (69 Fed. Reg. 15579 col. 3) Completely ignored (so far as we can tell) is the testimony of Mr. Gallagher and the information regarding losses incurred at the Deitrichs butter powder plants. See hearing Exhibit 19.<sup>8</sup> Also overlooked, or erroneously depreciated, is Bob Wellington’s explicit testimony concerning the Agri-Mark plant operating losses. Tr. 538 (“Q. [By Mr. Tosi] So your butter powder operations lose money? A. Yes. Yes.”)<sup>9</sup>

3. Accounting for “revenues” from balancing is inappropriately demanded. The issue of consideration of revenues is another aspect of the Recommended Decision to which we take exception. Delineation of “revenues” associated with providing marketwide balancing services

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<sup>8</sup> ADCNE rejects the implicit suggestion in the Recommended Decision that plant operating losses are required in order to support balancing payments. A plant operator may experience profitable plant operations but at a profit level which is diminished by balancing costs. There is nothing of which we are aware in the legislation, and certainly nothing in the statutory language which requires “losses” in any plant operations before marketwide service payments are adopted. Indeed, if “losses” are required to support balancing marketwide service payments, a whole host of questions would need to be addressed concerning allocation of plant resources to various product lines. The fact of the matter is that large cooperatives balance the market; their members’ equity investments are at risk in doing so, operating at less than full capacity reduces their potential return or generates an investment loss, and their members, on average, receive less than farmers delivering, on a daily basis, to proprietary plants.

<sup>9</sup> Bob Wellington went on to explain, in response to Mr. Tosi’s questions, why the Ling data was less than (cost wise), but superior to Agri-Mark actual plant numbers. Tr. 538–542.

has never before been demanded in a marketwide service hearing. For instance, in Order 30, the revenues associated with delivering milk to the Class I market were not considered in determining that an assembly credit and transportation credits should be paid from the marketwide pool. See 52 Fed. Reg. \_\_\_\_ (October 15, 1987)(Emergency partial decision adopting assembly and transportation credits in Order 30). One does not need to be intimately familiar with Order 30 to know that the over-order premiums which have prevailed in that market for more than 30 years are far in excess of the 8-cent per hundredweight credit allowed to handlers providing services of marketwide benefit. The point is that the statute allows reimbursement of costs when services performed by one party benefit the entire market. The statute does not say, “if the handler has no revenue from which such costs could be considered to be otherwise reimbursed.” There is simply no revenue analysis required in the statute; none was applied when Order 30 credits from the pool were adopted shortly after the enabling legislation was passed; and there should not have been any such showing required here. The point of the statute is that the service performed by one benefits all and all should share in the costs of providing the service. As Bob Wellington summarized in the opening of his testimony: “The economic return for providing milk under the Northeast Federal Order for producer members of cooperatives who balance the Class 1 market is less than that of producers who do not participate in providing balancing services. This inequity has -- has existed for many years but has grown since the current order was promulgated on January 1st, the year 2000.” (Tr. 418)

The statute’s conspicuous omission of a “net cost” test is wise because the analysis of handler revenues could be an endless one in terms of debating the allocation of revenues and cost. In a multi-product balancing plant, for instance, what “revenues” are associated with the lack of volume in the plant when Class I markets are serviced? The decision seems to imply that

revenues from other product sales at the balancing plants are to be considered for some reason. What do revenues from sales of butter made from surplus cream have to do with Class I balancing costs? What about revenues from sales of condensed milk to a cheese plant, or to an ice cream maker? What portion of the Class I over order premiums prevailing in the market should be considered as offsetting balancing costs? How are revenues to non-balancers to be considered since it is clear that producers who do not balance, the independent producers of the market, are paid mailbox premiums at least as high, and generally higher, than cooperative producers?<sup>10</sup>

The fallacy of focusing on supplier revenues is this: Any “answer” to the revenue analysis advocated by opponents of Proposal 7, and echoed by the Recommended Decision, avoids the bedrock issue addressed by Proposal 7 which is that while only some bear the costs of servicing the market, all benefit. This is the fundamental basis for marketwide service payments authorized by the AMAA: All should pay some share, through the pool, where only some provide certain enumerated services, including Class I balancing, which are “of marketwide benefit.”

4. The Class IV make allowance is no substitute for marketwide service payments. The Recommended Decision makes the contention that the make allowance embedded in the Class IV federal order prices compensates Order 1 handlers for marketwide balancing services. This is incorrect for several reasons. First, the Class III/IV decision referenced by the Recommended Decision only alludes to “balancing” with regard to the make allowance for butter. There is no indication in that decision that even suggests an

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<sup>10</sup> ADCNE witness Bob Wellington testified concerning this accounting abyss: “If I stood here before you and said, here are my costs at West Springfield, we would then spend a few days going over, well, how'd you allocate this cost. Don't you do this, and that's not balancing. Don't you do that, and that's not balancing.” (Tr. 540)



accommodation is made for balancing costs in the production of powder. Furthermore, in the Class III/IV hearings, Agri-Mark specifically made clear that any recognition of plant operating levels in the make allowances was insufficient to compensate for Class I balancing issues which would be addressed by marketwide service payments. (Tr. 1112–1115) In addition, the record here is quite clear that Class IV is not the only Class I balancing option. Gallagher, Tr. Page 139 of Volume 3; Exh. 18. Order 1 is balanced in part with transactions with cheese plants and there is not even a contention anywhere that the Class III make allowance provides any embedded compensation for Class I balancing. Finally, the allusion to “balancing” with respect to the butter make allowance in the III/IV decision has no definition to it. It does not state it is daily balancing; it does not state it is weekly balancing; or seasonal balancing; or any balancing related to Class I. By all indications, it is balancing of the market’s “excess reserve” as detailed by Dr. Ling, a cost which Proposal 7 does not attempt to recover. There is nothing in either the CDFA or RBCS cost studies used for the Class III/IV make allowances which attempt to isolate plant costs to Class I balancing, as the Ling study does so precisely. Manufacturing make allowances are just that; and nothing more. They are not reimbursement mechanisms for the marketwide balancing of the Class I demand.

5. The criteria for eligibility for payment should be addressed on a reopened record if necessary. Finally, the issue of eligibility for marketwide service payments is cited in the decision as a basis for rejecting Proposal 7. ADCNE has always been open to modified criteria for qualification for marketwide service payment so long as the qualification represented handlers who actually provided meaningful balancing services. The Recommended Decision appears to reflect confusion in the Department with respect to who does and does not incur balancing expenses. For instance, the Recommended Decision says that “two independent dairy

farmers. . . testified dairy farmers already pay for balancing as part of the expenses deducted from their milk checks by handlers.” The Administrator goes on to assert that “they testified that they and other producers have been informed by their cooperative handlers who market their milk that the cost of balancing is a component of the handling charges that are deducted from their milk checks.” This paragraph (69 Fed. Reg. 15578 Col. 2-3) embodies apparent confusion on the part of the Administrator concerning independent dairy farmers and balancing costs. First of all, independent dairy farmers do not have their milk marketed by “their cooperative handlers.” The independent dairy farmers who testified included the dairy farmer from New York State whose milk goes to a Class I plant 365 days each year. Tr. 588. How this farmer could be said to be absorbing balancing costs is really beyond comprehension. If the size threshold for receipt of balancing credits should be reduced, the handlers who perform sufficient balancing services should have provided information for the record with respect to their monthly volumes and balancing services, including costs and revenues. ADCNE cooperatives do not have knowledge of the operations of non-ADCNE handlers sufficient to craft such eligibility criteria but are not opposed to them if they are based on record evidence and otherwise fact-justified.

With respect to eligibility, the record establishes beyond peradventure that the ADCNE cooperatives balance the overwhelming majority of the Class I sales in this order. Exhibits 17, Tables 1A, 1B, and 2 and Exh 5, Appendix 15, 17, and Table presented and expounded upon by the ADCNE witnesses (and Mr. Fredericks for the Market Administrator) show the swings in weekly and seasonal Class I servicing by the ADCNE cooperatives which in aggregate reflect the overwhelming majority of sales in the order. Proposal 7 has within it no intention to disadvantage or unduly burden the smaller operating handlers who may, in fact, proportionately balance a Class I milk supply. We did not witness, however, testimony of any detailed or

credible nature of those services being provided. The casual comments that “we balance” indicated by several witnesses were not of the detail provided by ADCNE with respect to balancing operations and should not carry the same weight. All that notwithstanding, the criteria for who should receive marketwide service payments is certainly important and ADCNE suggests that the record could be reopened, or additional comments could be solicited, limited to and focused on that issue, if the Department would benefit from further in depth focus on that aspect of this complex matter.

**V. SUMMARY AND CONCLUSION**

ADCNE respectfully suggests, and requests, that the Department must re-visit the this hearing record with respect to both the recommended delay in payment to producers and the recommended denial of marketwide services payments. With respect to marketwide service payments for Class I balancing, the Recommended Decision does not comport with the statutory language, the Department’s prior application of that language, or the substantial record made by ADCNE in support of the proposals.

RESPECTFULLY SUBMITTED,

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Dated May 24, 2004

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