UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

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In re: **Milk in the Northeast and Other Marketing Areas**	**7 CFR Parts 1000 *et seq.*** **Docket No. 23-J-0067; AMS-DA-23-0031**

POST HEARING BRIEF OF THE INTERNATIONAL DAIRY FOODS ASSOCIATION

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TABLE OF CONTENTS

I. FMMO FORMULAS AS CURRENTLY DESIGNED AND IMPLEMENTED ALREADY PROPERLY TAKE FARM LEVEL COSTS INTO ACCOUNT, AND SOME PARTIES' CONTRARY POSITION FLIES IN THE FACE OF LONGSTANDING USDA POLICY, LEGAL REQUIREMENTS, COURT RULINGS, AND CONSISTENT USDA PRACTICE OVER MANY DECADES. 1

A. The Section 608c(18) Language Upon Which Proponents Rely Does Not Apply To the Amendment of Existing FMMOs. 3

1. USDA Has Consistently Taken This Position, Which At Least One Court Has Endorsed. 3

2. *St. Albans* and *Lansing* Do Not Support the NMPF Position. 13

B. Even If The Section 608c(18) Requirements Did Apply, They Are Fully Satisfied By The Operation Of The Class III And IV End-Product Pricing Formulas. 15

1. USDA And The Courts Have Consistently Reached This Conclusion. 15

2. This Framework Applies To Class I Prices As Well. 22

3. None Of the Other Proposals Relate to FMMO Provisions For Which Farm Level Costs Are Relevant. 23

4. The Long History Of FMMO Price Setting Fully Supports USDA's Reading Of Section 608c(18). 23

II. IT IS ENTIRELY APPROPRIATE FOR USDA TO ADOPT FMMO PROVISIONS FOR THE PURPOSE OF FACILITATING EFFECTIVE CLASS I PROCESSOR HEDGING. 31

TABLE OF AUTHORITIES

Page(s)

Cases

Arkansas Dairy Cooperative Association v. USDA,
573 F.3d 815 (D.C. Cir. 2009) .... *passim*

Barnhart v. Thomas,
540 U.S. 20 (2003) 7

Barnhart v. Walton,
535 U.S. 212 (2002) 23

Bragdon v. Abbott,
524 U.S. 624 (1998) 24

Bridgewater Dairy, LLC v. USDA,
2007 WL 634059 (N.D. Ohio Feb. 22, 2007) .... *passim*

Corley v. United States,
556 U.S. 303 (2009) 12

Edwards v. Prime, Inc.,
602 F.3d 1276 (11th Cir. 2010) 34

In re Haas,
48 F.3d 1153 (11th Cir. 1995) 8

Harding v. Dep't of Veteran Affairs,
448 F.3d 1373 (Fed. Cir. 2006) 35

Hibbs v. Winn,
542 U.S. 88 (2004) 12

Lansing Dairy, Inc. v. Espy,
39 F.3d 1339 (6th Cir. 1994) 13, 14

Minnesota Milk Prod. Ass'n v. Glickman,
153 F.3d 632 (8th Cir. 1998) 15

Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.,
416 F.Supp.2d. 92 (D.D.C. 2006) 11

Pierce Cnty v. Guillen,
537 U.S. 129 (2003) 34

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979)....................5

Ross v. Blake,
578 U. S. 632 (2016)....................34

Russello v. United States,
464 U.S. 16 (1983)....................8, 11

Soliman v. Gonzales,
419 F.3d 276 (4th Cir. 2005)....................8

Soto Padro v. Pub. Bldg. Auth.,
747 F. Supp. 2d 319 (D.P.R. 2010)....................35

Spencer Enters., Inc. v. United States,
345 F.3d 683 (9th Cir. 2003)....................8

St. Albans Cooperative Creamery, Inc. v. Glickman,
68 F. Supp. 2d 380 (D. Vt. 1999)....................13, 14

United States v. Wong Kim Bo,
472 F.2d 720 (5th Cir. 1972)....................8

Van Buren v. United States,
593 U.S. --, --, 141 S. Ct. 1648 (2021)....................34

VJC Productions, Inc. v. Kydes,
903 F. Supp. 42 (S.D. Ga. 1995)....................8

Statutes

7 U.S.C. § 602....................3, 6, 7

7 U.S.C. § 608b....................4, 6, 10, 11

7 U.S.C. § 608c(5)....................32

7 U.S.C. § 608c(17)(G)(iii)....................18, 19

7 U.S.C. § 608c(18)....................*passim*

7 U.S.C. § 7253(a)(1)....................13. 30

Agricultural Adjustment Act of 1933....................23, 32

Agricultural Marketing Agreement Act of 1937....................*passim*

Agriculture and Food Act of 1981....................8

Agriculture Improvement Act of 2018 32

Federal Agricultural Improvement and Reform Act of 1996 ....13, 30

Pub. L. No. 73-10....................23

Pub. L. No. 75-137....................23

Pub. L. No. 101-624....................30

Pub. L. No. 106-113....................13, 31

Regulations

7 C.F.R. § 900.27(b) 1

7 C.F.R. § 904.7(a)....................27

7 C.F.R. § 912.4 24

7 C.F.R. § 912.5(c)....................24

7 C.F.R. § 912.6(a)(l), (5) 25

7 C.F.R. § 913.5(c)....................24

7 C.F.R. § 920.5(b) 24

7 C.F.R. § 922.6(a)....................24

7 C.F. R. § 927.3(b)(8)....................26

7 C.F.R. § 927.4(a)....................25

7 C.F. R. § 927.4(a)(l)....................26

7 C.F.R. § 935.5 26

7 C.F.R. § 941.5 25

7 C.F.R. § 942.4(b) 26

7 C.F.R. § 942.5(a)(3)....................26

7 C.F.R. § 954.5 25

7 C.F.R. § 969.5 25

7 C.F.R. § 973.4(b) 26

7 C.F.R. § 973.5(a)(2) 26

7 C.F.R. § 1000.50(b) 32

7 C.F.R. § 1001.51 30

7 C.F.R. § 1001.60 29

7 C.F.R. § 1001.61(a) 29

7 C.F.R. § 1013.50 29

7 C.F.R. § 1013.51(a) 29

7 C.F.R. § 1126.50(a) 29

7 C.F.R. § 1126.51 29

7 C.F.R. § 1131.50(a) 29

7 C.F.R. § 1131.51 29

Federal Register Publications

13 Fed. Reg. 6,445 (Nov. 2, 1948) 28

27 Fed. Reg. 1802 (Feb. 27, 1962) 29

63 Fed. Reg. 4,802 (Jan. 30. 1998) 22

64 Fed. Reg. 16,026 (April 2, 1999) 15, 17, 23

64 Fed. Reg. 70867 (Dec. 17, 1999) 13

65 Fed. Reg. 76,832 (Dec. 7, 2000) 31

67 Fed. Reg. 67,906 (Nov. 7, 2002) 15, 17, 21, 31

73 Fed. Reg. 35,306 (June 20, 2008) 16, 18, 19

78 Fed. Reg. 9,248 (Feb. 7, 2013) 19

84 Fed. Reg. 8,590 (Mar. 11, 2019) 33

Others

Boston Milkshed Price Comm., *A Recommended Basis of Pricing Class I Milk in the Boston Market* (1947) 27

G. Beal & H. Bakken, *Fluid Milk Marketing* (1st ed. 1956) 26

J. Roberts and G. Grayson, *Formula Pricing of Fluid Milk* (1950)..28

Ohio Agricultural Extension Station, *Formulas For Pricing Milk to Producers in Ohio* (Jan 1954)..27

S. S. Johnson, *Formula Pricing Class I Milk Under Market Orders,* 31 J. of Farm Econ. 428, 430 (1949)..27

The International Dairy Foods Association ("IDFA") respectfully submits this post-hearing legal brief pursuant to 7 C.F.R. § 900.27(b), in order to address two important legal issues relevant to USDA's consideration of the 22 pending proposals to amend current federal milk marketing orders ("FMMOs"). IDFA is filing this brief well in advance of the April 1, 2024, deadline, in order that these legal issues can be fully considered by USDA in the course of its decision-making. IDFA will by the April 1, 2024, deadline file its separate Proposed Findings and Conclusions, which will address in depth the evidentiary record created during the hearing.

The two legal issues addressed here are:

- How farm-level costs are properly considered in setting make allowances and making other amendments to existing FMMO provisions, and
- Whether the facilitation of effective hedging by Class I handlers is a legally appropriate consideration in setting Class I prices and, most particularly, in setting the Class I skim milk mover.

I. FMMO FORMULAS AS CURRENTLY DESIGNED AND IMPLEMENTED ALREADY PROPERLY TAKE FARM LEVEL COSTS INTO ACCOUNT, AND SOME PARTIES' CONTRARY POSITION FLIES IN THE FACE OF LONGSTANDING USDA POLICY, LEGAL REQUIREMENTS, COURT RULINGS, AND CONSISTENT USDA PRACTICE OVER MANY DECADES.

Multiple witnesses appearing on behalf of the National Milk Producers Federation ("NMPF") presented extensive feed, fuel, and other farm level costs of production data in support of various NMPF proposals:[1] A mere sampling include the following:

- S. Koontz, Colorado State University, Hearing Exh. 304 (NMPF Exh. 55) (devoting his entire testimony to the costs to produce milk in Colorado and as compared to

[1] The costs of *transporting* raw milk from farm to Class I processing plants presents a different issue, addressed at pp. 22-23 below.

other states, including the costs of corn and alfalfa and transporting that feed to Colorado; the profitability of milk production in the state; and the costs and availability of irrigation water);

- H. Jensen, J.D. Heiskell and Company, Hearing Exh. 334 (NMPF Exh. 59) (I was "asked to provide data on corn basis, soybean meal basis, and DDG (Dried Distillers grains) price delivered into Colorado and California");
- B. Butcher, United Dairymen of Arizona, Hearing Exh. 376 (NMPF Exh. 46) (addressing the costs of water and the effect of drought, worker housing, and farmland costs in Arizona);
- E. Gallagher, Dairy Farmers of America, Hearing Exh. 175 (NMPF Exh. 24) (discussing at length feed costs and dairy production costs);
- C. Wolf, Cornell University, Hearing Exh. 169 (NMPF 27) (discussing dairy farm profitability and cost of production as well as factors driving those measures);
- L. Kootstra, Frazier LLP, Hearing Exhs. 79–84 (NMPF Exhs. 25–25E) (addressing farm cost trends on California).

This testimony appears to be predicated upon the assumption that 7 U.S.C. § 608c(18) requires that USDA directly take feed, fuel, and other farm level costs of production data into account in setting make allowances, establishing Class I differentials, and/or making other revisions to the existing FMMO provisions. *See*, *e.g.*, Hearing Exh. 175 (NMPF Exh. 24), at p. 2, testimony of E. Gallagher (Dairy Farmers of America) (contending that make allowances should reflect feed costs, other farm input price inflation, the cost of production, and dairy profit margins).

This is not correct, for two separate reasons.

First, the Section 608c(18) language upon which the NMPF proponents apparently rely as purportedly identifying feed, fuel, and the like as relevant factors does not apply when USDA is (as here) considering revisions to existing FMMOs, as opposed to engaging in the promulgation of a new FMMO.

Second, even if this Section 608c(18) language does apply to FMMO revisions, USDA's long-stated position, firmly backed by settled case law, is that USDA fulfills these Section 608c(18) requirements because its end-product pricing formulas for setting Classes III and IV prices utilize the supply and demand for and price of dairy products to capture farm production inputs and costs.

Indeed, ***for well over eighty years***, ***USDA's consistent FMMO practice has been to capture farm production inputs and costs indirectly***, rather than to set manufacturing or Class I prices based upon any direct consideration of feed, fuel, and other farm level costs. There is accordingly no basis for proponents' apparent attempt to persuade USDA to revise current FMMO provisions based upon direct or specific data regarding such farm level costs.

A. The Section 608c(18) Language Upon Which Proponents Rely Does Not Apply To the Amendment of Existing FMMOs.

1. USDA Has Consistently Taken This Position, Which At Least One Court Has Endorsed.

We start with the statutory language. Section 608c(18), entitled "Milk prices," states:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds,

> upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

As USDA cogently argued in its brief to the D.C. Circuit in *Arkansas Dairy Cooperative Association v. USDA,* No. 08–5406 (filed Dec. 10, 2008) (Appendix 30 hereto) at pp. 16–17, decision reported at 573 F.3d 815 (D.C. Cir. 2009):

> Plaintiffs contend that the make allowance adjustment failed to comport with 7 U.S.C. § 608c(18), which sets forth certain economic factors that should inform the initial setting of milk prices. As the district court explained, there is no basis for this position in the statute's text or in its longstanding interpretation by USDA. J.A. 77-87. The text of § 608c(18) makes clear that after the Secretary initially fixes minimum milk prices for a marketing order at a price other than parity, he is not bound to revisit every enumerated economic factor each time he makes an adjustment to those prices to account for changed circumstances. This conclusion is the only interpretation that gives effect to each sentence of that subsection.

As USDA further explained at pp. 17–18:

> The first sentence of § 608c(18) directs the Secretary to ascertain the parity price of milk — i.e., the current buying power of milk relative to its historical buying power — as a guidepost for establishing minimum prices in any milk marketing order. See 7 U.S.C. § 608c(18). USDA regularly calculates the parity price. The second sentence directs the Secretary to adjust that parity price as necessary based on consideration of certain economic factors. Id. The third sentence details the manner in which the Secretary is to depart from the traditional reliance on parity prices, if he finds them unreasonable in light of economic factors. Id. The Secretary has not set milk prices at parity for many years, since it is much higher than necessary to ensure an adequate milk supply.
>
> The fourth sentence, at issue in this lawsuit, sets forth the procedure for making further adjustments to minimum milk prices once the

> Secretary has already fixed minimum prices at a level other than parity using the procedures outlined in the first three sentences:
>
>> Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.
>
> Id. Although the fourth sentence requires that the rule-making process include an opportunity for hearing, it contains no language mandating consideration of each of the economic factors articulated in the second and third sentences. Once the Secretary has fixed prices at a level other than parity, the fourth sentence authorizes the Secretary to adjust minimum milk prices in response to "changed circumstances," without requiring re-consideration of all other economic factors.
>
> Thus, the fourth sentence provides the Secretary with greater discretion to adjust prices to respond to changed circumstances, once he has initially fixed prices at a level other than parity in accordance with the third sentence. A contrary reading of the fourth sentence would be inconsistent with the terms "thereafter," "changed conditions," and "as the Secretary finds necessary." See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

USDA advanced the same position in its Memorandum In Opposition To Plaintiffs' Motion For A Preliminary Injunction in *Bridgewater Dairy, LLC v. USDA*, No. 3:07 CV 104, Docket Entry 31 (filed Feb. 6, 2007) (Appendix 31 hereto), decision reported at 2007 WL 634059 (N.D. Ohio Feb. 22, 2007). As USDA once again explained at pp. 13–18:

> The text of 7 U.S.C. § 608c(18) makes clear that after ***the Secretary of Agriculture initially fixes minimum milk prices for a marketing order at a price other than parity***, he is not bound to re-consider every economic factor each time he makes an adjustment to prices to account for change circumstances. This conclusion, which eviscerates plaintiffs' claims, is a necessary result of the plain language in the four sentences of § 608c(18).
>
> The first sentence of § 608c(18) instructs the Secretary to ascertain parity prices of milk before establishing minimum prices in any milk marketing order:

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities.

7 U.S.C. § 608c(18). As explained above, "parity prices" are a measure of the current buying power of a unit of an agricultural commodity relative to its historical buying power and USDA calculates the milk parity price on a monthly basis.

The second sentence then instructs the Secretary to adjust the parity price based on the consideration of certain economic factors as follows:

> The prices which it is declared to be the policy of Congress to establish in section 2 of this title [7 U.S.C. § 602] shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates.

Id. The reference to the price which is the declared policy of Congress in section 602 is a reference to parity price. Thus, the second sentence specifies that the Secretary, in initially setting minimum milk prices for purposes of a milk marketing order, shall adjust parity price to consider certain economic factors — such as the price of feeds and the economic conditions of the marketing order.

The third sentence provides greater detail for how the Secretary should set minimum prices if he finds that parity prices are not reasonable in light of relevant economic factors:

> Whenever the Secretary finds, upon the basis of evidence adduced at the hearing required by section 8b or 8c [7 U.S.C. § 608b or this section], as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to

> which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quality of pure and wholesome milk, and be in the public interest.

Id. As can be seen, the third sentence requires a reasonableness determination by the Secretary as to parity prices in light of various economic factors. If the Secretary finds that parity prices are not reasonable, the third sentence directs the Secretary to fix the price of milk at a price (irrespective of parity price) that will reflect economic factors, insure a sufficient quantity of milk, and be in the public interest. Thus, under the third sentence the Secretary may, upon a finding that the parity prices of milk are unreasonable, fix those prices to reflect economic factors and other considerations.

The fourth sentence of § 608c(18) provides the procedure for making further modifications to minimum milk prices after the Secretary has fixed minimum milk prices using the procedures outlined in the first three sentences:

> Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

Id. While the fourth sentence still requires that the rule-making process include a hearing, it contains no language mandating consideration of each of the economic factors articulated in the second and third sentences. Notably, the fourth sentence applies when the Secretary, having previously fixed prices, decides to adjust them. Furthermore, the fourth sentence enables the Secretary to adjust minimum milk prices in response to circumstances that have "changed," without specifically requiring re-consideration of all other economic factors at the same time. Put summarily, the fourth sentence provides a more discretionary procedure for the subsequent modification of minimum prices — after the Secretary has previously fixed prices through the procedure specified in the second and third sentences.

Any other reading of the fourth sentence ignores the significance of three terms in the fourth sentence: "thereafter," "changed conditions," and "as the Secretary finds necessary." The "thereafter" term begins the fourth sentence and therefore modifies the last event described in the third sentence — the Secretary's initial fixing of minimum prices. See Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (explaining that under the "the rule of last antecedent,"

a limiting clause or phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows"). Thus, the fourth sentence applies after the Secretary has already considered the factors prescribed by the second and third sentences and made the decision to fix milk prices. Because the Secretary has long ago satisfied the procedural requirements of the second and third sentences (for instance, parity prices have not been used to set minimum prices following the Agriculture and Food Act of 1981), the adjustments at issue in this litigation are governed by the provisions of the fourth sentence.

The remaining significant terms in the fourth sentence demonstrate that in taking action pursuant to the fourth sentence, USDA is not bound to reconsider each of the factors listed in sentences two and three; rather, the Secretary has discretion to determine how "changed circumstances" necessitate a change in price. The use of the term "changed conditions," instead of a recapitulation of specific economic factors listed in both the second and third sentences, indicates that the fourth sentence should be given a distinct meaning. See Soliman v. Gonzales, 419 F.3d 276, 283 (4th Cir. 2005) ("Where Congress has utilized distinct terms within the same statute, the applicable canons of statutory construction require that we endeavor to give different meaning to those different terms . . . ."); Spencer Enters., Inc. v. United States, 345 F.3d 683, 689 (9th Cir. 2003). Notably, Congress had already demonstrated a willingness to re-articulate the mandatory economic factors word-for-word in the second and third sentences. If Congress intended to mandate reconsideration of each of those factors for all adjustments made under the fourth sentence, it would have repeated them — and it did not do so. See Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))); VJC Productions, Inc. v. Kydes, 903 F. Supp. 42, 44 (S.D. Ga.) ("Where Congress knows how to say something but chooses not to, its silence is controlling." (quoting In re Haas, 48 F.3d 1153, 1156 (11th Cir. 1995))).

Similarly, the phrase "as the Secretary finds necessary," indicates that in making adjustments under the fourth sentence, the Secretary is not bound by the rigid consideration of all the economic factors listed in the second and third sentences. Instead, the phrase evidences a legislative intent to allow the Secretary to use his discretion to determine the relevant changed conditions and further adjust minimum prices accordingly.

> Putting the pieces together, because the Secretary has previously engaged in the analysis in the second and third sentences to fix minimum prices, the recent adjustments to the make allowances are governed by the fourth sentence, which permits the Secretary to adjust the prices only in consideration of "changed conditions" as "[he] finds necessary."

The *Arkansas Dairy* district court adopted USDA's interpretation:

> Plaintiffs maintain that they can show a likely success on the merits because they argue that USDA has failed to follow statutory mandates to determine and consider the monthly average costs of feed and fuel in the marketing areas and to consider those numbers in determining whether or not to adjust make allowances. … Plaintiffs' claims are based on an erroneous reading of 7 U.S.C. § 608c(18), which does not constrain USDA in the manner they suggest.

Arkansas Dairy Coop., Inc. v. USDA, 576 F. Supp. 2d 147, 156–57 (D.D.C. 2008). As the court further explained:

> This Court's interpretation of the statutory language is that the second and third sentences of § 608c(18) only apply when the Secretary first fixes minimum prices using a new pricing methodology, and only to minimum prices as a whole, not to each input used to derive those prices. …
>
> USDA argues that the statute is clear that after the Secretary initially fixes minimum milk prices for a marketing order at a price other than parity, the Secretary is not bound to revisit every enumerated economic factor each time he makes an adjustment to those prices to account for changed circumstances. This is a reasonable interpretation of the statute, and an interpretation that gives effect to each sentence of the subsection. The first sentence of § 608c(18) directs the Secretary to ascertain the parity price of milk as a guidepost for establishing minimum prices in any milk marketing order.
>
> > The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities.

7 U.S.C. § 608c(18). The price parity is regularly calculated by USDA. The second sentence then directs the Secretary to adjust that parity price as necessary based on consideration of certain economic factors:

> [The parity price] shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates.

Id. The third sentence then details the manner in which the Secretary is to depart from the traditional reliance on parity prices if he finds them unreasonable in light of economic factors:

> Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

Id. The Secretary has not set price parity for many years, as the current price parity is much higher than necessary to ensure an adequate supply of milk. What the Secretary has done is fix minimum prices, first through competitive pay price series, and then through the product-pricing formulas in use today.

It is the fourth sentence that sets forth the procedure for making further adjustments to minimum milk prices once the Secretary has already fixed minimum prices at a level other than parity using the procedures outlined in the first three sentences:

> Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

> *Id.* Even though the fourth sentence still requires that the rule-making process include a hearing, it contains no language mandating direct consideration of each of the economic factors articulated in the second and third sentences. Once the Secretary has fixed prices at a level other than parity, this final sentence then enables the Secretary to adjust minimum milk prices in response to "changed circumstances" without specifically requiring re-consideration of all other economic factors.
>
> USDA argues that the term "changed circumstances" in the fourth sentence—while the second and third sentences both specifically mention a list of economic factors—indicates that the fourth sentence should be given a distinct meaning. In drafting the sentence in the way that it did, Congress clearly demonstrated a willingness to re-articulate the mandatory economic factors word-for-word in the second and third sentences. *See Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.,* 416 F.Supp.2d. 92, 100 (D.D.C. 2006)("'When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983))). Congress did not articulate those same requirements in the fourth sentence and chose to write the statute in that manner for a reason. This court is not persuaded to disturb the Secretary's reasonable interpretation of the statute.
>
> The fourth sentence provides the Secretary with greater discretion to adjust prices to respond to changed circumstances, once he has initially fixed prices at a level other than parity in accordance with the third sentence. Construing the statute in any other way would make the words of the statute meaningless.

Arkansas Dairy, 576 F. Supp. 2d at 157-58.

On appeal, the D.C. Circuit decided that it need not address this district court holding because ***at that time***, the Agricultural Marketing Agreement Act ("AMAA") contained another provision, Section 608c(17)(G), which provided that "[a]s part of any hearing to adjust make allowances under marketing orders ***commencing prior to September 30, 2012***, the Secretary shall—(i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area; (ii) consider the most recent monthly feed and fuel price data available;

and (iii) consider those prices in determining whether or not to adjust make allowances." The D.C. Circuit found that "[t]he text of § 608c(18) differs [only] very slightly in structure on this point from that of § 608c(17)(G)," so that "compli[ance]" with § 608c(18) followed as a matter of course from "compli[ance] with § 608(17)(G)(i)." *Arkansas Dairy*, 573 F.3d at 830–31.

As with the D.C. Circuit in *Arkansas Dairy*, the *Bridgewater Dairy* court ultimately found "it unnecessary to" resolve the question, because "[r]egardless of whether Section 608c(18) requires the Secretary to consider feed prices and supplies when amending make allowances, Plaintiffs cannot succeed on the merits because . . . these factors were given appropriate consideration." 2007 WL 634059 at *6.

In fact, the overlap between the operative language of §§ 608c(18) and 608(17)(G)) reinforces the correctness of USDA's position, and the *Arkansas Dairy* district court's holding, that the § 608c(18) criteria do not applying to FMMO revisions. If, contrary to USDA's stated position, those § 608c(18) criteria ***did*** apply to proceedings to revise existing FMMOs, Section 608(17)(G) would have been superfluous, because the considerations it mandated with respect to adjustments to FMMOs would already have been mandated by § 608c(18) (which the D.C. Circuit found differed only "very slightly in structure").

But statutory language cannot be read in a manner that renders it superfluous, *Corley v. United States*, 556 U.S. 303, 314 (2009), quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), and Section 608(17)(G) must be given meaning. The only way to do so is to conclude that Section 608(17)(G)'s requirements had non-superfluous effect because they did, on their face, apply to hearings held "to adjust make allowances," while § 608c(18) does not.

Concomitantly, the fact that Section 608(17)(G) requirements applied only to FMMO hearings commencing before September 30, 2012, necessarily means that they do not apply to the instant proceeding.

2. *St. Albans* and *Lansing* Do Not Support the NMPF Position.

The NMPF proponents' apparent attempt to rely upon *St. Albans Cooperative Creamery, Inc. v. Glickman*, 68 F. Supp. 2d 380 (D. Vt. 1999), or *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339 (6th Cir. 1994), which predated both *Arkansas Dairy* and *Bridgewater Dairy*, is misplaced. As USDA explained in its *Bridgewater Associates* brief (Appendix 31 hereto) at pp. 21—22:

> Plaintiffs offer no explanation as to why § 608c(18) should be read as they suggest, i.e., requiring consideration of the economic factors listed in the second and third sentences. As explained above, that construction does not comport with the plain language of § 608c(18), and it is at odds with principles of Chevron deference. Beyond that, the two cases that plaintiffs principally rely on, St. Albans and Lansing Dairy, offer them little or no assistance.
>
> Plaintiffs most rely heavily on the decision in St. Albans Cooperative Creamery, Inc. v. Glickman, 68 F. Supp. 2d 380 (D. Vt. 1999). As an initial matter, St. Albans was a ruling upon a motion for a temporary restraining order, not a final judgment, and the case never proceeded beyond that preliminary stage. That is so because shortly after the court issued its ruling in St. Albans, Congress legislative overruled the decision by directing the Secretary to adopt and implement the final USDA rule (subject to one amendment) that the St. Albans court had temporarily enjoined. See Pub. L. No. 106-113, 115 Stat. 1501 (Nov. 29, 1999); see also 64 Fed. Reg. 70867, 70868 (Dec. 17, 1999).
>
> Beyond the minimal persuasive value of St. Albans, it is distinguishable from this litigation both legally and factually. Legally, the St. Albans decision is distinguishable because it arose in the context of realigning and consolidating milk marketing orders under the Federal Agricultural Improvement and Reform Act of 1996 (the "FAIR Act"), see 7 U.S.C. § 7253(a)(1), and thus the Secretary's actions at least arguably constituted the initial fixing of minimum prices under new orders subject to sentences two and/or three of § 608c(18). Here, however, the case involves adjustments to the prices that already have been initially fixed, and therefore sentence four applies. Furthermore, the St. Albans court found that

> the record before it did not evidence direct consideration of regional economic factors. See id. at 390. In contrast, here, as explained below, USDA did consider the regional economic factors of the second and third sentences of § 608c(18) — even though it is under no legal obligation to do so.
>
> Plaintiffs' reliance on the Sixth Circuit's decision in Lansing Dairy, Inc. v. Espy, 39 F.3d 1339 (6th Cir. 1994), similarly does not advance plaintiff's case. Rather, that decision supports USDA's position. The central holding in Lansing Dairy is that a court should defer to USDA's interpretation of the milk statutes, especially as to when the § 608c(18) factors are to be applied. Id. at 1354–55. Such a holding undermines plaintiffs' very position. USDA's interpretation of § 608c(18) is that the factors in the second and third sentences need not all be considered each time the Secretary makes adjustments to prices pursuant to the fourth sentence (i.e., after the Secretary has set minimum prices off of parity prices). That position is premised on a plain-language reading of the statute, reasonably supported by canons of construction and practical feasibility. For that reason, under the deference required under Lansing Dairy, USDA's position controls, and plaintiffs' 'failure of consideration' claims fail as a matter of law.

The *Bridgewater Dairy* court agreed with USDA's views regarding *St. Albans* and *Lansing Dairy*: "*St. Albans* certainly supports Plaintiffs' interpretation of Section 608c(18), but it is not binding on this Court and, furthermore, any persuasive value is severely undermined by Congress' direct action a few months after the decision." *Bridgewater Dairy,* 2007 WL 634059 at *5. The court further explained:

> Plaintiffs contend that the Sixth Circuit's decision in *Lansing Dairy* "held that compliance with the requirements of 608c(18) was required in setting minimum price formulas" (Pls' Memo., Doc. No. 4, pp. 9–10) (citing *Lansing Dairy,* 39 F.3d at 1352–53). This was not the holding of *Lansing Dairy;* rather, it was merely mentioned in passing. The *Lansing Dairy* court held that the Secretary's interpretation of the AMAA, namely "that he need not undertake a § 608c(18) economic analysis before modifying location adjustments pursuant to 608c(5)," was reasonable and thus entitled to *Chevron* deference. *Lansing Dairy,* 39 F.3d at 1358. This decision actually favors Defendants here: the Sixth Circuit specifically held that Section 608c(18) was ambiguous and subject to multiple reasonable interpretations."

2007 WL 634059 at * 4.

For these reasons, the Section 608c(18) factors relating to farm level costs do not apply to these proceedings.

B. Even If The Section 608c(18) Requirements Did Apply, They Are Fully Satisfied By The Operation Of The Class III And IV End-Product Pricing Formulas.

1. USDA And The Courts Have Consistently Reached This Conclusion.

Furthermore, as USDA also set forth in its *Arkansas Dairy* appellate brief at p. 18 (Appendix 30 hereto), "even if § 608c(18) constrained subsequent adjustments to the *minimum prices*, there would still be no support for plaintiffs' argument that the statute requires that adjustments to make allowances reflect producer costs." As USDA explained:

> By its plain terms, § 608c(18) provides that only the overall *price* should reflect the enumerated economic factors. It does not mandate that every variable or input used to calculate that price also reflect those economic factors. See Minnesota Milk Prod. Ass'n v. Glickman, 153 F.3d 632, 644–45 (8th Cir. 1998). The make allowances adjusted on July 31, 2008, need not conform to § 608c(18), so long as the overall pricing formulas for the minimum prices reflect the statutory factors. And that is in fact the case. When USDA first adopted the pricing system presently in place, it determined that the overall design of the formulas would automatically account for the economic factors set forth in § 608c(18). See 64 Fed. Reg. 16,026, 16,095 (April 2, 1999); 67 Fed. Reg. 67,906, 67,915 (Nov. 7, 2002). Having made this determination in 1999 when it initially fixed those minimum price formulas, USDA is not bound to revisit it each time it adjusts the value assigned to some factor within those formulas, because the underlying design of the formulas remains unchanged and accords with § 608c(18).

Id. at 18–19.

As USDA had informed the *Arkansas Dairy* district court:

> It is therefore neither inappropriate nor surprising that, while USDA considers producer costs in fixing prices, it declined to modify the make allowances to account for those costs. The make allowance is the input in the product-pricing formula that accounts the costs

> *manufacturers* incur in transforming raw milk into other dairy products. In order to extrapolate the value that raw milk contributes to the commodity prices of dairy products — and thereby approximate raw milk's true value in the marketplace — these manufacturer costs must be included as part of the formula. The costs of *producing milk*, in contrast, are in the aggregate "reflected in the supply and demand conditions" that affect the NASS commodity prices of dairy products. See 73 Fed. Reg. at 35,324. Plaintiffs' insistence that the make allowance — rather than the formula as a whole—— reflect producers' costs misapprehends the underlying pricing mechanisms.

Defendant's Memorandum Of Points And Authorities In Opposition To Plaintiffs' Motion For Preliminary Injunction at p. 17 in *Arkansas Dairy Coop. Ass'n v. USDA,* No. 1:08-cv-01426, docket entry 15 (filed Aug. 28, 2008) (Appendix 37 hereto), decision reported at 576 F. Supp. 2d 147 (D.D.C. 2008).

These USDA briefs refer back to USDA's reasoning during the 2000 order reform. As USDA then explained, the costs of producing milk are captured through the formulas used to set regulated minimum prices for milk being used for Class III and IV products:

> The Act stipulates that the price of feeds and the availability of feeds be taken into account in the determination of milk prices. This requirement currently is fulfilled by the BFP [Basic Formula Price]. If the price of feed increases the quantity of milk produced would be reduced due to lower profit margins. As the milk supply declines, plants buying manufacturing milk would pay a higher price to maintain an adequate supply of milk to meet their needs. As the resulting farm profit margins increase, so should the supply of milk. Likewise, the reverse would occur if the price of feed declines. The price of feed is not directly included in the determination of the price for milk, but rather causes a situation in which the price of milk may increase or decrease. A change in feed prices may not necessarily result in a change in milk prices. For instance, if the price of feed increases but the demand for cheese declines, the milk price may not increase since milk plants would need less milk and therefore would not bid the price up in response to lower milk supplies.
>
> The pricing system contained in this decision will function in the same manner as the current pricing system by accounting for changes in feed costs and feed supplies indirectly. The product price formulas adopted in this rule should reflect accurately the market values of the products made from producer milk used in manufacturing. As feed costs increase with a resulting decline in production, commodity prices would increase as a result of

> manufacturers attempting to secure enough milk to meet their needs. Such increases in commodity prices would mean higher prices for milk. The opposite would be true if feed costs were declining. Additionally, since Federal order prices are minimum prices, handlers may increase their pay prices in response to changing supply/demand conditions even when Federal order prices do not increase.

Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Marketing Agreements and to Orders., 64 Fed. Reg. 16,026, 16,095–96 (April 2, 1999) (Appendix 32 hereto).

As USDA further explained in a subsequent 2002 decision:

> The [AMAA] stipulates that the price of feeds, the availability of feeds, and other economic conditions which affect market supply and demand for milk and its products be taken into account in the determination of milk prices. This requirement currently is fulfilled by the Class III and Class IV component price calculations. If conditions increase supply costs, the quantity of milk produced would be reduced due to lower profit margins. As the milk supply declines, plants buying manufacturing milk would pay a higher price to maintain an adequate supply of milk to meet their needs. As the resulting farm profit margins increase, so should the supply of milk. Likewise, the reverse would occur if economic conditions reduce supply costs. The price of feed is not directly included in the determination of the price for milk, but rather is one economic condition which may cause a situation in which the price of milk may increase or decrease. A change in feed prices may not necessarily result in a change in milk prices. For instance, if the price of feed increases but the demand for cheese declines, the milk price may not increase since milk plants would need less milk and therefore would not bid the price up in response to lower milk supplies. Also, other economic conditions could more than offset a change in feed prices and thus not necessitate a change in milk prices.

Milk in the Northeast and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreement and To Order, 615, 7 Fed. Reg. 67,906, 67,911 (Nov. 7, 2002) (Appendix 33 hereto).

And as USDA later confirmed in 2008:

> In the aggregate, the costs of producing milk are reflected in the supply and demand conditions for the dairy products. When the supply of milk is insufficient to meet the demand for Class III and Class IV products, the prices for these products increase as do

> regulated minimum milk prices paid to dairy farmers because the milk is more valuable, and this greater milk value is captured in the pricing formulas.

Milk in the Northeast and Other Marketing Areas; Tentative Partial Final Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreements and Orders, 73 Fed. Reg. 35,306, 35,324 (June 20, 2008) (Appendix 34 hereto).

In short, the FMMO pricing system accounts for changes in feed costs, feed supplies, and other economic conditions, as explained above. The end-product pricing formulas reflect accurately the market values of the products made from producer milk used in manufacturing. As supply costs increase with a resulting decline in production, commodity prices increase as manufacturers secure additional milk to meet their needs. Such increases in commodity prices mean higher prices for milk. The opposite occurs if supply costs are declining.

The D.C. Circuit in *Arkansas Dairy* fully endorsed USDA's position that any obligation it has under Section 608c(18) (or under now-expired 608c(17)(G)) to consider producer feed and fuel costs is fully satisfied by the operation of the Class III and IV end-product pricing formulas. As the court explained:

> With regard to the Secretary's obligation to "consider [producers' feed and fuel] prices in determining whether or not to adjust make allowances," 7 U.S.C. § 608c(17)(G)(iii), the Secretary explicitly addressed these costs in promulgating the *Interim Rule*:
>
>> In the aggregate, the costs of producing milk are reflected in the supply and demand conditions for the dairy products. When the supply of milk is insufficient to meet the demand for Class III and Class IV products, the prices for these products increase as do regulated minimum milk prices paid to dairy farmers because the milk is more valuable and this greater milk value is captured in the pricing formulas. Dairy farmers face no regulatory minimums in their costs and face no regulated minimum payment obligation in the way that regulated handlers must pay dairy farmers for milk.

> 73 Fed. Reg. at 35,324.[2] The Secretary contrasted these producers costs, reflected in market pricing, with handlers' costs of manufacturing:
>
>> The ability of a manufacturer to offset cost increases are limited by the level of make allowances in the Class III and Class IV price formulas. Manufacturing processors are charged the [Federal Milk Marketing Order] minimum price for producer milk used to produce Class III and Class IV products. However, plant manufacturing cost increases may not be recovered because Class III and Class IV product-price formulas use make allowances that are fixed regardless of market conditions and change only by regulatory action. Simply put, when manufacturing cost increases result in costs higher than those provided by the formula make allowance factors, the value of milk used to make those products may be over-valued.
>
> *Id.* at 35,323. The Secretary concluded that it was therefore necessary to increase make allowances to reflect increases in the manufacturing costs incurred by handlers as shown in the record evidence. *Id.* at 35,323–4.
>
> In sum, the Secretary considered the costs to producers, but reasoned that those costs could be recouped through market mechanisms. The make allowances, by contrast, represent the costs of handlers and are the only mechanism through which manufacturers' costs can be recouped under the pricing formulas. The Secretary concluded it was necessary to increase make allowances to reflect handlers' increased costs. Although the Secretary increased make allowances and thereby decreased the amount received by producers for a given market price, his well-reasoned analysis in the rulemaking record constitutes "consider[ing producers' feed and fuel] prices in determining whether or not to adjust make allowances," § 608c(17)(G)(iii).

573 F.3d at 831–32.

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[2] USDA repeated verbatim this same point -- that "the costs of producing milk are reflected in the supply and demand conditions for the dairy products" -- when it later issued the final decision implementing make allowance amendments. *See* Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreements and Orders and Termination of a Portion of the Proceeding, 78 Fed. Reg. 9,248, 9,270 (Feb. 7, 2013) (Appendix 35 hereto).

On that basis, the D.C. Circuit concluded that "[a]lthough we hold that the producers . . . correctly contend the Secretary was required to consider their costs for feed and fuel in deciding whether or not to amend make allowances, for the reasons set forth in Part IV they have shown no likelihood of success on the merits of their contention the Secretary exceeded his powers by failing to consider those costs." *Id.* at 832[3]

The *Bridgewater* court likewise concluded that USDA's approach satisfied Section 608c(18) statutory requirements, agreeing with USDA that "even if the Secretary was required to consider the Section 608c(18) factors, these factors are reflected, albeit indirectly, in the current product-price formulas." The court reasoned:

> In a final decision issued November 7, 2002, the USDA explained in detail how the Section 608c(18) factors are accounted for under the current product-price-formula system:
>
>> The [AMAA] stipulates that the price of feeds, the availability of feeds, and other economic conditions which affect market supply and demand for milk and its products be taken into account in the determination of milk prices. This requirement currently is fulfilled by the Class III and Class IV component price calculations. If conditions increase supply costs, the quantity of milk produced would be reduced due to lower profit margins. As the milk supply declines, plants buying manufacturing milk would pay a higher price to maintain an adequate supply of milk to meet their needs. As the resulting farm profit margins increase, so should the supply of milk. Likewise, the reverse would occur if economic conditions reduce supply costs. The price of feed is not directly included in the determination of the price for milk, but rather is one economic condition which may cause a situation in which the price of milk may increase or decrease. A change in feed prices may not necessarily result in a change in milk prices. For

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[3] As a reminder, the D.C. Circuit held that "the Secretary was required to consider [producers'] costs for feed and fuel in deciding whether or not to amend make allowances" because ***now-expired*** Section 608c(17)(G) so required, *see* pp. 11-12 above.

> instance, if the price of feed increases but the demand for cheese declines, the milk price may not increase since milk plants would need less milk and therefore would not bid the price up in response to lower milk supplies. Also, other economic conditions could more than offset a change in feed prices and thus not necessitate a change in milk prices.
>
> The pricing system, according to the recommended decision, accounted for changes in feed costs, feed supplies, and other economic conditions, as explained above. The product price formulas adopted in the recommended decision would reflect accurately the market values of the products made from producer milk used in manufacturing. As supply costs increase with a resulting decline in production, commodity prices would increase as manufacturers secure additional milk to meet their needs. Such increases in commodity prices would mean higher prices for milk. The opposite would be true if supply costs were declining.

67 Fed. Reg. 67906, 67911–12 (Nov. 7, 2002).

Section 608c(18) does not specifically state that the Secretary must receive direct evidence of producer costs. Rather, this section only requires that the Secretary fix minimum prices which are "adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products." As explained above by the USDA, the pricing system currently in place (*i.e.* the Class III and Class IV product-price formulas) has been designed to account for these factors. *Id.* The USDA's Interim Order only modifies the amount of the make allowances; it does not modify the portion of the formulas which indirectly incorporates feed costs or supply. Therefore, even with increased make allowances, the fluctuating minimum milk prices are still "adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products."

Even if Section 608c(18) is read to require consideration of these factors, they have been given appropriate consideration. Accordingly, Plaintiffs are unlikely to succeed on the merits in this matter.

2007 WL 634059 at * 6–7.

2. This Framework Applies To Class I Prices As Well.

Class I prices are set by combining the Class III and IV prices with a Class I differential. Given that, for the reasons just explained, Class III and IV prices themselves capture feed, fuel, and other farm level costs, those factors are perforce captured in the Class I price as well.

Accordingly, when setting Class I differentials, USDA has not separately included a factor for general farm level costs. Instead, Class I differentials have been established by adding on top of the Class III and IV price ***adjustments unique to Class I milk or products***. This is comprised of two elements. The first is a base differential, currently $1.60, which historically has been made up of the cost of obtaining and maintaining a Grade A supply; any special balancing costs attendant to serving Class I processors; and a portion of the actual competitive costs incurred by fluid plants to simply compete with manufacturing plants for a supply of milk.[4] Added to the base differential

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[4] USDA explained this approach as follows during the 2000 order reform:

"Option 1A [which was ultimately adopted] utilizes $1.60 as the minimum price in the three base zones. Currently, the lowest differential in Federal orders is $1.04 ($1.20 in Minneapolis) in the Upper Midwest order.

A review of current marketing practices has revealed that the $1.04 per hundredweight base zone differential may not be established at a level high enough to ensure adequate milk supplies for fluid use. First, a portion of the Class I differential must reflect the value associated with maintaining Grade A milk supplies since this is the only milk available for fluid use….

It has been estimated that this value may be worth approximately $0.40 per hundredweight. . . .

Traditionally, the additional portion of the Class I differential reflects the marketing costs incurred in supplying the Class I market. These marketing costs include such things as seasonal and daily reserve balancing of milk supplies, transportation to more distant processing plants, shrinkage, administrative costs, and opportunity or "give-up" charges at manufacturing milk plants that service the fluid Class I markets. This value has typically represented approximately $0.60 per hundredweight….

….

Option 1A establishes an additional competitive factor into the development of the base zone Class I differential. Option 1A values this competitive factor to be worth about $0.60 per hundredweight. This value reflects approximately two-thirds of the actual competitive costs incurred by fluid plants to simply compete with manufacturing plants for a supply of milk." Milk in the New England and Other Marketing Areas; Proposed Rule on Proposed Amendments to Marketing Agreements and Orders, 63 Fed. Reg. 4,802, 4,907-09 (Jan. 30,1998) (footnote omitted) (Appendix 36).

is a location differential reflecting some of the costs of moving milk from areas of production to Class I processing facilities. Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Marketing Agreements and to Orders, 64 Fed. Reg. 16,026, 16,112 et seq. (Apr. 2, 1999) (Appendix 32 hereto).

Accordingly, farm level costs are considered in Class I pricing only insofar as they relate to a cost specific to Class I, and the only such cost ever identified is the cost of maintaining Grade A status. (Whether that cost still exists, or is related to Class I milk, will be addressed in IDFA's Proposed Findings and Conclusions.)

3. None Of the Other Proposals Relate to FMMO Provisions For Which Farm Level Costs Are Relevant.

The remaining proposals relate to the formula assumptions regarding milk composition (Proposals 1 and 2), which end products are included in the pricing formulas (Proposals 3–6), the proper yield factor assumptions regarding the transformation of raw milk to end products (Proposals 10–12), whether and how to change the mechanism and timing by which the Class I skim milk mover incorporates the pricing of Class III and IV prices (Proposals 13–18), and the Class II differential (Proposal 21). None of these proposals implicate farm level costs.

4. The Long History Of FMMO Price Setting Fully Supports USDA's Reading Of Section 608c(18).

USDA's conclusion that its consideration of feed, fuel, and other farm level costs is appropriately addressed through the Class III and IV pricing formulas and changes in end-product prices and that the Secretary need not give "direct" consideration to the "cost of feeds, feed availability" reflects over 80 years of actual practice under the Agricultural Adjustment Act of 1933 (48 Stat. 31, Pub. L. No. 73-10), amended and reenacted by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, Pub. L. No. 75-137). Given that the courts "normally accord particular deference to an agency interpretation of longstanding duration," *Barnhart v.*

Walton, 535 U.S. 212, 220 (2002) (quotation omitted), recognizing that the agency's practices rest on "a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quotation omitted), NMPF's contrary position should be rejected.

Even before the 1937 amendment that added Section 608c(18), federal milk marketing orders routinely utilized an end-product price formula that addressed farm cost factors only *indirectly*. For example, the Dubuque, Iowa order, adopted in 1936, priced Class III milk (milk other than that consumed in fluid or cream form) based upon a fixed adjustment to the Chicago butter price. *See* 7 C.F.R. § 912.4 (1936) (definition of milk classes), 7 C.F.R. § 912.5(c) (1936) (Class III pricing) (Appendix 2). The Kansas City, Missouri order adopted in 1936 also based its Class III price upon the Chicago butter price. *See* 7 C.F.R. § 913.5(c) (1936) (Appendix 3).

The 1937 addition of § 608c(18) and the specific criteria upon which NMPF purport to rely had no impact upon the established practice of using manufactured product pricing formulas. For example, the La Porte County, Indiana order, adopted in November 1937, was structured exactly the same as the Dubuque and Kansas City orders adopted in 1936 and cited above. *See* 7 C.F.R. § 920.5(b) (1937) (pricing Class II milk at 4 times the Chicago butter price plus thirty percent) (Appendix 4). The same is true for the Cincinnati, Ohio order adopted in May 1938. *See* 7 C.F.R. § 922.6(a) (1938) (pricing Class III milk at four times the Chicago butter price plus thirty percent) (Appendix 5). *Feed prices and the like did not directly set the price.*

The New York order was the first to adopt a formula for Class I (fluid) milk based upon the price paid for manufactured dairy products, adopting in August 1938 a formula whereby the price for Class I milk would rise and fall each month with the price of wholesale butter in metropolitan New York. For example, if the price of butter was under 20 cents during summer

months, the price of Class I milk would be $1.80 per hundredweight; if the price of butter was between 20 cents and 25 cents, the Class I price would rise to $2.00; etc. *See* 7 C.F.R. § 927.4(a) (1938), *reprinted in* 3 Fed. Reg. 1945, 1947 as Article IV, Sec. 1 (Appendix 6). *Feed prices and the like did not directly set the price.*

That approach to Class I pricing later gave way to a system under which the Class I price was established by adding a fixed amount or "differential" *(e.g.,* 20 cents) to a formula price that varied from month to month. For example, the Dubuque, Iowa order was amended in 1943 to price Class I milk at 70 cents plus the higher of (a) 0.4 times the price per pound paid for cheese in Plymouth, Wisconsin, plus the price per pound of butter in Chicago, times 3.9 or (b) the average price paid for milk by 10 condensed milk plants located in Illinois and Wisconsin. *See* 7 C.F.R. § 912.6(a)(l), (5) (1943) (Appendix 7). *Neither price mechanism directly accounted for such Section 608c(18) factors as the cost or availability of feeds, but rather accounted for them indirectly through the price being paid for something else (e.g., cheese and butter). The Dubuque order was very typical of milk orders in general.*[5]

During the 1940s, classes of milk other than Class I (fluid) also continued to be priced in many orders based upon manufactured product price formulas and/or prices paid for farm milk in distant markets. The New York order in 1942 provided that Class III milk (used to make certain cheeses) would be the higher of: (a) the average price paid for milk at designated

[5] The Duluth-Superior, Minnesota order in 1942 provided that the Class I price would be a fixed Class I differential plus a formula amount derived from the price of butter and dry skim milk solids. *See* 7 C.F.R. § 954.5(a)(l), (a)(2) (1943) (Appendix 8). The Chicago order in 1941 and the Suburban Chicago order in 1944 established a Class I price by adding a fixed Class I differential to the higher of: (a) a formula based on the price of butter and dry skim or nonfat milk, (b) a formula based upon the price of butter and cheese, or (c) the price paid for milk by designated evaporated milk plants in Michigan and Wisconsin. *See* 7 C.F.R. § 941.5(a)(2), (b) (1941) (Appendix 9); 7 C.F.R. § 969.5(a)(l), (b) (1944) (Appendix 10).

evaporated milk plants in Michigan, Ohio, and Wisconsin, or (b) the price paid for butter in Chicago, plus 30 percent, multiplied by 3.5, plus 7 cents. *See* 7 C.F. R. §§ 927.3(b)(8), 927.4(a)(11) (1942) (Appendix 11). The Omaha-Council Bluffs order in 1943 adopted a formula for Class III milk (milk not consumed in fluid or cream form) that was driven by the price paid for butter and dry skim milk in Chicago. *See* 7 C.F.R. §§ 935.5(b), 935.6(c) (1943) (Appendix 12). In 1943, the New Orleans order priced Class III milk (all milk other than that consumed in fluid or cream form or used to make cream cottage cheese) based on the price paid in Chicago for butter. *See* 7 C.F.R. §§ 942.4(b), 942.5(a)(3) (1943) (Appendix 13). The Minneapolis-St. Paul order priced Class II milk (all milk not consumed in fluid form or as cream) based upon the price paid for butter in New York and nonfat dry milk in Chicago. *See* 7 C.F.R. §§ 973.4(b), 973.5(a)(2) (1945) (Appendix 14). *Thus, the use of manufactured product price formulas to set the minimum price of milk, without direct consideration of the price of feed, etc., formed the bedrock of the federal order system.*

Many orders established prices by reference to the price paid for milk by specified, often far distant, condensed milk plants. Because manufacturers at that time often had the option of making their products from either Grade B (unregulated) or Grade A (regulated) milk, the regulated price for Grade A milk had to be maintained at or near the price of Grade B milk. Using the average price paid by condensed milk plants buying unregulated Grade B milk in order to set the regulated price accomplished this goal. "Surplus [regulated] fluid milk must be priced competitively with manufactured dairy products processed in [unregulated] areas of manufacturing production and transported to metropolitan distribution centers." G. Beal & H. Bakken, *Fluid Milk Marketing,* p. 326 (1st ed. 1956) (Appendix 15). Thus, the costs of feed, etc., were *accounted for only indirectly, through the price being paid for unregulated milk.*

The other formula generally in use was the butter-powder formula "based on the idea that the price of these products were a reliable barometer of general economic conditions as well as a good index of the market situation for dairy products." Boston Milkshed Price Comm., *A Recommended Basis of Pricing Class I Milk in the Boston Market,* p. 8 (1947) (Appendix 16); see also Ohio Agricultural Extension Station, *Formulas For Pricing Milk to Producers in Ohio,* p. 6 (Jan 1954) ("In all the federal order markets in Ohio the butter-powder formula was included as an alternate basic formula price during the latter part of 1946 and early 1947.") (Appendix 17).

After World War II, a small minority of orders started to experiment with a different, "economic formula" methodology for setting Class I prices. Many factors went into those formulas. Tellingly, most of these factors are not mentioned in § 608c(18), at least not explicitly. For example, the Boston order, which was the first to adopt this approach (in 1948), adopted a Class I formula that was based in equal part upon three indicators: (1) the index of wholesale commodity prices in the entire United States, (2) the index of department store sales in New England, and (3) farm wages and dairy feed costs in New England. *See* 7 C.F.R. § 904.7(a) (1948) (Appendix 19).

The latter factor presumably comes closest to the mechanism envisioned by NMPF. Yet this approach to setting class prices was criticized by many. *See, e.g.,* S. S. Johnson, *Formula Pricing Class I Milk Under Market Orders,* 31 J. of Farm Econ. 428, 430 (1949) (Appendix 18) ("It is extremely doubtful if changes in inter-market price differentials resulting from the adoption of [the Boston] formula in some or all of the other ... federal order markets would be logical or reasonable, judged either from the empirical record or from the standpoint of economic theory"). And a system that would directly base minimum milk prices to farmers on the costs of feeds, etc. was explicitly considered by USDA and rejected for Ohio in 1948, because it would not

"induc[e] the production of adequate milk supplies," would not prevent "short-run aberrations of prices," and would not "reflect ...basic changes in conditions affecting nationally the supply and demand for manufacturing milk promptly as they occur." Handling of Milk in the Tri-State Marketing Area, 13 Fed. Reg. 6,445, 6,446-47 (Nov. 2, 1948) (Appendix 28).

Small wonder, then, that the vast majority of milk orders did not take this "direct" approach, but instead continued to set Class I prices by adding a fixed Class I differential to either (a) the price paid for butter, cheese and/or powder *(i.e.,* manufactured products), usually in geographically distant markets, or (b) the price paid for milk by specified unregulated condensed milk plants, often located at great distances from the geographic boundaries of the affected order. According to a contemporaneous compilation, 29 of the 35 federal orders in existence at the end of 1949 used one or both of these methodologies. *See* J. Roberts and G. Grayson, *Formula Pricing of Fluid Milk,* p. 10 (1950) (Appendix 20). And, with respect to milk used for purposes other than Class I, the use of manufactured product price formulas was also extremely widespread:

> All of the markets operating under federal order on April 1, 1948, made use of some type of manufactured dairy product formula to establish minimum prices to producers. ... Many of these markets combined several products. The comparative picture shows that there were 24 markets using a butter-powder combination, 23 markets involving prices paid by manufacturing milk plants, two recognizing cheddar cheese as an alternative, five using a combination of cream and skim powder, twelve using a combination of butter and cheese, and two allowing butter and casein as alternatives.

Beal & Bakken, Fluid Milk Marketing, *supra* at pp. 322–23 (1956) (emphasis added) (Appendix 15). All of these systems incorporated the price of feeds, etc. only indirectly.

In 1962, a trend began that, by 1975, resulted in every single federal milk order in the entire country using exactly the same formula for pricing milk used for manufacturing purposes (and the cessation, for the time being, of the use of product price formulas). Under this system, the "basic

formula price," used in all orders to set the price used to make products such as cheese, butter, and ice cream, was determined by the average price being paid for raw milk by several hundred unregulated processing plants located in Minnesota and Wisconsin. The Class I price was established by adding to this "basic formula price" a fixed differential, which varied from order to order.

Thus, by 1975, every order in the entire country, no matter where located, priced its milk using exactly the same formula. The formula captured the Section 608c(18) criteria indirectly, using a formula based upon the price being paid for unregulated raw milk in Minnesota and Wisconsin. *See*, *e.g.*, 7 C.F.R. §§ 1001.60, 1001.61(a) (1975) (New England Order) (Appendix 21); 7 C.F.R. §§ 1013.50, 1013.51(a) (1975) (Southeastern Florida Order) (Appendix 22); 7 C.F.R. §§ 1131.50(a), 1131.51 (1975) (Central Arizona Order) (Appendix 23); 7 C.F.R. §§ 1126.50(a), 1126.51 (1975) (Texas order) (Appendix 24).

As the Department of Agriculture contemporaneously observed, "[p]roducer groups and handlers generally supported the adoption of a uniform basic formula for all the orders," because "a single basic formula price in all the orders would provide a desirable basis for price alignment among the several orders," which would overcome "a serious problem" of price misalignment among the orders. Milk in Certain Marketing Areas, 27 Fed. Reg. 1802, 1803 (Feb. 27, 1962) (decision adopting the "basic formula price" in 36 orders) (Appendix 25).

However, a problem developed from the system's complete reliance upon the price paid for Grade B (unregulated) milk in Minnesota and Wisconsin. The declining quantity of such milk in those states (and in the entire United States) led to serious concern that the price being paid would no longer serve as an accurate barometer of the competitive value of milk. Congress in 1990 directed that the Secretary consider adopting, by means of a national hearing, an "alternative

pricing formula" to the existing "Minnesota-Wisconsin price." *See* Pub. L. No. 101-624, § 103(a) (Appendix 26). Such "a" price series, adopted at a national hearing, would, by definition, be uniform, be based on conditions that were not local to each order and would capture § 608c(18) factors indirectly (through the price being paid for something) rather than directly (*i.e.*, through a formula tied directly to feed costs and the like).

The replacement series adopted by the Secretary in 1995 was in fact uniform in all orders, adopting a modified formula based upon the price paid for Grade B milk in Minnesota and Wisconsin, adjusted monthly by the price paid in Chicago and Wisconsin for butter and cheese and the price paid in Western markets for nonfat dry milk and dry buttermilk. *See*, *e.g.*, 7 C.F.R. § 1001.51 (1995) (Appendix 27). In other words, the Secretary reintroduced into federal milk orders the use of manufactured product price formulas, because the price paid for manufactured products would now be used to adjust the price for Grade B milk in Minnesota and Wisconsin, for purposes of setting minimum federal order milk prices. Thus, the use of manufactured product price formulas to set the minimum price of milk, ***without*** direct consideration of the price of feed, etc., once again formed the bedrock of the federal order system.

Then in 1996, Congress enacted the Federal Agriculture Improvement and Reform Act ("FAIR Act"), which, inter alia, directed the Secretary to reduce the number of milk market orders to no less than ten and no more than fourteen and to consider changes to the pricing formulas. *See* 7 U.S.C. § 7253(a)(l). Given the continued decline in Grade B milk, the Secretary proposed to rely entirely on end-product pricing formulas for setting the price paid for milk for manufacturing purposes. After a legal battle principally focused on other aspects of the proposal, Congress enacted into law H.R. 3428, which directed that the proposed rule, including the use of end-product pricing formulas, become final, with certain modifications, and required

the Secretary to conduct supplemental rulemaking regarding the pricing formulas for Class III and Class IV milk products. *See* Pub. L. No. 106-113, § 1000(a)(8), 113 Stat. 1501, 1536–37 (1999).

Such hearings were held in May 2000, resulting in a tentative final decision issued in December 2000 and implemented January 1, 2001, *see* Milk in the Northeast and Other Marketing Areas; Tentative Decision on Proposed Amendments and Opportunity to File Written Exceptions to Tentative Marketing Agreements and to Orders, 65 Fed. Reg. 76,832 (Dec. 7, 2000) (Appendix 38), and a final decision issued in November 2002, *see* 67 Fed. Reg. 67906 (Nov. 7, 2002) (Appendix 33). As discussed at length at pp. 15-21 above, in both this 2002 decision and a subsequent 2008 decision, USDA explained at length why its approach to setting minimum milk prices, which did not rely directly on farm level costs, fully comported with Section 608c(18) requirements. And, as further discussed at pp. 15-21 above, USDA successfully defended its approach in two separate federal court lawsuits, *Arkansas Dairy* and *Bridgewater Dairy*.

In sum, USDA's conclusion that its consideration of feed, fuel, and other farm level costs is appropriately addressed through the movement of end-product prices and that the Secretary need not give "direct" consideration to the "cost of feeds, feed availability," reflects over eighty years of actual USDA practice, backed by well-considered USDA decision-making, fully endorsed in judicial reviews.

II. IT IS ENTIRELY APPROPRIATE FOR USDA TO ADOPT FMMO PROVISIONS FOR THE PURPOSE OF FACILITATING EFFECTIVE CLASS I PROCESSOR HEDGING.

IDFA Proposal 14 is designed to facilitate effective hedging by Class I handlers (while preserving farmers' desire to be paid over time the same amount as they would receive under the "higher of Class III or IV" Class I skim milk mover pricing formula). MIG Proposal 15 has the same aim, using a somewhat different formula.

IDFA witnesses submitted written and oral testimony and other evidence supporting the proposition that such hedging will promote the sale of Class I products, to the benefit of both processors and dairy farmers, particularly in competition with plant based-beverages, and especially in increasing sales to food service and other important outlets. IDFA will address this subject in detail in its Proposed Findings and Conclusions.

Questions raised during the hearing suggest a predicate legal issue, which this brief will now address: whether facilitating Class I processor hedging is a permissible goal under the AMAA. The answer is clearly yes.

We start by making clear what is ***not*** the proper question. The proper question is ***not*** whether the AMAA ***as enacted in 1937*** contemplated that goal (although, as we later explain, that goal is in fact fully consistent with the AMAA as enacted). The proper question is whether the AMAA ***in its current form*** contemplates that goal.

The AMAA now in force incorporates the amendment made by Section 1403 of the Agriculture Improvement Act of 2018, Public Law 115-334 (Dec. 20, 2018). That AMAA amendment, codified in 7 U.S.C. § 608c(5), was made with one principal purpose in mind: facilitating effective Class I processor hedging.

Section 1403 provided in pertinent part:

> SEC. 1403. CLASS I SKIM MILK PRICE.
>
> (a) CLASS I SKIM MILK PRICE.—Section 8c(5)(A) of the Agricultural Adjustment Act (7 U.S.C. 608c(5)(A)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, is amended by striking ''Throughout'' in the third sentence and all that follows through the period at the end of the fourth sentence and inserting ''Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), for purposes of determining prices for milk of the highest use classification, the Class I skim milk price per hundredweight specified in section 1000.50(b) of title 7, Code of Federal Regulations (or successor

> regulations), shall be the sum of the adjusted Class I differential specified in section 1000.52 of such title 7 (or successor regulations), plus the adjustment to Class I prices specified in sections 1005.51(b), 1006.51(b), and 1007.51(b) of such title 7 (or successor regulations), plus the simple average of the advanced pricing factors computed in sections 1000.50(q)(1) and 1000.50(q)(2) of such title 7 (or successor regulations), plus $0.74."

USDA fully recognized at the time that the purpose of this statutory amendment was to facilitate Class I processor hedging (while being "roughly revenue neutral" in terms of the Class I dollars paid dairy farmers). As USDA cogently explained in its Federal Register notice implementing the statutory amendment:

> The dairy industry has calculated that applying the "higher of" provisions to skim milk prices has returned a price $0.74 per hundredweight above the average of the two factors since the pricing formulas were implemented in 2000 [and] the inclusion of the $0.74 in the calculation should make the change roughly revenue neutral. At the same time, it is anticipated that using the average of the Class III and Class IV advanced pricing factors in the Class I skim milk price formula will allow handlers to better manage volatility in monthly Class I skim milk prices using Class III milk and Class IV milk futures and options. Until now, uncertainty about which Class price will end up being higher each month has made effective hedging difficult.

Federal Milk Marketing Orders—Amending the Class I Skim Milk Price Formula, 84 Fed. Reg. 8,590, 8,591 (Mar. 11, 2019) (Appendix 1).

Section 1403(a) was secured through the joint efforts of IDFA and NMPF, which in lobbying Congress via their joint "NMPF and IDFA Dairy Price Risk Management Recommendations" (Attachment A to Hearing Exh. 275 (IDFA Exh. 37)) explained that "changing the Class I mover to the [simple average of the Class III and Class IV advanced price plus $0.74] would":

- "balance processor desire for better price risk hedging with cooperative and dairy producer desire to maintain FMMO integrity.

• eliminate the uncertain basis that occurs when the mover shifts between Class III and Class IV.

• allow the use of existing Class Ill and Class IV futures and options to manage Class I price risk with minimal changes to the FMMO system.

• provide several benefits that can result from the ability to hedge longer-term costs for fluid milk products.

• allow processors to manage price risk for dairy beverage ingredients, as they currently can for non-dairy ingredients.

• allow dairy producers to effectively hedge the Class I portion of their producer milk payments, as they currently can for the other portion of their payments.

• encourage and promote the use of dairy ingredients in new fluid milk and dairy-based beverages that meet Class I specifications."

In short, Congress in 2018 amended the AMAA for the specific purpose of promoting Class I processor hedging. And, "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren v. United States*, 593 U.S. --, --, 141 S. Ct. 1648, 1660–61 (2021), quoting *Ross v. Blake*, 578 U. S. 632, 641–642 (2016). Interpreting an amendment to provide the same results as would have already applied under the statute "gives the amendment no 'real and substantial effect' and, accordingly, cannot be the proper understanding of the statute" as amended. *Pierce Cnty v. Guillen*, 537 U.S. 129, 145 (2003). Rather "changes in statutory language generally indicate an intent to change the meaning of the statute." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010) (citation omitted).

Thus, the 2018 amendments altered the AMAA to confirm the promotion of Class I processor hedging as an appropriate purpose of the AMAA. Whether the AMAA previously had

that goal is not relevant. Indeed, if the AMAA as originally enacted and the 2018 amendments were deemed to conflict in this regard, that would simply call for "the application of the ancient canon of construction *lex posterior derogate legi priori:* where two statutory provisions appear to conflict, the later in time prevails." *Harding v. Dep't of Veteran Affairs*, 448 F.3d 1373, 1376 n. 2 (Fed. Cir. 2006); *Soto Padro v. Pub. Bldg. Auth.*, 747 F. Supp. 2d 319, 329 n. 4 (D.P.R. 2010) ("Because the statute contradicts itself, under the rule of *lex posterior derogate priori* the court must apply the later-enacted provision.")

To be clear, facilitating effective hedging is not the sole goal of the AMAA as amended. But to be equally clear, facilitating effective hedging is a legitimate goal for the Secretary to pursue because Congress chose to amend the AMAA to make that explicit. IDFA will address in its Proposed Findings and Conclusions why the Secretary will greatly foster public policy and the needs of the entire dairy industry by doing so in this proceeding.

None of the foregoing discussion is intended to suggest that the AMAA as enacted in 1937 would have precluded USDA from adopting FMMO provisions, like Proposal 14, that facilitate Class I processor hedging. The AMAA contemplates that regulated prices shall "reflect … economic conditions which affect market supply and demand for milk or its products." 7 U.S.C. § 608(c)(18). The "product" of Class I milk is fluid milk products, and it is milk used for those products whose effective hedging Proposal 14 seeks to facilitate. If, as IDFA will show in its Proposed Findings and Conclusions, current "economic conditions" dictate that Class I processors be able to offer customers the kind of pricing that hedging facilitates and such efforts result in increased sales redounding to the benefit of both Class I processors and the dairy farmers that supply them, the AMAA as originally enacted surely would have accommodated Proposal 14.

Respectfully submitted,

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February 13, 2024

CERTIFICATE OF SERVICE

Milk in the Northeast and Other Marketing Areas
Docket No.: 23-J-0067

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct, and this is to certify that a copy of the POST HEARING BRIEF OF THE INTERNATIONAL DAIRY FOODS ASSOCIATION and APPENDICES TO POST HEARING BRIEF OF THE INTERNATIONAL DAIRY FOODS ASSOCIATION (COMBINED) has been furnished and was served by electronic mail upon the following parties on March 22, 2024 by the following:

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