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July 17, 2009

Hearing Clerk, OALJ
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Ave. SW
Washington, D.C., 20250-9203

Re: Hearing Docket AO-14-A78 et seq, Producer-handler hearings.

Dear Sir or Madam

Enclosed for filing with the Hearing Clerk is an original and three copies of post-hearing brief on behalf of Mallorie's Dairy, Nature's Dairy, and Country Morning Farms.

Respectfully yours,

A handwritten signature in black ink, appearing to read "J.H. Vetne", with a long horizontal line extending to the right.

John H. Vetne
Attorney for Nature's Dairy, Mallorie's Dairy
and Country Morning Farms.

Ec:
Interested Parties (via email attachment only).

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**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

HEARINGS ON PROPOSALS TO AMEND
ALL FEDERAL MILK MARKETING ORDERS
(Producer-Handler and Exempt Plant Hearings)

Docket Nos. AO-14-A78 et seq.; DA-
09-02, AMS-DA-09-0007

74 Fed. Reg. 16296 (April 9, 2009)

**POST-HEARING BRIEF:
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ARGUMENT
SUBMITTED ON BEHALF OF
MALLORIE'S DAIRY, COUNTRY MORNING FARMS, AND NATURE'S DAIRY**

I. INTRODUCTION

Mallorie's Dairy, et al. ("Mallorie's"), producer-handlers that operate dairy farms and small-business milk plants in the states of Oregon, Washington, and New Mexico, submit this Post-hearing brief, with requests for rulings on proposed findings of fact and conclusions of law, pursuant to 5 U.S.C. §557(c) and 7 C.F.R. §§900.9(b) and 900.12 - .13a. In this proceeding, trade associations representing the nation's largest dairy processors (IDFA), and the nation's largest dairy cooperatives (NMPF), complain the producer-handlers under Federal Milk Marketing Orders (FMMOs) have a current or potential economic advantage over fully-regulated handlers due to producer-handlers' exemption from minimum milk price regulation on own farm milk. They proposed to eliminate the producer-handler exemption that has existed for over 70 years.

Proponents, IDFA/NMPF and their supporters, of course, have the "burden of proof" to come forward with evidence and facts to support their claims of competitive dislocation by a preponderance of evidence. After a hearing with nearly 4000 pages of testimony, and 106 exhibits, we examine the record for meaty evidence supporting

proponents' claims and are again left to wonder: "Where's the beef"? See, *Lehigh Valley Farmers v. Block*, 829 F.2d 409, 414-16 (3rd Cir.1987).¹ Before we proceed to examine the record for evidence (if any) supporting proponents' claims, however, it is useful to provide a foundation for the principle of "burden of proof" in administrative proceedings (like this one) subject to hearings under 5 U.S.C. §556 and decisions under *id.* §557.

II. *Proponents' Burden of Proof Under the APA*

Section 7(c) of the Administrative Procedure Act says that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). For several decades after passage of the APA, courts and agencies believed "burden of proof" to mean only the burden of production or "going forward" with evidence. See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983). However, only a decade ago, in *Greenwich Collieries* the Court firmly concluded that the "burden of proof" in § 7(c) was more demanding, and additionally meant "the burden of persuasion." *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994); It is now understood that combination of "burden of proof" and "substantial record evidence" standards

¹ The court in *Lehigh* vacated an FMMO decision, following a lengthy hearing of virtually identical bulk, where proponents did not present evidence that any "federally regulated handler lost sales because of the alleged competitive advantage" from plants that proponents sought to have USDA regulate; and supporting testimony "consisted of extremely general and speculative opinions." See also, *Borden v. Butz*, 544 F.2d 312, 319 (7th Cir. 1976) (there was no substantial evidence to support the Secretary's decision when the testimony "consisted of hortatory, conclusory and speculative opinions and predictions"). *Lehigh v Block* is of particular importance in this producer-handler proceeding, because the "competitive advantage" of which proponents complained in that case was virtually identical in nature (or hypothesis) to the competitive advantage that IDFA and NMPF allege producer-handlers enjoy over regulated handlers in this case. Further, the remedy sought by proponents in *Lehigh* is identical to the remedy sought by IDFA and NMPF here – full regulation of the targeted handler competitors.

in formal “on the record” hearings under the APA – as is the case for this hearing -- impose a traditional “preponderance of evidence” burden on the party or agency proposing a rule or order. Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise §10.7 (3d ed. 1994). As explained in the legislative history of the APA, reproduced in *Steadman v. S. E. C.*, 450 U.S. 91, 101 (1981), this is precisely what Congress intended:

"[W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide 'in accordance with the evidence.' Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 37 (1946) (emphasis added).

In other words, if a rule is to be promulgated or amended, proponents must provide the Secretary, in the public Hearing Record, with essential facts sufficient to make a “prima facie and substantial case” for the relief requested, and that evidence must outweigh any opposing or rebuttal evidence. *Fairmont Foods v. Hardin*, 442 F.2d 762 (D.C. Cir. 1971) Alternatively, Dairy Programs must come forward in the hearing with its own evidence to support a rule it desires to adopt. *Abbotts Dairies Div. v. Butz*, 389 F. Supp. 1, 8-9 (E.D. Pa. 1975).

As described below, proponents of proposals to eliminate the producer-handler exemption fail to meet this burden on the merits of the proposals because (1) the essential ‘facts’ they rely upon are not facts at all, but rather hypothesis built upon assumption followed by speculation about what might happen in the future,² (2) proponents failed to assemble and present concrete data on handlers’ costs and marketing practices so that the

² Speculation based on conclusory assertions of a similar nature was fatal to the pricing rule reviewed by the 7th Circuit in *Borden, Inc., v. Butz*, 544 F.2d 312 (1976).

advantage enjoyed by producer-handlers, if any, could be objectively measured, and (3) IDFA member-proponents and allies expressly refused to disclose relevant evidence of their own costs, activities and competitive characteristics in the regulated market.

III. THE ELEMENTS APPLICABLE TO RELIEF SOUGHT BY PROPONENTS

Understanding who has the burden to produce sufficient facts proving “prima facie and substantial case” is not enough for analysis of, and decision on, the facts offered. A decision-maker, and parties to the proceeding, must also know the elements of the “case” to which proffered facts may relate. For example, to recover on a common law negligence claim, a plaintiff must present facts proving each of the following elements: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached the defined duty (such as, by careless behavior); (3) the plaintiff was injured or damaged, and (4) the plaintiff’s injuries were caused by defendant’s breach of the duty to plaintiff. With these elements in mind, the parties know what type of evidence to present in support or opposition to a claim, the judge will be able to rule on the relevance of evidence, and the jury will be able to decide whether a case has been proven by a preponderance of evidence.

For administrative proceedings, comparable elements of the “case” are contained in standards or mandates expressed in acts of Congress, in agency regulations, and in agency decisions. As for court proceedings, in administrative proceedings these standards must be known in advance of a hearing, and be sufficiently clear, so that a proponent is on notice of what facts must be offered to make a “prima facie and substantial case,” an opponent is on notice of what facts are required for rebuttal, and all

parties as well as the agency have a common reference for what facts are relevant to ultimate conclusions and decision.

In this producer-handler proceeding, the elements or standards to be applied to record evidence are those in the AMAA, and, if consistent with the AMAA, objective standards revealed in existing regulations and prior rulemaking decisions of the agency. USDA's final decision on producer-handler proposals for the Pacific Northwest and Arizona markets contains the agency's latest notice of its views on what standards apply. 70 Fed. Reg. 74166, 74185 (Dec. 14, 2005) ("PNW-AZ Dec").

In that decision, the Administrator interpreted the AMAA and its legislative history to authorize full regulation of producer-handlers "if they are so large as to disrupt the market for producers." *Id.* Expressing adherence to decision-making standards in prior FMMO hearings over the course of 20 years, the Administrator reaffirmed the evidentiary standard – regulation of producer handlers would be justified "if it could be shown that producer-handlers cause market disruption to the market's dairy farmers or regulated handlers." *Id.* Disruption, if shown, would constitute evidence of "disorderly marketing" (*id.*),³ which the AMAA authorized USDA to cure by remedial regulations, as limited by 7 U.S.C. §608c(5).

³ The statutory term "disorderly marketing" has not been defined by USDA, nor have agency standards been promulgated by which objectively to apply the term in hearing proceedings. The term takes its substance, however, from events and observed market behavior at the beginning of the Great Depression, when producers of milk for surplus products engaged in cutthroat price competition for a share of sales to fluid milk markets in the cities, causing dairy market failure. "Disorderliness... refers to the lack of a predictable, sustainable, and efficient flow of a product to a specific market, ultimately [leading] to the breakdown of dairy markets." Erba, Eric and Andrew Novakovic, *The Evolution of Milk Pricing and Government Intervention in Dairy Markets* (Cornell University, CPDMP, EB 95-05, Feb. 1995), www.cpdmp.cornell.edu at p. 6. By this standard of "predictable, sustainable, and efficient," it would appear that the producer-handler business model, often serving only local and niche markets, conforms to the best objectives of orderly marketing.

Applying these somewhat subjective standards to record evidence in the PNW-AZ proceeding, the Administrator concluded that a distribution limit of three-million pounds for producer-handler eligibility was justified because the facts revealed: (1) “regulated handlers competing against large producer-handlers are at a competitive price disadvantage,” (2) as a result of the price advantage in the Arizona market, a, “large producer-handler [was] able to compete for commercial customers at prices that a regulated handler [was] unable to match,” (3) as a result of the price advantage in the Pacific Northwest Market, regulated handlers were “unable to compete for sales with large producer-handlers,” and the large producer handler’s exemption from milk price regulation thereby created “insurmountable marketing obstacles” to regulated handlers seeking to market milk to customers supplied by the large producer handler, (4) to the same effect in both markets, “large producer handlers have and use a pricing advantage that cannot be overcome by fully regulated handlers,” and (5) by the foregoing observed competitive conduct – producer-handlers’ gain of Class I market share from disadvantaged pool handlers – pool producers in the market lost significant blend price revenue. 70 Fed. Reg. at 74186-88.

The satisfactory remedy to the foregoing observed market disruption was to limit the monthly of producer-handler distribution to three million pounds. *Id.* This decision was strongly supported by NMPF, which declared it to be “fair.” Ex. 103.

IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS

In this proceeding, NMPF and IDFA offered facts that fall far short of measuring up to the evidentiary standards for relief expressed, reaffirmed, and applied by the Administrator in the PNW-AZ decision. As described below, the “evidence” submitted

by proponents – largely abstract hypothesis and speculative prediction – was of the same type erroneously relied upon by USDA in rulemaking decisions vacated by the 3rd Circuit in *Lehigh*, and by the 7th Circuit in *Borden*.

1. The foundation for IDFA-NMPF's case is a rhetorical construct whereby their statement of hypotheses and assumptions of fact is designed to produce a dispositive conclusion of market disruption (or, more accurately, potential market disruption).

2. The essentials of IDFA-NMPF's restatement of the case are as follows (*E.g.*, Hearing Exhibits 23 (Cryan), 24 (Tonak), 25 (Asbury), 28 (Newell), and 80 (Yonkers)).

- (a) Regulated handlers must pay minimum Class I prices for fluid milk.
- (b) Pool producers receive blend prices for milk sold to Class I handlers.
- (c) The obligation of regulated handlers to the pool for milk purchased from producers is assumed to be the difference between regulated Class I prices and blend prices.
- (d) Producer-handlers are assumed to use their own farm milk for packaged fluid (Class I) sales; producer-handlers' imputed plant value of own farm milk is therefore the Class I price.
- (e) Producer-handlers are assumed to have a transfer price equal to the blend price in transactions between the farm side and the plant side of producer-handler operations.⁴
- (f) The plant side of a Producer-handler operation receives the benefit of the difference between the imputed plant value (Class I) and the imputed farm revenue (blend transfer price).
- (g) The plant side of a producer-handler operation therefore has a competitive price advantage over regulated handlers equal to the Class I minus blend prices at all times.
- (h) With the competitive price advantage, producer-handlers can undercut wholesale milk prices to grocery stores and other buyers, taking business away from pool handlers and pool producers solely because of exemption from regulated pricing.
- (i) The foregoing price or competitive advantage is sufficient to warrant elimination of the producer-handler exemption from pricing and pooling.

As the witness for NMPF acknowledged (Cryan, Tr. 1951):

Q. And the pricing advantage you refer to is simply the arithmetic difference between Class I and blend?

A. Simply, yes.

⁴ The attribution of blend price as the transfer price is unsupportable for reasons stated in post-hearing briefs of Select and Continental, and of AIDA. Mallories' incorporates the transfer price arguments in those briefs.

3. Assuming that alleged price or competitive advantage of producer-handlers is properly measurable by reference to classified price and pool obligations paid by regulated handlers, and avoided by producer-handlers, the assumption that Class I minus blend price defines the advantage or disadvantage is contrary to the real (not imputed) evidence of record. Regulated distributing plants invariably have uses for producer milk other than Class I. For such uses the regulated handler draws from (or receives a credit from) the producer-settlement fund, so that the plant's pool obligation is less than the difference between Class I and blend prices. Producer-handlers likewise use own farm milk for purposes other than Class I packaged fluid milk sales. *E.g.*, Hearing Exhibits 61 – 65, 81 (Gilbert), 82 (Flanagan), 92 * (Sapp . *not received in evidence). For such non-Class I uses, producer-handlers receive no draw (or credit) from the producer-settlement fund.

4. If obligations paid to the producer-settlement fund by regulated handlers compared to similar obligations avoided by producer-handlers are a proper measure of producer-handler price or competitive advantage, actual (or potential) obligations at comparable plant blend prices must be employed.

5. IDFA and NMPF's assumptions, therefore, overstate the claimed competitive advantage of producer handlers even on a hypothetical basis.

6. NMPF and other supporters of proposal No. 1 admit, further, that a simple arithmetic comparison of regulated prices paid by pool handlers and regulated prices imputed to be avoided by producer-handlers do not, alone, prove a competitive advantage of any kind that allows producer-handlers to compete on price, and undercut wholesale prices offered by regulated plants. See, Cryan, Tr. 407, 413, 417; Latta 1407

7. Processing, balancing, distribution and other costs associated with generally smaller producer-handler plants are much greater than those of larger, regulated pool distributing plants with which producer-handlers may compete.. Cryan, Tr. 407, 413, 417; Hearing Exs. 81 (Gilbert), 82 (Flanagan), 92 * (Sapp).⁵

8. Because of greater operating costs, smaller producer handler plants cannot compete on price with regulated plants, or cause disruptive displacement of Class I pool milk on the basis of price, until a point at which the “price advantage” alleged by NMPF is greater than the cost disadvantage of the smaller plants. As stated by NMPF’s witness:

As producer-handlers become large enough, their advantage in terms of their cost of milk can become the primary basis for their existence as handlers. A large producer-handler can now enter the bottling business, even if it is not competitive in its processing costs, purely because the disparity in the regulatory scheme creates an advantage.

Although exempt plants enjoy the same price advantage that producer-handlers now do, for very small plants this advantage is greatly outweighed by high processing costs; so that the price advantage is neither the primary basis for a small handler’s business nor a disruptive force on the market.

Cryan, Tr. 407, 417.

9. Proponents offered no evidence to quantify or even to estimate a producer-handler plant size at which the alleged price advantage may offset the higher operating costs of producer-handlers, thereby creating an arguable competitive advantage in price offered to wholesale customers.⁶ Cryan, Tr. 1953, 1955-56 (acknowledging the difference between competitive advantage and NMPF’s theory of price advantage).

⁵ * indicates an exhibit not received by the ALJ. A separate Motion has been filed on the ruling.

⁶ Counsel for Dean Foods offered a witness for Harrisburg Dairies, a regulated pool plant with a distribution volume of about 5 million pounds per month. The witness claimed no current disruption from producer-handlers, but estimated a potential competitive disadvantage if a comparable price exempt plant entered the market. Dewey, Tr. 2369. No inference may be

10. Proponents have the ability to assemble such operating cost data from handler members to estimate a plant size at which the alleged price advantage outweighs the cost disadvantage. *See*, Exhibit 73; 67 Fed. Reg. 67906, 67931 (Nov. 7, 2002) (discussing plant cost surveys received in evidence that were commissioned by IDFA affiliate NCI).

11. When questioned, witnesses for proponents refused to answer questions about their own plant and marketing operations, including processing costs, relevant to proponents' claims of competitive disadvantage. Carrejo (Price's Dairy/Dean Foods), Tr.1457-58, 1460, 1471, 1494-95.

12. As a matter of law, USDA can and should find that the evidence proponents failed or refused to disclose would have been adverse to their claims of competitive disadvantage.⁷ In hearings under APA §556, agencies may clearly "draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts." The Attorney General's Manual on the Administrative Procedure Act (1947), at 76.

13. Proponents were hard-pressed to come up with any concrete illustrations of market disruption, such as that described in the PNW-AZ decision, that was caused by

drawn from Harrisburg Dairies' size that a 5-million pound-per-month plant has sufficiently low operating costs to compete with large plants in FMMO markets. Harrisburg Dairies' ability to prosper in an FMMO environment is not because FMMO creates a level competitive playing field to milk plants of all sizes. To protect small handlers like Harrisburg Dairies, Pennsylvania regulates minimum wholesale prices. This creates a wholesale price playing field that allows smaller plants to remain viable so that producers will have a market for their milk. Dewey Tr. 2381-82.

⁷ *Interstate Circuit v. United States*, 306 U.S. 208, 226-67 (1939); *United States v. United States Coin & Currency*, 379 F.2d 946 (7th Cir. 1967); *Stagner v. United States*, 197 F.2d 992, 994 (5th Cir. 1952); *Local 167 v. United States*, 291 U.S. 293 (1934); *In re DeGraff Dairies*, 41 Agric.Dec. 388, 402-403 (1982); 29 Am. Jur. 2nd Evidence §§ 178-179.

any competitive advantage of producer-handlers. Dean Foods presented one witness who claimed to have lost business on the basis of wholesale price to a producer-handler, but the Dean Plant apparently operated in a market in which Dean previously had virtually no competition. Carrejo, Tr. 1443-1512. *See* also Exh. 92* and 93* (not rec'd)

14. Proponent witnesses generally denied current dislocation or market disruption from existing producer handlers, but rather speculated that there was a potential for proliferation of large producer-handler plants in the future. Cryan, Tr. 407, 417, 1697; Tonak, Tr. 507; 524.

15. If Proposal No. 1 is nevertheless adopted, Mallories' proposal No. 17 should be adopted to preserve most producer-handlers' investment-backed expectations over the course of seven decades, for reasons argued in Select Dairies' post-hearing brief on "grand-fathering," and in Exhibit 102, both incorporated by reference.⁸

ARGUMENT

By any measure of burden of proof, substantial record evidence, and faithfulness to agency precedent, proponents have failed to demonstrate that any change to producer-handler standards is justified, with the possible extension of size limits now in place in the Pacific Northwest and Arizona to other markets. This conclusion is enhanced by the extra care required of USDA to consider alternatives, and make sound findings about competition, when decisions are to be made on issues such as presented on this record.

⁸ A grandfather provision will also avoid costly claims and litigation for regulatory taking. *See, e.g., Rose Acre Farm v. United States*, 2007 WL 5177409 (Fed.Cl. 2007) (compensation for the taking of eggs for a public purpose, resulting in a producer receiving the lower value of breaker eggs for manufacturing rather than higher prices for table eggs).

V. *USDA's SPECIAL AMAA DECISION-MAKING RESPONSIBILITIES.*

Even under ordinary circumstances, standards for reasoned administrative action are "strict and demanding." *Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 28, 48 (1983). An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it - for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43; *Rhode Island Higher Educ. Assistance Auth. v. Secretary of Educ.*, 929 F.2d 844, 855 (1st Cir. 1991).

Milk Marketing Order rulemaking standards are further constrained because the Secretary "does not have 'broad dispensing power,'" *Zuber v. Allen*, 396 U.S. 168, 183 (1969), and because regulations adopted without handler approval -- as is always the case for milk orders -- can only be made after all less-burdensome alternatives have been examined, and the Secretary makes a finding based on the record that "the issuance of such order is the only practical means of advancing the interests of the producers." 7 U.S.C. §608c(9)(B); *Block v Community Nutrition Institute*, 467 U.S. 340, 342 (1984)(section 8c(9)(B) is a power-limiting condition imposed by Congress on the Secretary).

VI. *USDA's SPECIAL RESPONSIBILITIES TO SMALL BUSINESSES*

As explained in the Notice of Hearing, USDA has a special responsibility to consider the impact of proposed rules on small businesses. Like AMAA section 8c(9)(B), the Regulatory Flexibility Act requires the Secretary to take a hard look at less

burdensome regulatory alternatives. Milk handlers with fewer than 500 employees are considered small businesses. Producer-handlers are a smaller subset of small business handlers, with small plants, few employees, and unique business model characteristics such as risk of the plant operator in the farm, and risk of the farm operator in the plant.

A February 2005 report to Congress by the Chief Counsel for Advocacy, Small Business Administration, explains agency rulemaking obligations to small businesses under the 1980 Regulatory Flexibility Act (5 U.S.C. §601, et seq.), the 1996 Small Business Regulatory Enforcement Fairness Act (5 U.S.C. § 604), and Executive Order 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002), as follows:

Before Congress enacted the Regulatory Flexibility Act in 1980, federal agencies did not recognize the pivotal role of small business in an efficient marketplace, nor did they consider the possibility that agency regulations could put small businesses at a competitive disadvantage with large businesses or even constitute a complete barrier to small business market entry. Similarly, agencies did not appreciate that small businesses were restricted in their ability to spread costs over output because of their lower production levels. As a result, *when agencies implemented “one-size-fits-all” regulations, small businesses were placed at a competitive disadvantage with respect to their larger competitors. This problem was exacerbated by the fact that small businesses were also disadvantaged by larger businesses’ ability to influence final decisions on regulations.* Large businesses have more resources and can afford to hire staff to monitor proposed regulations to ensure effective input in the regulatory process. As a result, consumers and competition were undercut while larger companies were rewarded.

<http://www.sba.gov/advo/laws/flex/04regflx.html>, Report on the Regulatory Flexibility Act (February 2005, footnotes omitted, italics supplied). The SBA’s manual, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003) at p. 31, further explains that agency responsibilities extend to subsets of small businesses. A regulatory flexibility analysis “will enable direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a specific subset of small entities.” Further, the analysis will examine whether

the alternatives are effectively designed to achieve the statutory objectives.” (emphasis provided). This is illustrated by EPA’s hard look at a subset of low-revenue small business laundries that would be disproportionately affected by point-source effluent standards proposed in 1997. *See*, http://www.sba.gov/advo/rep_lau.txt

In this proceeding, the principal proponent for new regulatory burdens on producer-handlers are the nation’s largest milk companies, represented by IDFA, and the nation’s largest dairy cooperatives, represented by NMPF. To paraphrase the SBA’s Chief Counsel for Advocacy: Mallorie’s Dairy, et al., are struggling to avoid proposed “one size fits all” rules that would benefit large IDFA members and large NMPF members, but uniquely burden their small business competitors.

VII.1 USDA’S RESPONSIBILITIES INVOLVING ISSUES OF COMPETITION

More than 60 years ago, the Supreme Court instructed that administrative agencies, as part of public interest assessment, “must estimate the scope and appraise the effects of the curtailment of competition which will result from” economic regulation.

McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944). The requisite competitive appraisal requires agencies to “make findings,” “draw conclusions,” and to “weigh these conclusions along with other important public interest considerations.”

Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C.Cir.1968); *United Air Lines Inc. v. Civil Aeronautics Board*, 766 F.2d 1107 (7th Cir. 1985).

The most exhaustive analysis of *McLean Trucking* and its progeny is contained in *United States v. Federal Communications Commission*, 652 F.2d 72 , 87-88 (D.C. Cir. 1980) (en banc), involving then-new satellite broadcasting technology:

"The whole theory of licensing and regulation by government agencies is based on the belief that competition cannot be trusted to do the job of regulation in that

particular industry which competition does in other sectors of the economy." *Hawaiian Telephone Co. v. FCC*, 162 U.S. App. D.C. 229, 498 F.2d 771, 777 (D.C.Cir.1974).⁷⁷ Since "the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same to achieve the most efficient allocation of resources possible," *Northern Natural Gas Co. v. FCC* (supra) 399 F.2d at 959, we have insisted that the agencies consider antitrust policy as an important part of their public interest calculus. But the agencies are not "strictly bound by the dictates of (the antitrust) laws," *id.* at 961; rather, they are entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry.

This rule of decision-making described in *McLean* remains firmly in place in administrative law jurisprudence. *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004) (involving agency findings and conclusions on anticompetitive impacts of the "do not call registry" rule); *Noram Gas Transmission Co. v. F.E.R.C.*, 148 F.3d 1158 (D.C.Cir. 1998) ⁹

⁹ Any doubt that anticompetitive considerations are important in USDA's milk order regime is firmly laid to rest by the U.S. Department of Justice's 1977 very lengthy report, entitled "Milk Marketing," to President Ford's Task Group on Antitrust Immunities ("DOJ Milk Marketing Report"). The Department of Justice's analysis concluded that...

The [federal milk] order system, particularly those features which protect high price levels, creates incentives as well as opportunities for cooperatives to extend and maintain cartelization of the dairy industry. Cooperatives seek to increase their share of the raw milk market, to restrict the supply of milk going into particular markets, especially those where the cooperative has overwhelming control, and to raise Class I prices in those market orders where a cooperative's market share is greatest.

* * * * *

Dairy cooperatives are more prone to use market orders for predatory purposes and in exclusionary fashion in areas where they have a large market share and face competition mostly from independent farmers, small local cooperatives, or regional cooperatives without a substantial share in any one market.... Thus, it is particularly important to understand the incentives and means provided cooperatives by the order system to achieve and protect a larger share of the market.

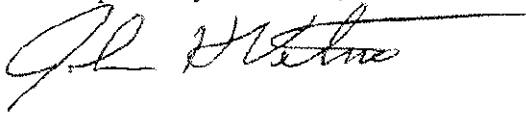
DOJ Milk Marketing Report at 292, 294. With specific reference to so-called pooling standard rules, such as are at issue for producer-handlers in this case, DOJ explained (*id.* at 333)

The most fertile ground for tailoring order provisions to the cooperative's needs... is in the area of pool plant qualification.*** The ability to change pooling requirements for distributing and supply plants alike can be a significant source of power for a cooperative with predatory intentions.

CONCLUSION

On the hearing record before the Secretary, proponents have failed to meet their burden to prove the need for amendment to producer-handler standards by "prima facie and substantial case." If the Secretary nevertheless determines that some change is required and can lawfully be made due to potential market disruption from large producer-handlers, the current size limitations adopted for the Pacific Northwest and Arizona markets should be extended other markets, as may be supported by record evidence of need for those markets.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. H. Vetne", with a long horizontal flourish extending to the right.

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July 17, 2009