UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

IN RE:

MILK IN THE UPPER MIDWEST
AREA; HEARING ON PROPOSED
AMENDMENTS TO TENTATIVE
MARKETING AGREEMENT
AND ORDER

DOCKET NO. A0-361-A39;DA-04-03

COMMENTS AND EXCEPTIONS

SUBMITTED BY

DEAN FOODS COMPANY

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COMMENTS AND EXCEPTIONS OF DEAN FOODS, INC.

For its Comments and Exceptions to the Tentative Partial Decision in this proceeding, Dean Foods respectfully says the following:

A. *Allegations of Ex Parte Communications Are Unfounded*

Realizing that there is a lack 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 throw enough at the hearing Record, 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. The latest inchoate allegations of *ex parte* communications also fit this mold. We know of no evidence presented to establish that USDA officials were in fact in the room(s) when the alleged communications took place except as noted in Ms. Dana Coale's memorandum of May 23, 2005 (now part of this Record). Without more, the opponents nonetheless are demanding that the Department track down the details and circumstances of these communications and place them on the record.[1] The result of complying with this demand would be delay.

[1] 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.*

Moreover, it is precisely because the opponents' allegations are inchoate that the Department must conclude that they are made in furtherance of a 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 parte* 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.[2] 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.

[2] 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).

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 communications are **made in secret** and where communications involve arguments of which other interested parties are not already on **notice**.[3] 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 (subject to Ms. Coale's May 23, 2005 Memorandum).

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

[3] 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.

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.

In sum, the alleged communications were not secretive and were not new or additional to statements and evidence already in the record. As such, there is no risk that the alleged communications would affect any open proceedings and thus a further delay of the decision-making process for the purpose of searching and disclosing the details and circumstances of such communications, beyond Ms. Coale's May 23, 2005 memorandum, is unnecessary. USDA need not and should not give in to the opponents' obvious and continued delay tactics.

B. ***Depooling is the Critical Issue***

While Dean Foods appreciates and endorses the Secretary's Partial Tentative Decision, which partially to addresses the existing disorderly marketing conditions, Dean Foods cannot stress enough the importance of immediate, meaningful amendments being adopted and implemented dealing with the critical problem of depooling. Without repeating its principal brief, Dean Foods believes the Secretary should not remain silent about this issue in the face of overwhelming evidence that the practice known as depooling (often literally no more than the mirror image of "paper pooling" discussed in the Tentative Partial Decision) constitutes disorderly marketing.

Perhaps the Secretary has been waiting for the conclusion of the three pending hearings regarding depooling. If so, that time has passed and amendment and implementation is immediately appropriate. Neither Class I handlers paying the Class I differential for the benefit of the entire pool nor the dairy farmers who steadfastly sell and **deliver** milk to those Class I

facilities are treated remotely fairly by the present rules. We urgently urge the Secretary to adopt Dean Foods' recommended solutions to this large and growing problem.

C. *Dean Continues to Support Tighter Pooling Requirements*

Dean also reiterates its support in its original brief for real, meaningful pooling requirements that actually result in fluid milk delivered to fluid milk plants as opposed to being paper pooled. It is not enough to say that a large milk supply exists adjacent to fluid milk marketing plants. Given the payment of a Class I differential by Class I fluid milk plants, it is also critical to make certain that such a supply is available and actually serves the fluid milk market. It is for this reason that Dean Foods continues to support proposals submitted to the Secretary and urges the Secretary to adopt promptly depooling solutions that meaningfully account for producer and handler equity.

D. *Conclusion*

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

Respectfully submitted,

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