NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Chapter XIII

Compact Over-Order Price Regulation

AGENCY: Northeast Dairy Compact Commission.

ACTION: Proposed rule.

SUMMARY: This rule proposes a compact cover-order price regulation for the territorial region of the six New England states, in the amount of $16.94 (Zone 1), for six months duration. The Northeast Dairy Compact Commission (Compact Commission) establishes this price regulation based on its determination that it is necessary to assure the viability of dairy farming in New England and to assure the region's consumers of a continued adequate, local supply of fresh and wholesome milk, reasonably priced.

DATES: Comments must be received by May 12, 1997.

ADDRESS: Comments should be submitted to the Northeast Dairy Compact Commission, 43 State Street, P.O. Box 1058, Montpelier, VT 05601. The complete file for this proposed rule is available for public inspection during normal business hours at the offices of the Commission.

FOR FURTHER INFORMATION CONTACT: Daniel Smith, Executive Director, Northeast Dairy Compact Commission at the above address or by telephone at (802) 229–1941 phone or by facsimile at (802) 229 –2028.

SUPPLEMENTARY INFORMATION:

Background

The Compact Commission was established under authority of the Northeast Interstate Dairy Compact (Compact). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Pub. L. 93–370; Maine—Pub. L. 89–437, as amended, Pub. L. 93–320; Massachusetts—Pub. L. 93–370; New Hampshire—Pub. L. 93–184–A; Rhode Island—Pub. L. 93–336; Vermont—Pub. L. 89–95, as amended, 93–97. Consistent with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Pub. L. 104–127 (FAIR ACT), Section 147, codified at 7 U.S.C. § 7256. Subsequently the United States Secretary of Agriculture, pursuant to the FAIR ACT, authorized implementation of the Compact.

Section 8 of the Compact empowers the Compact Commission to engage in a broad range of activities that are designed to ''promote regulatory uniformity, simplicity and interstate cooperation.'' For example, the Compact authorizes the Compact Commission to engage in a range of investigations of the existing milk programs of both the participating states and the federal milk marketing system, to make recommendations to participating states, and to improve industry relations as a whole. *See* Compact, Art. IV, § 8.

In addition to the powers conferred by Section 8, the Compact also authorizes the Compact Commission to consider adopting a compact over-order price regulation. *See* Compact, Art., IV, § 9. A ''compact over-order price'' is defined as:

> A minimum price required to be paid to producers for Class I milk established by the Commission in regulations adopted pursuant to sections nine and ten of this compact, which is above the price established in federal marketing orders or by state farm price regulation in the regulated area. Such price may apply throughout the region or in any part or parts thereof as defined in the regulations of the commission.

See Compact, Art. II, § 2(8); *see also* Compact, Art. IV, § 9 (''The Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area.'')

Such price regulation establishes the minimum procurement price to be paid by fluid milk processors to farmers used for New England fluid milk consumption. The regulated price established by the Compact Commission is actually an incremental amount above, or ''over-order'' (Federal Order #1) the minimum price for the same milk established by Federal Milk Market Order.

Section 11 of the Compact specifically delineates the procedures that the Commission must employ in the event it wishes to promulgate an over-order price regulation.

> Before promulgation of any regulations establishing a compact over-order price or commission marketing order, including any provision with respect to milk supply under subsection 9(f), or amendment thereof, as provided in Article IV, the commission shall conduct an informal rulemaking proceeding to provide interested persons with an opportunity to present data and views. Such rulemaking proceeding shall be governed by section four of the Federal Administrative Procedures Act, as amended (5 U.S.C. § 553). In addition, the commission shall, to the extend practicable, publish notice of rulemaking proceedings in the official register of each participating state. Before the initial adoption of regulations establishing a compact over-order price or a commission marketing order and thereafter before any amendment with regard to prices or assessments, the commission shall hold a public meeting. The commission may commence a rulemaking proceeding on its own initiative or may in its sole discretion act upon the petition of any person including individual milk producers, any organization of milk producers or handlers, general farm organizations, consumer or public interest groups, and local, state or federal officials.

Pursuant to § 11 of the Compact, the Compact Commission issued a Notice of Hearing on December 13, 1996, and held public hearings on December 17 and 19, 1996. The Notice also invited the public to submit written comments through January 2, 1997. Following the close of this comment period, the Commission met on January 16, 1997 and established three working groups to consider the testimony and data submitted. The Commission issued a Notice of Additional Comment Period on March 14, 1997. This comment period closed on March 31, 1997; the reply comment period closed April 9, 1997.

Statement of Required Findings of Fact

§ 12(a) of the Compact directs the Commission to make four findings of fact as the basis for promulgating a compact over-order price regulation.

(a) In addition to the concise general statement of basis and purpose required by section 4(b) of the Federal Administrative Procedure Act, as amended (5 U.S.C. § 553(c)), the commission shall make findings of fact with respect to:

> (1) Whether the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.
> (2) What level of prices will assure that procedures receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.
> (3) Whether the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.
> (4) Whether the terms of the proposed regional order or amendment are approved by producers as provided in section thirteen.

Compact Art. V. § 12.

For purposes of clarity, the analysis of the testimony and comment first addresses the substance of findings (2) above, or the level of price needed by producers to cover their costs of production and which will elicit an adequate supply of milk for inhabitants. The conclusion of that analysis is that the current pay price is not sufficient to cover cost of production or to elicit an adequate supply of milk for inhabitants. Based on that determination the

resulting analysis addresses the substance of finding (1) above, or whether the establishment of minimum milk prices to dairy farmers would serve the public interest.

Summary of Comment

I. Finding

What level of prices will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.[1]

This finding requires consideration of the core issues regarding the financial health of the region's dairy farmers and the Compact's associated purpose of assuring the region's adequate supply of milk. More specifically, this finding requires the Commission to make a determination of the price level necessary both to ensure the continuing financial viability of New England dairy farms and to elicit an adequate supply for the region's fluid, or milk beverage, consumption.

Section 9(e) of the Compact provides guidance to the Commission with regard to the factors to be considered in analyzing the cost of production issue. That section directs the Commission.

> to consider the * * * costs of production including, but not limited to the price of feed, the cost of labor including the reasonable value of the producer's own labor and management, machinery expense, and interest expense. Section 9(e) also guides this inquiry by requiring the Commission to consider ''the price necessary to yield a reasonable return to the producer and distributor.

Based upon this statutory guidance, the Commission sought testimony and comment on the following subjects and issues:

(1) Farmer costs of production, including the components identified by Compact Section 9(e), and the pay price needed to yield a reasonable rate of return to producers; and

(2) Prevailing pay prices received by dairy farmers in the New England region; and

(3) The balance between production and consumption of fluid milk products.[2]

A. Issue: Farmer Cost of Production and the Pay Price Needed To Yield a Reasonable Rate of Return to Producers

The comment received makes clear that, despite the approach of Section 9(e), there is very little agreement on what ''costs'' should be included in the cost of production, and even how they should be calculated. Beyond actual cash costs, there is considerable disagreement over whether to include or exclude, and how best to consider, depreciation, family living costs, return or equity, a reasonable value for the farmer's own labor, and debt service. There was no common definition throughout the testimony among farmers or economists. Farmers, themselves, quite frequently, excluded the value of their own labor and or depreciation in calculating their own costs of production.

The diversity of comment makes clear the difficulties of cost of production analysis. Cost of production can and do vary widely from farm to farm and year to year.[3] Even one commenter who opposed the adoption of a price regulation agreed that there is a lack of consensus on the amounts that should be considered in calculating costs of production.[4] University of Vermont dairy economist Rick Wackernagel suggests the difficulty of isolating the cost of producing a hundredweight of milk from what is typically a diversified farming operation, and that any such attempt is at best ''an approximation.[5]

As will be discussed, despite the diversity of their analytical approach, the comments do reflect near unanimous agreement on at least three important aspects of the cost of production equation:

(1) For an extended period of time prices have not covered the full costs of production, however defined,

(2) price instability has caused financial stress and made it impossible for farmers to plan financially; and

(3) over time, net, ''mail box'' price levels received by farmers have not kept up with inflation.

In addition, the Compact Commission will review the comments relating to the structure and health of the New England dairy industry.

The Compact Commission's review of comment under this section includes a comprehensive survey of the testimony and comment received from dairy farmers, and a response to opposing comments received. The Commission notes that very few conflicting comments were submitted for consideration.

(1) Price Insufficiency

Commenters indicated again and again that, in general, farmers in New England had done a good job of holding down costs of production in response to flat milk prices by increasing productivity and efficiency.[6] According to one survey of New England farmers, however, this efficiency and productivity has not equated to profitability. According to the survey conducted by the Farm Credit Services, forty-two percent of the farms had a negative cash margin in 1995.[7]

This survey included seventy-three New England farmers who participate in Agrifax, a financial accounting service provided to farmers by local Farm Credit Associations. Despite the relatively small size of the survey sample, the results are useful to the Commission because, according to the authors, survey participants are generally larger and perhaps better managed than the average dairy farm in New England. The survey indicates that the average adjusted cost of producing milk by New England farms in this survey in 1995 was $15.37 per hundredweight, when including a 4% rate of return on equity. Before the 4% rate of return on equity the net cost of production was 14.25.[8]

Smith concluded

> When you consider the average price received by farmers in our survey for New England was $13.70 per hundredweight in 1995, it is not surprising that many dairy farms are having financial difficulty.[9]

There was also abundant evidence in the record that costs of production for 1996 will likely be as high or even higher than in 1995 and again not be covered by the price received. Jim Putnam, a Senior Vice President with First Pioneer Farm Credit Bank, for

[1] The Compact Commission has determined that the findings here required need not contain any determination with respect to the provision of milk supplies utilized for manufactured purposes. Under current circumstances, the Compact Commission is authorized to regulate *only* the price of milk used for fluid consumption. *See* 7 U.S.C. § 7256(2) (''The Northeast Interstate Dairy Compact Commission *shall not regulate* Class II, Class III, or Class III-A milk *used for manufacturing purposes* or any other milk, other than Class I fluid milk, as defined by a Federal milk marketing order issued under 7 U.S.C. § 608c of this title, reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.'') The Commission has concluded that the finding provision with regard to milk used for manufactured purposes stems from the Compact's alternative authority to regulate that additional milk supply with a Commission marketing order. *See* Compact, Article IV, § 9(c). Under the Compact, however, this authority could be utilized only in the event the federal Market Order System is eliminated. *See* Compact Article IV, §§ 9(a) and (c). This is not presently the case. Morever, this residual authority was struck by the Congress when it approved the Compact. Pub. L. 104–127(2). Accordingly, because the Commission has authority only to regulate the price of milk used for fluid milk purposes, its findings only deal with fluid milk supply and consumption issues.

[2] 61 CFR 65604.

[3] See December 19, 1996 hearing transcript (12/19/96 HT): Putnam at 141, 148–49; Stevens at 158–60; Carlson, at 232–34; Buelow, at 248; Beach at 288–90; Platt, at 292.

[4] Vetne, 12/19/96 HT at 264–66.

[5] Wackernagel, Compilation of January 2, 1997 Written Comment (1/2/97 WC) at 482–83.

[6] *See* DeGues, 1/2/97 WC at 74; Sciabarrasi, 1/2/97 WC at 309; and Smith, 12/17/96 HT at 36.

[7] *See* Smith, 12/17/96 HT at 36.

[8] *See* Smith, 12/17/96 HT at 36.

[9] Smith, 12/17/96 HT at 36.

example, testified that he ''would estimate probably a dime or more higher in 96'' primarily as a result of a 29% increase in purchased feed prices which can account for up to 50% of the cost of production in New England.[10] The average 1996 mailbox price in New England was measured as $14.25, leaving a shortfall of over $1.00, against this commenter's estimated cost of production.

Farmers consistently referred to the fact that low farm prices made it difficult for them to reach their ''break-even'' point, let alone generate any meaningful return.[11] As one witness testified:

> I have two young children and she'll say gee, Dad, we've had a break-even for less price this year for a lower milk price and let's go out and eat and I've got to explain to her that when you break even, you don't eat, that's just paying the operating expenses and says nothing about investing in your business and making it a long range commitment.[12]

Other farmer-witness testified that they, themselves, were living below the poverty line and were eligible to participate in the WIC program.[13]

The result of these depressed prices and the inability to make ends meet will, according to one commenter, cause farmers to ''tighten their belt'' or ''hunker down'' and ''wait out the point in time when they'll go back to breakdown.'' [14] Farmers, thus, are struggling to make ends meet.

The testimony and comments also made clear that this failure of milk prices to cover, or even meet, the costs of production is not a short-lived phenomenon, but rather, is part of a long-term trend that extends back into the mid-1980s. Numerous studies, which were corroborated by substantial anecdotal evidence from farmers, documented the chronic price insufficiency over the last decade.

The USDA Economic Research Service estimates that during the 1985 to 1990 period, cash receipts of Northeastern dairy farmers rose from $13.96 to $16.00 per hundredweight while the cost of production jumped from $12.06 to $16.46. In 1990, dairy farmers in the Northeast average a net loss of .46 cents per hundredweight of milk sold.[15]

Several other studies reached similar conclusions. For example, in a study commissioned by the Maine Milk Commission submitted by Mike Wiers, the Commission's Chair, economists Robert Milligan and Wayne Knoblauch analyzed total costs of production (cash costs, depreciation, a 5% return on equity, and a return on the farmer's labor) in Maine and the five Southern New England states of Vermont, New Hampshire, Massachusetts, Connecticut and Rhode Island—the six Compact states. They found that for Maine the total costs of production per hundredweight to be $17.24 in 1982 and $17.17 in 1987. For the Southern New England States, the costs were $16.65 and $16.62 respectively.[16] For these years, the Market Administrator's Report indicates that the blend prices for Order 1, Zone 21 were $13.61 and $12.56, reflecting pay prices below the costs of production.

University of Vermont Extension economist Rick Wackernagel submitted a study which relief upon an analysis of farm income and expense data from Agrifax and ELFAC farms to estimate costs of production for 1988 through 1990. The costs considered included cash operating expenses, capital costs (other than land) and the labor provided by the farm family; they did not provide for any return on the owner's equity in land. According to this study, net costs of production on these Vermont farms in 1988 were about $13 per hundredweight. In 1990, they had risen to $15 per hundredweight.[17] By comparison, the Market Administrator's Report indicates blend prices for 1988 and 1990, Order 1, Zone 21 were $12.22 and $13.95, respectively. This study again confirms the fact that prices were inadequate to enable farmers to meet the break-even point.

Economist Neil Pelsue submitted another study of the costs of production in Vermont, conducted by the Community Development and Applied Economics Department at the University of Vermont.[18] This study analyzed cost of production by considering all cash expenses, capital replacement costs, and unpaid farm labor, using a hired wage rate. For 1990, the study found the average cost of production to be $14.33 per hundredweight, or about $0.67 less than the Wackernagel study determination. When the economic or ''full ownership'' costs of production was analyzed, however, which included a residual return to management and risk, the measurement of cost of production ballooned to an average of $16.41 per hundredweight. This determination is substantially higher than the Wackernagel analysis and well above the reported blend price of $13.95 for the year.

The Pelsue study also determined that nearly two-thirds of the surveyed farms had negative residual returns. The study concluded, that ''[m]ore than half of the survey farms had economic costs of production that exceeded their receipts. This implies that if current market conditions do not improve, those farms may find it hard to continue operating in the long run.'' [19]

Vermont Department of Agriculture economist Reenie De Geus provided testimony indicating that:

> In 1995, the most recent year, costs of production averaged $14.06 for the group. (Vermont Dairy farmers) This is $0.83 lower [sic] than the actual milk prices received of $13.23. In fact, in each of the last 5 years, milk price received was lower than the cost of production by an average of $1.08.[20]

Finally, as mentioned above, there was near unanimous testimony from farmers that price levels were inadequate to enable them to cover their costs of production. As one commenter summarized, the result of these chronically depressed prices will be ''attrition.'' [21]

The evidence submitted to the Commission regarding the inadequacy of prices paid to farmers currently and over an extended period of time is persuasive. Although the degree of the price inadequacy varies from commenter to commenter, the evidence supports the conclusion that costs of production exceed prices paid to farmers. [22]

(2) Price Instability

Abundant testimony in the record indicates that price instability, and wide fluctuations in the price of milk, were significant sources of financial stress for the dairy industry. These wide

[10] Putnam, 12/19/96 HT at 148–149; *see also* Smith, 12/17/96 HT at 38; Andrew, 1/2/97 WC at 5.

[11] *See* Mason, 12/17/96 HT at 87; d'Boer, 12/17/96 at 192; Putnam, 12/19/96 HT at 144–45, 146.

[12] Holmes, 12/17/96 at 93.

[13] *See* Mason, 12/17/96 HT at 85–86.

[14] Putnam, 12/19/96 at 147–48.

[15] Pelsue, 1/2/97 W/C at 274.

[16] In reply comment, Bill Gillmeister indicated that the higher cost of production in southern New England was a significant issue that must be addressed. *See* Gillmeister, Reply Comment, (RC) April 9, 1997. The Commission agrees that the loss of milk supply nearest to the population centers is an issue of utmost concern, and the reasons for this particular decline should be most carefully scrutinized. As described at footnote 3, the Commission has concluded that it should initiate a regional cost of production study by the close of the regulation adopted under this rule. The comparative costs of production within the region will be a key part of this analysis.

[17] Wackernagel, 1/2/97 W/C at 515.

[18] Pelsue 1/2/97 W/C at 282.

[19] Pelsue, 1/2/97 W/C at 282.

[20] De Geus, 1/2/97 WC at 74.

[21] Putnam, 12/19/96 HT at 148.

[22] The Commission again notes the disparities in study methodologies. While repeating its belief in the broad breadth and strength of these studies for the conclusion that current prices are not covering costs of production, the Commission also has identified the need for a uniform, regional, cost of production study, to be initiated before the close of the regulation imposed by this rule.

variations in price made it difficult for farmers to make good business decisions and to plan financially. Robert Wellington, Vice President of Agri-Mark, testified that:

* * * data from the New England Market Administrator's office show*–*–*the price volatility exhibited in the past 12 months is triple that experienced in 1981 and much larger than most of the 1980's and nearly all of the 1990's. This combination of lower prices with unpredictable volatility has made business planning nearly impossible and has put severe financial strain on most farms. [23]

Robert Smith of the Farm Credit System testified with respect to price instability that:

The volatility in milk prices makes it very difficult for farmers to effectively plan and make the type of investment necessary to position themselves for the future. The Commission can play a major role in helping to reduce this volatility through establishing a higher minimum Class I price. This will help keep farmers and land in business and maintain a stronger agriculture industry in New England for future generations. It will enable dairy farmers to make necessary investments to enhance efficiencies and will benefit communities with enhanced economic activity. [24]

Comments from farmers expressing frustration over the wide swings in milk prices were abundant and adamant. Tom Magnant, a dairy farmer from Franklin Vermont testified: ''We find it very difficult to make ends meet with the milk prices that fluctuate between $11.00 and $15.00 a hundredweight.'' [25]

Jeffrey Holmes, a farmer from Langdon, New Hampshire testified that:

I think one of the key things that's going to be gained from this potential floor price and Mr. Smith alluded to that is the stability of the price to the producer. We have no say in what we get and that's been true for years and years, but in this day and age of tight margins we really need to plan on a certain price. We're making borrowing decisions on variations of ten, twenty and thirty cents a hundred and the last two months we dropped 2 dollars and I don't know what the figure is—$2.50 with a little over a month warning that was coming and it's really a farce that we have to make long range plans based on that type of marketplace. [26]

Jim Jenks, a farmer from Danville, Vermont, testified:

I regret that I'm not a more prudent businessman but one thing I know is if we're going to make a good decision with respect to putting my family's equity on the line, we need to know something about the stability of our markets and our future. So with regard to the Compact Commission and the price that they could set, one thing that we're really looking for is stability. We need price. And there's a lot of other factors. But stability and a price that goes with it is really critical.[27]

Ralph McNall, a dairy farmer and a Director of the Vermont St. Albans Cooperative Creamery testified that:

Price stability is the greatest potential benefit of the Compact. Within our own business costs have increased dramatically in the last five years. The improvements or expansions have been difficult to justify or prepare for with the fluctuations of the price paid for milk. I fully support the Compact and its potential to stabilize the milk price to allow my business to plan its future.[28]

Charles Telly, a dairy farmer from Dunstable Mass testifying on behalf of the National Grange: ''I am increasingly concerned about the fluctuating prices * * * It is difficult for me to plan out—to financially plan out my future three, five or ten years in advance because of the uncertainty I face each month with the ever changing milk price''.[29]

These comments are persuasive, and they demonstrate the need for price stability in the region in order to avoid the harmful effects of price volatility.

(3) Failure of Milk Prices to Account for Inflation

Both economists and farmers identified the failure of milk prices to keep up with inflation as a factor contributing to farm financial stress. A recent study conducted and submitted by University of Vermont dairy economist, Rick Wackernagel presented a comprehensive analysis of the impact of these two variables—price insufficiency and inflation—upon farm profitability.[30] Because of its comprehensive approach, the Commission finds this study persuasive and relies on it extensively.

The Wackernagel study analyzes the economic effects of three different price trajectories for two different farm sizes—an 80 cow herd and a 350 cow herd. Wackernagel's first trajectory used a macro-economic model developed by the Food and Agriculture Policy Research Institute (FAPRI) for 1997 modified to reflect local price levels and yields as a base. The base scenario is premised upon a Class I price of $16.17 per hundredweight at Zone 21 and a blend price of $14.70 per hundredweight. Under this scenario, both farms operate at low to modest levels of profitability. They are stressed financially during several periods of price instability and by a general downward trend in price, however. The financial results for these two farm sizes are ''marginal to somewhat unattractive'' at these price levels, providing ''an extremely modest return on investment of 0.4 to 3.0%''.[31]

The second trajectory attempts to moderate price instability by holding the Class I price constant. Wackernagel estimates that the Class I price accounts for about forty percent of the variation in the blend price and that stabilizing the Class I price could potentially reduce the variability of the blend price by about half. The economic impact of this approach upon farm income and survival, however, was similar to the base (first) trajectory, suggesting that price instability is not the only factor placing financial stress on these farming operations. Inflation, was a factor as well, as Wackernagel explains: ''The Consumer Price Index (CPI) shows a third source of financial stress for these farms, inflation. In contract to its steady upward progression, the first two trajectories have downward trends.[32]

Wackernagel's third price trajectory raises the Class I price to $17 per hundredweight (Zone 21), yielding a project blend price of $15.45, and increases the Class I price by one-half the rate of inflation in subsequent years. This price trajectory has the greatest positive impact on retention of equity, net farm income and survivability, even though its upward slope is less than that of the CPI.

Farmers also identified inflation as a significant source of financial stress. Ellen Paradee, a dairy farmer from Grand Isle, Vermont testified that:

Since 1985, our property taxes have increased two hundred percent. Our grain costs have increased one hundred percent. And our utility costs have increased one hundred and twenty five percent. In 1985, the average blend price for Zone 25 was $12.57 per hundredweight. In 1995, the average blend price was $12.56 per hundredweight. Essentially, there has been no increase in the blend price. If the price of milk had kept pace with inflation, it would be approximately $26 per hundredweight.[33]

Ralph McNall commenting on his own farm finances and inflation said:

* * * utility cost, electricity, for example, has gone from, in the year 1991 it's gone from $3,600 to $5,800 for an increase of fifty two percent.

Purchased feed is another example—$37,000 to $76,000 for an increase of one hundred and five percent. Fertilizer—$4,900 to $8,100 for an increase of sixty six percent . . . It is important to note that steps have been taken to reduce electricity costs, for

[23] Wellington, 3/31/97 AC.

[24] Smith, 12/17/96 at 39.

[25] Magnant, 12/17/96 at 227.

[26] Holmes 12/17/96 at 92–93.

[27] Jenks, 12/17/96 HT at 153.

[28] McNall, 12/17/96 HT at 221.

[29] Telly, 12/19/96 HT at 123.

[30] Wackernagel, 1/2/97 W/C at 467 et seq.

[31] Wackernagel, 1/2/97 W/C at 473.

[32] Wackernagel, 1/2/97 W/C at 473.

[33] Paradee, 12/17/96 HT at 232.

instance through plate coolers and heat reclaimers within the milk house and yet as I said before the cost went up fifty percent. Reliance on purchased fertilizer has been reduced, supposedly, through the installation and utilization of liquid manure.[34]

John Mordasky, dairy farmer and Legislator from Stafford, Connecticut, said:

I lost from eight to ten thousand dollars a year in the last four years and I feel that this has come about because the relative price of milk has stayed the same. Fuel has gone up, grain has jumped out of sight and it just—all the other costs that are involved—equipment, parts—have gone very, very, high and they're not relative anymore.[35]

(4) Structure and Health of the New England Dairy Industry

The comment received also makes clear the devastating impact that chronic price insufficiency, price instability, and the failure of milk prices to keep up with inflation over the last decade has had, and will continue to have, on the structure and health of the New England dairy industry absent intervention through regulation by the Compact Commission.[36]

According to the extensive testimony by University of New Hampshire Extension Specialist Michael Sciabarrasi, the character of the New England dairy industry is still predominantly family owned and operated, made up of mostly small to medium sized producers, and is heavily dependent on family labor.[37] Maintenance of this market structure premised on family farms is precisely the express purpose of the Compact. See Compact Article I, § 1.[38]

Mr. Sciabarrasi's conclusions were corroborated by much of the evidence adduced at the hearings. There is abundant evidence that many of the region's farms are small to medium-sized. Likewise, there is substantial anecdotal evidence of heavy dependency on family labor, much of which often goes unpaid.[39]

The testimony of Robert Smith, with the Yankee Farm Credit Bank and Farm Credit of Maine, described the effect of the industry's chronic distress upon this basic market structure. According to Smith, ''The number of dairy farms in New England declined by 41% over the past 10 years. (1985–1995) During this period the number of cows has declined 24%, total production has declined 4% and land used in farms fell by nearly 600,000 acres.'' [40] According to another commenter, New England has lost dairy farmers at a rate of about 40% faster than the national average, between 1987 and 1992.[41]

Statistics cited by another commenter indicate these problems are particularly severe in the southern portion of the Compact region. Massachusetts, the most populous state, has seen the greatest effect, showing a 35% decline in cow numbers and a 20% decline in milk production during the period of 1986 through 1995. Each of the two other southern New England states, Connecticut and Rhode Island, have also shown substantial declines in farms, cow numbers and production *See* New England Agricultural Statistics, 1995–96, USDA, Page 68.[42]

The economic literature submitted into the record addressing this issue likewise concludes that inadequate milk prices threaten the long-run survival of small and medium-sized farms. Quiroga & Bravo-Ureta, ''Short- and Long-Run Adjustments in Dairy Production: A Profit Function Analysis,'' 24 Journal of Applied Economics 607–16 (1992).[43] In this study, the authors extracted data from Vermont farms between 1966 and 1988 and applied that data to econometric models to test the effects of milk price reductions on several factors, including farm size. The results of their analysis were consistent with the view that low milk prices threaten the economic viability of small- and medium-sized dairy farms in the short run, and continue the trend towards fewer, and larger, dairy farms over the long run. Yet, it is precisely this fear of continuing attrition among the region's small rural dairy farmers that led to the enactment of the Compact, and prompted the Commission to undertake this proceeding. *See, e.g.*, Compact, Art. I, § 1.

(5) Comments and Testimony From Farmers

In the language of economists, the Commission was told that a farm can continue to operate in the short term only if market prices cover variable costs. In the long term, it must cover the total cost of production and marketing or the farm will cease operating.

(WC 282 Pelsue) Farmers were more likely to describe this situation as living off their depreciation or living off their equity, in terms evidencing both frustration and humor.

Connecticut dairy farmer, Mavis Collins, testified that:

People in fact used to ask us ''what will you do with all the money from selling your development rights'' and we jokingly would reply, ''We'll farm until the money is all gone.'' And unfortunately, that's almost what's happened. This year alone we had to use $24,000 of our savings plus $11,000 from creditors in order to keep up with current bills. * * *[44]

Wendy Kennedy a farm wife and owner of a farm accounting and tax service told the Commission:

I pulled out the full time dairy farmers from my files. (25 files) The average income from their Schedule F which is where you report farm income was a negative $5,263 for last year. (1995) * * * With a negative bottom line of $5,263 these families are living off their depreciation or selling off their assets to live * * * You can't run a business like that and be in business next year.[45]

Nowhere was the gap between cash receipts and costs of production more apparent than when farmers talked about family living expenses or any return for their family's labor: A Massachusetts dairy farmer testified: ''My brother Edward and I milk about one hundred cows in Westhampton, Mass. Ed and I take a draw of $300 per week and each of us work about one hundred hours per week (6 a.m.–8 p.m. 7 days).[46]

Jan d'Boer who milks 95 cows with his family told the Commission: ''We looked it over and we came up with about 35 hours of family labor a day * * * And the wages per hour we came up with after we figured it all out is $2.55 an hour.'' [47]

John Potter, a Washington, Connecticut dairy farmer: ''My costs show $7.17 to produce milk, January through November. That's not including anything for family living. That doesn't include anything for depreciation or paying back debt.'' [48]

[34] McNall, 12/17/96 HT at 222 and 223.

[35] Mordasky, 12/19/06 HT at 12.

[36] One commenter felt that the Commission should not take action because he believed that other regions of the country were losing dairy farmers at a faster rate than New England. *See* Tipton, WC 1/2/97 at 462. A finding that New England is losing farmers faster than any other part of the country is unnecessary to establishing an over-order price regulation.

[37] Sciabarrasi, 1/2/97 WC at 309.

[38] Three commenters expressed the opinion that the market should be left to work without regulation, even if this meant continued farm loss. (Baker, 12/17/96 HT at 185, Schnittker, 1/2/97 WC at 313 and Vetne, 12/19/96 HT at 269.) As one Commenter recognized, this is essentially a question of public policy. In response, the Commission refers to the Compact's Statement of Purpose, that ''dairy farmers are essential to the region's rural communities and character'' and are ''an integral component of the region's economy.'' Compact Article I, § 1.

[39] *See* 12/17/96 HT: Mason at 87; Olson at 146; d'Boer at 192.

[40] Smith, 12/17/96 at 34.

[41] Ed Barron, 12/17/96 HT at 60.

[42] William Zweigbaum, U–NH Extension 3/31/97 AC.

[43] Bravo-Ureta, 1/2/97 WC.

[44] Collins, 12/19/96 HT at 56.

[4] Kennedy, 12/19/96 HT at 239–240.

[46] Parsons, 1/2/97 WC at 236.

[47] d'Boer, 12/17/96 at 192.

[48] Porter, 12/19/96 HT at 226.

Joanne Reynolds, nurse and farm wife: ''In 1996, our milk price averaged $14.88, but our expenses averaged $12.73. These expenses do not reflect depreciation, debt principal or family living expense. What other segment of society works 4000 hours a year, has a $500,000 investment and is basically living off of depreciation.'' [49]

John Mordasky testified that: ''In the last four years, in order to support my wife and myself we lived on our depreciation and my legislative pay.'' [50]

John Devine of Devine farms of Massachusetts testified, '' * * * we had the accountant pull off the facts from April to November and we had a net loss of $12,877.23.'' [51]

Wayne Bissonette a dairy farmer from Hinesburg, Vermont told the Commission that:

> * * * long term decisions * * * [are] becoming increasingly difficult as milk prices swing more dramatically with no apparent link to other costs and market forces * * * ''I consider myself to be a fairly efficient farmer,'' he said, ''and I believe that I could make money with a blend price of $14.50. This does not allow for much return on my equity but at this level I would be paying income tax.''

Alice Allen a dairy farmer from Wells River, Vermont said:

> In 1973, when my husband and I first began shipping milk, we were receiving $7.50/cwt (federal Order 1) for milk. We were paying $60 a ton for excellent quality 2nd cut hay and $80 a ton for 20% protein. In 1996, we are receiving $15.37/cwt and paying $145 a ton for second cut hay and $250 a ton for 20% protein concentrate.[52]

Scott Mason, a registered jersey farmer from Coos County testified that:

> I'm looking at a break-even cost for my farm of $14.31. This price does not include any figure for return to equity or family labor. So 14.31 is I work 70 hours a week for nothing, my wife works approximately 30 hours a week on the farm for nothing, and we risked every last penny that we have for no return.[53]

Leon Berthiaume the general manager of the St. Albans Cooperative in St. Albans Vermont testified in summary with respect to the members of his cooperative that:

> * * the average size farm for the St. Albans Coop Creamery produces 1.6 million pounds of milk per year and through these statistics [UVM and USDA] we know the net cost of production, not including return on investment would be in the range of $13.50 to $14.25 per hundredweight.[54]

The strength and consistency of the evidence in the record with respect to the impact on farmers of their inability to cover their costs of production provides stark evidence to the Commission of the severity of the problems facing the region's dairy farmers, as well as the consequences of inaction.

B. Issue: Prevailing Pay Prices Received by Dairy Farmers in the New England Region

The issue of the pay prices received by New England dairy farmers is important because it bears directly on determining the necessary level of any Compact Over-order Price Regulation that might be imposed.

According to a review of the statistical data and the comment received, prevailing farm prices are a function of two computations: federally regulated uniform (or ''blend'') prices and net or ''mailbox'' price.

Statistics published by the Market Order # 1 Administrator provide comprehensive and complete data to address the first part of this issue—the market structure of federal, minimum, price regulation. These statistics are compiled by the Market Administrator as part of the regulation of the federal order, by law, and are published monthly, annually, and in ten-year compilation form. See 7 C.F.R. § 100.3(c)(4), (9). They serve as the common basis for all New England regional dairy marketing analysis and, together with similar statistics supplied for other regions, form the basis for national analysis.[55]

These statistics report the precise minimum uniform or ''blend'' prices paid to dairy farmers under federal regulation. According to the statistics, these prices are announced and paid monthly, using one hundred pounds (cwt) of milk as the unit of measure.

General managers and economists employed by cooperatives of dairy farmers which operate in the region described in comprehensive detail the integration of market forces at work in the regulated marketplace. According to these commenters, farmers receive from the marketplace a ''mailbox'' or net pay price, which accounts for a variety of market payments received and costs incurred for the sale of the milk they produce. [56]

The following chart illustrates these two price computations of prevailing pay prices of the region's dairy farmers.

[49] Reynolds, 1/2/97 W/C at 293.

[50] Mordasky, 12/19/96 HT at 10.

[51] Devine, 12/19/96 HT at 220.

[52] Allen, 1/2/97 W/C at 3.

[53] Mason, 12/7/96 HT at 87.

[54] Berthiaume, 12/17 HT at 93 *et seq.*

[55] submitted for reference by De Geus and Gilmeister, 3/3/97 AC.

[56] According to Wellington et al, (AC 3/31/97) and pursuant to federal Market Order # 1, the cost of transporting the bulk fluid milk from the farm to the processing plant is a key cost to farmers which reduces the prevailing farm price. This issue is discussed in more detail in the next finding section.

CLASS I, BLEND AND MAILBOX PRICES 1995–1996

[Per CWT]

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1995												
Class I	15.10	14.62	14.59	15.03	15.13	14.4	14.36	14.66	14.47	14.79	15.32	15.85
Blend	13.12	13.13	13.25	13.19	13.27	12.84	12.83	13.24	13.32	13.7	14.24	14.43
Mail box	11.83	11.86	11.98	11.93	11.92	11.39	11.35	11.71	11.88	12.42	13.14	13.20
1996												
Class I	16.11	16.15	15.97	15.83	15.94	16.33	17.01	17.16	17.73	18.18	18.61	17.37
Blend	13.79	13.63	13.55	13.53	13.84	14.53	15.25	15.48	15.96	16.04	15.65	14.37
Mail box	13.38	13.23	13.14	13.08	13.49	14.08	14.77	15	15.55	15.83	15.37	14.12

C. Issue: The Balance Between Production and Consumption of Fluid Milk Products

As noted, the finding analysis regarding the price calculation simultaneously accounts for the level required to ensure the region's local supply of fluid milk products and the amount needed to cover cost of production. Section 9(e) of the Compact specifically requires the Compact Commission to consider the balance between production and consumption of milk and fluid milk products in the regulated area.

Inquiry under this issue assisted the Commission in determining whether the region presently is being supplied locally or has become dependent upon supply from distant sources, notwithstanding any present price disparity between cost of production and the pay price. This understanding allowed the Commission to determine the degree to which price regulation is needed to sustain current, sufficient, local supply, and the degree to which it is also needed to encourage and ensure new and added local supply.

According to data, the six state, New England, region draws approximately seventy percent of the raw product supply needed for the consumption of all milk products, fluid and manufactured, from New England farmers. The total volume of milk supplied for the region is approximately five billion pounds. The predominant remainder is supplied by New York farmers, who have traditionally made up a substantial portion of the New England milkshed. Less than three percent of the raw milk supply for the New England market is produced outside of the six state/New York milkshed.

According to the Market Order statistics, approximately fifty percent of this raw product milk supply is processed for consumption as fluid, or drinking milk, in the New England region. The raw product supply for this in-region fluid production and consumption draws from both the New England and New York farmers comprising the New England milkshed. At present, approximately 98 percent of the fluid milk products consumed in the region are produced by fluid processing plants located in New England. The remaining two percent of fluid milk consumption is supplied by packaged milk products imported by plants nearby to New England. A small percentage of the in-region fluid production is similarly exported for consumption in the immediate areas adjacent to New England.

The Market Order statistics also describe with particularity that the remainder of the raw product milk supply is processed within New England into manufactured dairy products. In contrast to fluid milk products, these manufactured dairy products are consumed both within and outside the New England region.

It is universally understood that the same raw product supply can be used for both fluid, processing and manufacturing purposes. Given this substitutability, and assuming reliance upon farmers in New York State as part of the milkshed, the Commission concludes that New England is, overall, presently in stable balance of regional production and consumption of fluid milk products.

At the same time, the Market Order statistics describe a marked decline in production over time in every individual New England state except Vermont.[57]

RECEIPTS OF MILK FROM PRODUCERS, BY STATES

[Thousand Pounds]

Year	CT	Me	MA	NH	NY	RI	VT	All States
1985	594,785	345,956	540,143	338,028	1,284,015	39,722	2,256,595	5,399,244
1986	574,279	333,124	506,773	343,806	1,280,331	36,912	2,266,222	5,341,447
1987	541,118	293,373	450,524	301,738	1,313,635	36,198	2,236,238	5,172,824
1988	515,512	262,059	418,055	281,403	1,391,994	34,490	2,214,116	5,117,629
1989	502,716	217,437	400,105	268,453	1,388,680	29,651	2,167,758	4,974,803
1990	494,619	216,586	407,704	280,201	1,455,463	29,805	2,229,961	5,114,341
1991	504,516	253,383	412,990	294,185	1,545,890	30,056	2,268,174	5,309,194
1992	525,702	260,759	427,407	307,159	1,560,245	28,853	2,367,566	5,477,691
1993	504,282	288,776	424,836	310,463	1,443,447	28,266	2,345,423	5,345,493
1994	491,495	296,500	398,271	299,911	1,283,684	27,161	2,301,044	5,098,521
1995	487,493	346,443	400,501	314,610	1,417,034	28,536	2,375,518	5,370,135
1996	457,230	388,684	388,227	312,293	1,459,469	26,850	2,350,348	5,383,101

Source: New England Market Order Administrator's Statistical Summaries.

MILK MARKETED BY PRODUCERS: SOLD TO PLANTS AND DEALERS: BY STATE

[Million Pounds]

YR	CT	ME	MA	NH	RI	VT	Total NE
1986	575	670	535	362	36.0	2405	4583.0
1987	540	654	480	314	36.0	2370	4385.0
1988	515	620	437	296	35.0	2350	4253.0
1989	500	585	422	286	30.0	2295	4118.0
1990	495	590	436	297	30.2	2330	4178.2
1991	505	600	440	313	33.4	2370	4261.4
1992	526	623	454	328	32.3	2474	4437.3
1993	527	645	452	320	31.9	2470	4445.9
1994	514	621	431	308	31.2	2422	4327.2
1995	508	625	426	322	32.1	2507	4420.1

Source: MILK: Annual Quantities Used and Marketed by Producers, 1986–1995 New England Agricultural Statistics, 1995–1996.

[57] See also New England Agriculture statistics, submitted by William Zweigbaum, A/C 3/31/97.

This statistical picture of decline is further corroborated by the previously cited testimony of Smith and Baron. According to Smith, ''The number of dairy farms in New England declined by 41% over the past 10 years. (1985–1995) During this period the number of cows has declined by 24%, total production has declined 4% and land used in farms fell by nearly 600,000 acres.'' [58] According to another commenter, New England has lost dairy farmers at a rate of about 40% faster than the national average, between 1987 and 1992.[59]

According to statistics cited by another commenter, problems are especially severe in the southern portion of the Compact region. Massachusetts, the most populous state, has seen the greatest effect, showing a 35% decline in cow numbers and a 20% decline in milk production during the period of 1986 through 1995. Each of the two other southern New England states, Connecticut and Rhode Island, have also shown substantial declines in farms, cow numbers and production.[60]

Another commenter indicates that milk production in New York state, the supplemental portion of the New England milkshed has also declined. Citing USDA statistics, this commenter states that ''New York milk production was down 4 percent in February 1997 compared to one year ago.'' [61]

This commenter also indicates that the milkshed has expanded in area as production closer to the production centers has declined:

> The milk supply area for the New England market has steadily increased over time as dairy farmers in the region have gone out of business. When the New England Order was promulgated more than twenty years ago, the supply area, or milkshed, covered all the six New England states and a dozen or so eastern New York counties. Recent information provided by the Market Administrator's Office shows that the New England market now receives milk from thirty four New York counties as far west as Ontario County. Ontario County is about 360 miles distance from Boston. This distant milk is primarily needed to satisfy the daily Class I needs of New England bottlers during the peak demand period in late summer and fall when schools go back into session and milk supplies are seasonably at their lowest level. The New England milkshed has increased in size by approximately 10 miles.[62]

From the comment and statistics, therefore, the Compact Commission concludes that production and consumption in New England, though presently in balance, are operating in a balance that is under tremendous stress. The supply most local to the population centers, or that provided by southern New England farms, has been greatly diminished and is in fact disappearing. Production at the outer reaches of the milkshed has been able to replace this loss of the most local supply. Yet this more distance supply is itself under stress and is in fact in decline, causing the outer boundaries of the milkshed to be expanded.

The Compact Commission consequently concludes that the present stress on the balance between the region's production and consumption must be relieved if the region is to continue to be provided an adequate, local supply of fluid milk. The Commission concludes that the present balance likely will not be maintained and could soon begin to significantly erode, which would threaten the region's supply, if the stress is not relieved. To ensure a continuing balance, the present, local supply must at least be stabilized, if not increased. Furthermore, the present, distant supply itself must be stabilized as well, to ensure that the milkshed does not reach further west.

D. Summary Analysis of Costs of Production and Sufficient Price

Based on this summary of comment and analysis under issues (1), (2) and (3) above, the Commission concludes the chronic loss of dairy operations in the region, and thereby the stress on the region's local supply of milk, is a direct result of the volatility of farmer milk prices and their chronic insufficiency, including the failure of prices to adjust for inflation.

The Commission further concludes, accordingly, that price regulation is necessary to address the chronic pricing problems and to continue the assurance of an adequate, local supply of milk for the region.

Price Volatility, Cost of Production and Chronic Insufficiency of Price, and the Failure of Price To Adjust for Inflation

1. Price Volatility

The concern with price volatility is described in detail above. The Commission concludes that this price volatility can and should be addressed directly by Compact Over-order price regulation. Compact Over-order price regulation can minimize and even eliminate price volatility by establishing a level, Class I, floor price that combines the Federal Order minimum price with a ''floating'' Over-order price. Such a combined floor price will serve to eliminate the volatile swings in federal Class I pricing.

More specifically, the precise amount of the ''floating'' component of the Compact Over-order Price Regulation will be the difference in amount between the federal, regulated, price that is announced monthly and the amount of Compact Over-order Price Regulation itself. As explained below, the Commission is adopting a combined, federal Order and Compact Over-order, Class I price of $16.94 (Zone 1). The ''floating'' or ''Over-order'' component of the Compact price regulation will be the difference between the announced Federal Order, Class I, Zone 1 price for each month and $16.94.

2. Cost of Production and Chronic Insufficiency of Price

The evidence in the record suggests that the costs of production in the New England states, within the meaning of the required finding, is best defined as a range. The Compact Commission draws this conclusion for two reasons. First, both the farm testimony and that of the region's dairy economists indicates that costs of production vary from farm to farm. Second, the testimony of the dairy economists themselves define a wide range of values.

The range presented in their study data varied widely, between approximately $13.50 and $17.24 per cwt. Leon Berthiaume testified that costs of production among members of a substantial Vermont cooperative ranged from $13.50–$14.25; on behalf of the Vermont Department of Agriculture, Reenie De Gues testified that Vermont production costs were $14.06; University of Vermont economist Rick Wackernagel testified that costs were at $15.00; Neil Pelsue testified of costs equaling $16.41; Bob Smith described costs of $15.37; The Economic Research Service provided an estimate of at $16.46; Milligan and Knoblauch concluded that production costs were as high as $17.24.

These variances can be explained by several factors, including the different time frames surveyed, the different data relied upon, and the different costs included in the survey evaluations. Despite the recognized, inherent, limitations resulting from this variability, this data base is still most comprehensive, and allows the Commission to settle upon a range of cost of production that is most reliable.

To establish its range, the Compact Commission has referred to the above series of summary numbers and eliminated the high and low values. The

[58] Smith, 12/17/96 HT at 34.

[59] Barron, 12/17/96 HT at 60.

[60] *See* New England Agricultural Statistics, 1995–96, USDA, Page 68.

[61] Wellington et al, 3/31/97 AC at 6.

[62] Wellington et al, 3/31/97 AC at 6.

Compact Commission then matched this range against the variety of anecdotal statements presented by dairy farmers in testimony and comment. Accordingly, the Compact Commission determines that, for purposes of analysis under this rule, the range of New England cost of production is reliably understood to be somewhere between $14.06 and $16.46 per cwt.

As described earlier in detail, the data, comment and testimony received demonstrated overwhelmingly that New England farmer pay prices are and have been chronically below this defined range of cost of production. The Compact Commission further concludes that the amount of this insufficiency is also best described as a range.

As described earlier, the USDA Economic Research Service estimate that during the 1985 to 1990 period, cash receipts of Northeastern dairy farmers rose from $13.96 to $16.00 per hundredweight while the cost of production increased from $12.06 to $16.46. This describes a deficiency in price range of $1.90–$0.46. Vermont Department of Agriculture economist Reenie De Geus provided testimony indicating that:

> In 1995, the most recent year, costs of production averaged $14.06 for the group. (Vermont Dairy farmers) This is $0.83 lower than the actual milk prices received of $13.23. In fact, in each of the last 5 years, milk price received was lower [sic] than the cost of production by an average of $1.08.[63]

Using the figures here identified, the Commission accepts this comment and concludes that cost of production exceeds farmer pay price by an amount in the range of $0.46–$1.90.

As cited earlier, Ms. De Gues provides some context for this apparent range in deficiency:

> In good years, we find that the cost of production tends to rise with the price of milk. With the extra cash farmers replace worn out equipment and make repairs that may have been delayed for years. When the price of milk drops below cost, they consume some of the equity in their farms to meet family living expenses and cash flow demands.[64]

3. Adjustment for Inflation—Determination of Specific Price Amount and Formula

As described earlier, the chronic insufficiency in price can be traced to a number of sources. The Compact Commission has determined that the single most readily identifiable basis of price insufficiency is the failure of farm prices to adjust to inflation over time.[65] Given this readily apparent concern from the hearing record, in the subsequent Notice of Comment, the Compact Commission specifically sought comment as follows:

> The Commission is considering a possible Compact over-order price regulation that will be based, at least in part, on an adjustment for inflation to the Class I, fluid milk price, over time. The Commission seeks comment on the advisability of such an approach, as well as possible methodologies for determining the impact that such an adjustment would have on the Class I, fluid milk price, over time.[66]

In response, the Commission received a combined comment from Reenie DeGeus and Bill Gillmeister, dairy economists for the Vermont and Massachusetts Departments of Agriculture, respectively, providing a detailed analysis on this point. They proposed a one-time adjustment of the Class I price, (Zone 1) using 1991 as the base year for the adjustment. They proposed using the 1990 CPI as the base index, given that the Compact expressly uses this base year for adjusting the cap on its regulatory authority. See Compact Section 9(b). They suggest further using the CPI–U Boston as the appropriate, more local indicator of the inflation factor.

This equation yields a Class I, Zone 1 price of $16.94 per cwt. for 1997.

The Commission accepts the recommendation of these two state agriculture department economists. 1991 is a reasonable year to use for the historic period; 1991 prices were markedly low, following an historic year of high prices. This erratic fluctuation in prices was of similar type to the recent swing of November, 1996–January, 1997, and thus provides a recent and analogous, relevant time period for the inflation adjustment. In addition, as the commenters note, using the low point, 1991, of this last pricing cycle ensures that the inflation adjustment will be appropriately limited.

Wellington, et al. also submitted comment in response, indicating concern with the use of an automatic inflation adjustment. They indicated that inflation must be accounted for as a dynamic factor of retail prices as well as farmer cost of production. They indicated that the price regulation, including all relevant factors, should be assessed every six to twelve months, rather than made to adjust to a single static indicator.[67]

The Compact Commission accepts this comment, as well. The Commission agrees that the inflation adjustment should not serve as the single, permanent, function of price adjustment. Rather, it serves as the initial, limited, regulatory response to the defined chronic market problems of price insufficiency and volatility.

The Compact Commission further agrees that the overall price regulation adopted by this rule must be revisited after the passage of some time rather than imposed permanently. As discussed throughout this summary of comment, the Commission has determined that the duration of the rule will be six months. This will allow the Commission to assess again the broader market circumstances in the manner contemplated by the commenters.

Accordingly, the Compact Commission has adopted the price/inflation adjustment presented by DeGues and Gillmeister, which accounts for this six month duration of the rule. Given that this six month period will be from July–December, 1997, the Commission adopts their calculation of price, adjusted for inflation for 1997, of $16.94 (Zone 1).

The Compact Commission recognizes that this price level, in itself, will not be sufficient to cover the defined range of deficiency between current farmer pay prices and cost of production. The Commission expects instead the combined benefits of price enhancement and stability to result in the positive impact on the region's milk supply, as contemplated by the finding analysis under this section.

The Commission here expressly refers to and relies upon the analysis of Professor Wackernagel, which assessed the impact on profitability of a Class I price of $16.89 (Zone 1) ($16.17 Zone 21). The price analyzed is thus directly in line with that adopted by the Commission. According to this analysis, farms operating in such a stabilized pricing environment would remain under stress financially, but would show some improved financial performance, able to operate at low to modest levels of profitability.[68]

The Commission, again, concludes that this price level is the appropriate, initial increment to establish, for the defined period of six months. This initial, limited duration of the regulation will allow the Commission

[63] De Geus, 1/2/97 WC at 74.

[64] De Geus, 1/2/97 WC at 75.

[65] The Commission here specifically notes the determination of Professor Wackerngel's analysis regarding the significance of inflation. Wackernagel, 1/2/97 WC at 473.

[66] 62 FR 12252.

[67] Wellington et al at 11. Another commenter expressed similar concern. See Vetne, 12/19/96 HT at 269.

[68] Wackernagel, 1/2/97 WC at 473.

soon to revisit again the issues raised by this finding analysis. For that next time, The Commission's inquiry will have the benefit of the performance of the existing price regulation. Such a record will aid the Commission's analysis.

II. Finding

Whether the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

The Commission referred to the Compact's express Statement of Purpose in determining the intended meaning of ''public interest'', as used in this finding. The Statement of Purpose declares at the outset that:

> The mission of the commission is to take such steps as are necessary to assure the continued viability of dairy farming in the northeast, and to assure consumers of an adequate, local supply of pure and wholesome milk.
>
> The participating states find and declare that the dairy industry is the paramount agricultural activity of the northeast. Dairy farms, and associated suppliers, marketers, processors and retailers, are an integral component of the region's economy. Their ability to provide a stable, local supply of pure, wholesome milk is a matter of great importance to the health and welfare of the region.

Compact Art. I, § 1.

Section 9(e) of the Compact provides further guidance with regard to the intended meaning of ''public interest''. This section provides a concise but non-exhaustive list of criteria for the Commission to consider ''in determining the price''. Compact Art. IV § 9(e). Pursuant to that section:

> [T]he commission shall consider the balance between production and consumption of milk and milk products in the regulated area, the costs of production including, but not limited to the price of feed, the cost of labor including the reasonable value of the producer's own labor and management, machinery expense, and interest expense, the prevailing price of milk outside the regulated area, the purchasing power of the public and the price necessary to yield a reasonable return to the producer and distributor.

Based on the inclusion of this broad list of criteria, the Compact Commission determined that it must balance the interest of all market participants described by the Statement of Purpose—processors, retailers and consumers, along with farmers.[69] This necessarily requires a broad inquiry, one that takes into account the common interest of all market participants in the maintenance of dairy farming in the region.

The Compact Commission thereby identified four main components of the ''public interest'' contemplated by this Finding: (i) Assuring the continued viability of dairy farming in the region, (ii) assuring *simultaneously* the continued viability of associated suppliers, marketers, processors and retailers, (iii) benefiting consumers through the maintenance of an adequate supply of milk, reasonably priced, and (iv) maintaining a *local* supply of milk.

Based on this definition of ''public interest'', the Commission sought comment on the following subjects and issues:

(1) The balance between production and consumption in the region—the pay price needed to yield a reasonable rate of return to producers and to ensure an adequate supply of milk for the region.

(2) The prevailing farm prices for Class I, fluid milk, inside and outside the New England region,

(3) The prevailing processing and wholesale costs for Class I, fluid milk, inside and outside the New England region,

(4) The costs of transporting bulk fluid milk products to plants located within the New England region,

(5) The costs of delivering fluid milk products processed outside the New England region to outlets within the region,

(6) The purchasing power of the general public,

(7) The elasticity of demand for fluid milk products,

(8) The cost of retailing fluid milk products,

(9) The prevailing retail prices for Class I, fluid milk, inside and outside the New England region,

(10) The potential impact of a flat, combined, regulated, Federal Order and Compact Over-Order price on the wholesale market for fluid milk products,

(11) The potential impact of a flat, combined, regulated, Federal Order and Compact Over-Order price on the retail market for fluid milk products,

(12) The potential impact of a flat, combined, regulated, Federal Order and Compact Over-Order price on school lunch programs.

(13) The potential impact of a flat, combined, regulated, Federal Order and Compact Over-Order price on the Women, Infants and Children Special Supplemental Nutrition Program of the United States Child Nutrition Act of 1966.[70]

A. Issue: The Balance Between Production and Consumption in the Region—The Pay Price Needed To Yield a Reasonable Rate of Return to Producers and to Ensure an Adequate Supply of Milk for the Region

This issue is the premise for the remaining discussion of the public interest in regulated milk pricing.[71] The remaining discussion is triggered by the Compact Commission's determination that such farm price regulation is necessary, both to yield a reasonable rate of return to producers and to ensure an adequate, local, supply of milk for the region.

This issue was previously addressed in detail in the previous finding section. In summary, the Compact Commission concluded that farmer pay prices must be enhanced, stabilized and adjusted for inflation. The Commission thereby determined that a flat, combined, federal Class I and Compact Over-Order Price Regulation in the amount of $16.94 (Zone 1) per cwt was necessary to accomplish these objectives.

B. Issue: Prevailing Farm Prices Inside and Outside the New England Region

Compact Section 9(e) provides specifically for consideration of this issue. Mailbox price statistics allow for a determination of present comparison of milk prices in adjacent markets. The following chart submitted as part of a written comment describes these comparative prices.[72]

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[69] Neil Marcus, President of Marcus Dairy, Inc. emphasized the importance of considering the impact of the Compact on all market participants in his testimony. *See* HT 82–83; 12/19 Marcus.

[70] See 61 CFR 65604; 62 CFR 12252.

[71] As noted previously, this issue is raised specifically by Compact Section (e).

[72] Wellington et al, 3/31/97 AC appendix.

MAILBOX MILK PRICES FOR SELECTED FEDERAL MILK ORDERS

[Dollars per hundredweight]

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1995												
New England	$11.83	$11.86	$11.98	$11.93	$11.92	$11.39	$11.35	$11.71	$11.88	$12.42	$13.14	$13
NY/NJ	12.00	12.02	12.14	11.88	11.82	11.45	11.39	11.74	12.01	12.61	13.17	13
Middle Atlantic	12.15	12.07	12.06	11.83	11.86	11.50	11.60	12.14	12.26	12.82	13.50	13
1996												
New England	13.38	13.23	13.14	13.08	13.49	14.08	14.77	15.00	15.55	15.83	15.37	14
NY/NJ	13.44	13.29	13.18	13.16	13.70	14.10	14.82	15.05	15.68	15.68	14.82	13
Middle Atlantic	13.57	13.27	12.86	12.76	13.41	14.40	15.07	15.49	16.05	15.84	15.55	14

Source: Exhibit Co-op #1C & #1D, Additional Comment as submitted by Robert Wellington, on behalf of Agri-Mark Dairy Co-op, St. Albans Co-op Creamery, & Independent Dairymen's Co-op.

From this chart, it can be seen that 1995 mailbox prices for the New England market were consistently less than those for the New York-New Jersey and Middle Atlantic markets, but by relatively small amounts. This data further indicates that prices throughout the three-market area are presently in relative alignment.

C. Issue: Costs of Transporting Bulk Fluid Milk Products to Plants Located Within the New England Region

As made clear by comment received, and based on common knowledge, the cost of transporting bulk fluid milk products is most significant to the calculation of the cost of the delivered raw product to the processing plant, because of the significant expense involved. It is thus a critical input of the wholesale and, hence, the retail price.[73]

According to Wellington *et al,* ''[d]ue to its bulkiness, milk is expensive to transport. Back haul opportunities to lower transportation costs are also more limited with milk due to its sanitary standards and large volume which moves on a daily basis.'' [74]

According to the reported statistics, the regulated price itself accounts for the transportation costs of raw fluid milk supplies. Market Order #1 establishes a zone differential to account for this transportation cost. This differential is established per cwt. in an amount equal to 3.6 cents per ten miles transported. According to Wellington et al, this rate has not changed since 1982.

Market Order #1 uses zone 21 as the representative zone for farm pricing. 7 CFR 1001.50(a). This zone is 210 miles from the Boston, or city, zone. 7 CFR 1001.52(d). The cost of transportation from this representative zone 21 to the city, zone 1, is 72 cents per cwt. 7 CFR 1001.52(g).

Further, according to Wellington et al, a 1994 consolidation of federal orders in the southern market established a rate of 3.9 cents/cwt per ten miles transported. There is no explanation as to whether the higher rate for the new southern order better reflects costs in the Northeast, although that is the inference, or whether the higher cost is attributable to market conditions in the south. The comment does identify with specificity a higher cost of transportation for the Agri-Mark cooperative, which represents approximately half of all New England farmers. This cost is represented as 4 cents/cwt for each ten miles transported.

[73] The broader issues of impact on the wholesale and retail markets are analyzed at the end of this finding section.

[74] Wellington et al, 3/31/97 AC at 4.

D. Issue: Prevailing Processing and Wholesale Costs for Class I, Fluid Milk, Inside and Outside the New England Region

This issue is significant because processing and delivery are the only intermediate stops in the commercial channel for milk between farm and retail outlet other than transport of the raw supply. The delivered cost to the retail outlet can thus be determined as a function of a relatively few variables.

Although the Compact Commission requested comment on this issue, it did not receive data regarding processing and wholesale costs specific to the New England market. While two of the fluid milk processors doing business in the New England market did submit comment,[75] along with a trade organization from New York state,[76] none of these comments presented data with regard to costs of operation.

A very recent and comprehensive national study of 35 plant operations submitted by a group of dairy economists from Cornell University provides useful guidance to the Commission on this issue. R. Aplin, E. Erba, M. Stephenson, ''An Analysis of Processing and Distribution Productivity and Costs in 35 Fluid Milk Plants'', February 1997, R.B. 97–03, Cornell University. The study is particularly useful because fourteen of plants studied, though unnamed, are identified as being located in the Northeast.

The study indicates that the processing and wholesale costs for Class I milk are a function of three variables: (1) the procurement cost for the raw product supply, in significant part, combined with (2) processing, delivery and sales costs for servicing the retail outlet, and (3) return on capital.

An extract entitled ''Presentation at IDFA Annual Meeting in Dallas, Texas (October 1996) was also submitted. This extract provides ''estimated costs of marketing 2% lowfat milk through supermarkets, New York Metro Area, $ per gallon, 1995.'' In this extract, the raw product cost is identified as $1.31 per gallon. (This is in line with the net combined regulated and ''over-order'' Class I price for the New England market.) According to the study, there is an additional plant cost of $0.24 per gallon and a package cost of $0.10 per gallon. There are additional delivery, selling and general and administrative costs, totaling $0.22. Finally, the extract identifies a return for cost of capital in the amount of $0.06.

The study thus identifies a total, delivered, processing and wholesale cost of $1.93 per gallon.

The Economic Research Service of the United States Department of Agriculture also provides a breakdown of wholesale costs, nationally, per half gallon.[77] According to this study, for 1992, the farm value was $0.597; assembly and procurement totaled $0.058; the processing cost was $0.191; and wholesaling costs were $0.196. Total costs per half-gallon equal $1.042 according to this ERS study. For comparison purposes, assuming equal costs per gallon as the costs per half gallon in the study, this would mean a total delivered cost of $2.08 per gallon, or $0.15 more than shown in the Aplin study.

The ERS study further notes that ''processing costs have remained stable since 1986 (through 1992), after rising 16 percent from 1982 through 1986.[78]

Both the Aplin study and extract, and the ERS study, indicate that processing plants are covering their margins. The Aplin extract also provides a precise indicator of the ''return for cost of capital.'' This amount is identified by the extract as $0.06, or only a three percent return.

E. Issue: Costs of Delivering Fluid Milk Products Processed Outside the New England Region to Outlets Within the Region

This issue is significant for two reasons. First, these identified costs complete the description of delivered cost to the retail outlet. Second, the issue inquires into whether finished, Packaged milk products transported from plants located away from the region's population centers can serve as a substitute supply for the finished product provided by more local plants.

The Compact Commission requested but did not receive data regarding packaged product delivery costs specific to the New England market. The Cornell University study cited above [79] sheds light on this issue. According to the study, costs of delivery for packaged fluid milk products range from $0.216 to $0.541 per case, with an average cost of 38.8 cents per case, or about $0.097 cents per gallon. (There are 4 gallons/case.) [80]

[75] Neil Marcus on behalf of Marcus Dairy, 12/19/96 HT at 81 and 1/2/96 AC; Donald Turner, Turner's Dairy, 12/19/96 HT at 176.

[76] Bruce Krupke on behalf of New York State Dairy Foods, Inc. 3/31/97 AC; John H. Vetne, on behalf of New England Dairies, Inc. 3/31/97 AC.

[77] Food Cost Review, 1995/AER–729. (Submitted as reference source by DeGuess and Gilmeister, 3/31/97 AC.)

[78] AER 726 at 26.

[79] Aplin et al, R.B. 97–03, Cornell University, February, 1997.

[80] Aplin et al at 21.

With regard to the possibility of substitution of packaged milk supply, as discussed in the first finding analysis, the Market Order statistics makes clear that the major processing facilities servicing the New England region are currently located nearby the population centers of the region they serve. These plants currently provide for almost all of the market's supply of finished product. At present, then, there is almost no substitution for this local supply of finished packaged product with finished product imported from distant plants.

The detailed analysis of the Aplin study provides insight into this settled market pattern. Cost of operating a delivery vehicle contributed an average of 43 percent of the delivery cost per case. The remainder of the cost is attributable to driver labor cost. (Vehicle operating cost ranged from 21 percent to 53 percent.[81] The study further indicated that these costs were for routes serving large customers, and that route costs for serving smaller customers ''is expected to be much higher.''

Most significantly, route labor productivity was shown by the study to decrease substantially with greater distance traveled and on routes with numerous customer stops. A 1.0 percent increase in miles traveled per month increased direct delivery cost by 2.9 percent per case. A 1.0 percent increase in customer stops made per month increased the cost by 1.1 percent per case. Not surprisingly, the study concludes that plants located in more densely populated areas had lower direct delivery costs.[82]

This delivery cost analysis of the Cornell study thus explains the present market pattern: Plants located near population centers are the most cost effective. According to this pattern, the market should continue to consist of plants located nearby the population centers, plants which are supplied with raw product from the milkshed and which in turn provide finished product to the region's retail outlets.

F. Issue: The Price Needed to Yield a Reasonable Rate of Return to Processors of Fluid Milk Products

This inquiry is derived directly from Section 9(e) of the Compact and is significant in view of the Compact's emphasis on the financial health of the entire dairy industry. The focus of the inquiry is the determination of a price that ensures a reasonable rate of return. It is of present significance for the baseline determination of whether processing plants are currently covering costs of production.

The Compact Commission did not receive information with regard to the price required to yield a reasonable rate of return specifically to New England fluid processors. According to the extract of the Aplin et al, Cornell study cited above, return for cost of capital for the nearby New York metro area plant equaled $0.06 per gallon.

The Compact Commission concludes that this data may be relied upon to determine that the region's fluid processors are presently covering their costs with a return on capital, however slight. As noted, the Aplin study was a number of nationally representative fluid plants, of which fourteen were from the Northeast. It is reasonable to assume that a representative number of these region-wide plants in turn were from the New England area, and that the extract chosen by the authors may be understood as representing this group as a whole, including New England plants.

G. Issue: The Purchasing Power of the General Public

This inquiry is also drawn directly from Section 9(e) of the Compact. The Compact Commission concludes that the Compact focuses primary concern on the consumer interest because milk is a staple product. The impact of price regulation upon the consumer's ability to pay is thus a critical part of the Compact Commission's assessment of the public interest under this finding section.

To sharpen inquiry under this broader issue, the Compact Commission sought comment on a number of issues relating to the potential impact of price regulation on consumers. These issues include: The elasticity of demand for fluid milk products, the costs of retailing Class I, fluid milk in the New England region, the prevailing retail prices for Class I, fluid milk, inside and outside the New England region, the cost of retailing fluid milk products, and the potential impact of a flat, combined regulated, Federal Order and Compact Over-Order price on the retail market for fluid milk products.[83]

The Compact Commission also focused specific attention on the potential impact of price regulation on lower income consumers. Specifically, the Commission sought comment on the potential impact of a flat, combined, regulated, Federal Order and Compact Over-Order price on the Women, Infants and Children Special Supplemental Nutrition Program of the United States Child Nutrition Act of 1966, and the impact of such a price on the school lunch program.[84]

Each of these issues is addressed in turn.

H. Issue: The Elasticity of Demand for Fluid Milk Products

Citing recent studies, Wellington et al identify the demand coefficient for fluid milk as 3.1. This means that a ten percent increase in price will result in a 3.1 decrease in demand.[85]

In response to this comment, Thomas Conway, Esq., former Counsel and former Executive Director of the New York State Legislative Commission Dairy Industry Development, submitted a study of ''Consumer Response to the Unprecedented Rise in the Retail Price of Fluid Milk in 1989–1990'' (Consumer Response).[86] This study focused on the actual impact on consumption of a relatively large increase in retail milk prices during late 1989 and early 1990.

The study group was of four regions, including the Northeast. During this time, the price of milk rose to $2.67 a gallon, a $0.34 increase. Directly contrary to the traditional analysis of the elasticity of demand for milk, consumption actually increased rather than decreased in two of the regions studied. In the Northeast, the 15.04 percent price increase in the Northeast was matched by lower sales of only 0.98, or well below that expected based on any of the demand coefficients identified above.

The study concludes ''that other factors were more important than price to the determination of consumer demand for fluid milk''.[87] Other factors included growth in personal income, demographic factors, advertising and increased concerns over health and nutrition.

While this study is now dated, the Compact Commission accepts its basic premise that analysis of the impact must account for the market function as a whole, rather than focus upon a strict elasticity of demand equation. Nonetheless, the Commission remains aware of the importance of accounting for the direct impact on consumption that an increase in retail prices may have.

I. Issue: Costs of Retailing Class I, Fluid Milk in the New England Region

The Commission did not receive comment with specific regard to New England costs of retailing. As noted, the

[81] Aplin et al at 48.

[82] Aplin et al at 54

[83] See 61 CFR 65604; 62 CFR 12252.

[84] See 61 CFR 65604; 62 CFR 12252.

[85] Wellington et al, 3/31/97 AC.

[86] New York State Legislative Commission of Dairy Industry Development, August, 1990.

[87] Consumer Response at 11.

Aplin et al, extract of the Cornell study identified a total delivery cost of $1.93. Adding an identified supermarket cost and return of $0.19 establishes for this extract a retail cost of $2.12.

The ERS study identified a total delivered cost of $1.04 and a retailing cost of $0.35, for a total retail cost $1.39 per half gallon. The retail cost component for the ERS study is substantially higher than that for the Aplin study. The ERS study indicates part of this cost may represent wholesaling formerly performed by processors, which would explain at least part of the difference.

The Commission concludes that the more recent Cornell extract provides a useful benchmark for assessing New England costs of retailing.

J. Issue: Prevailing Retail Prices for Class I, Fluid Milk, Inside and Outside the New England Region

There are two significant concerns raised by this issue. First, the inquiry addresses the benchmark question of whether retail margins are covering costs, much as the earlier inquiry addressed whether processor margins were sufficient to cover costs. Second, the inquiry must consider the relative retail costs beyond the area subject to Compact Over-order Price Regulation, as part of the ongoing process of assessment of the potential impact of price regulation on the region's retail prices.

James G. Hines, Director of Dairy Services, submitted for the record copies of the tracking studies of retail prices conducted by The International Association of Milk Control Agencies. The Association tracks and publishes monthly price surveys from a number of markets nationwide. The following is an extract from three markets:

RETAIL PRICES—DIFFERENT MARKETS

[1995–1996]

	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1995												
MA (Boston)	$2.49	$2.09	$2.49	$1.99	$2.29	$2.39	$2.39	$2.49	$2.49	$2.49	$2.09	$2.49
NY (Albany)	2.18	2.18	2.18	2.16	2.16	2.15	2.17	2.17	2.17	2.17	2.19	2.23
NJ (North)	2.55	2.56	2.53	2.53	2.53	2.53	2.54	2.53	2.52	2.55	2.56	2.57
1996												
MA (Boston)	2.19	2.29	1.99	2.49	2.59	2.29	2.59	2.59	2.29	2.59	.....	.....
NY (Albany)	2.23	2.23	2.25	2.26	2.25	2.32	2.4	2.42	2.42	2.46	.....	.....
NJ (North)	2.56	2.57	2.59	2.59	2.58	2.58	2.65	.....	2.67	2.67	.....	.....

Source: International Association of Milk Control Agencies.

The Aplin et al extract identified a total, delivered cost of $1.93, and a total retail cost of $2.12, including combined retail cost *and* return on capital. The Compact Commission concludes from this survey of prices that, as measured against their identified delivered cost, New England retailers are currently covering their costs of production with an adequate return on capital.

The Commission further concludes that this on-going Agencies' study of markets both within and outside the New England region provides the basis for the Commission to monitor the impact of regulation on New England retail prices. The Commission will be able to utilize this study data and compare the current, relative alignment in prices between the New England and New York regions against the relative alignment once price regulation is in place.[88]

K. Issue: The Potential Impact of a Flat, Combined, Regulated Order and Compact Over-Order Price on the Wholesale Market for Fluid Milk in the Region

The purpose of this most critical inquiry is to address the potential impact on the wholesale market of price regulation. Commenters described a number of potential concerns and potential benefits. The benefits described were premised on the value of price stabilization. The concerns raised related to the potential for market distortion and competitive harm to current market participants.

In reply comment, Berthiaume[89] described the benefit of a stabilized pricing as imposed by this rule. He indicated that Compact Over-order price regulation would bring stability to the regulated Class I price, and not merely as a floor price. ''The value of a flat regulated minimum Class I price is that the wholesale cost of milk would and could be anticipated.''

The Commission agrees with this statement and adopts it as a finding with respect to this issue. As discussed above, farm prices have been marked by persistent, erratic fluctuations which translate directly into the wholesale price. The Commission concludes that, while processors are currently covering their margins, minimization of such persistent fluctuations in price can only serve as a benefit to stability of firm participants in the wholesale market.

Other commenters expressed concern about the potential for market distortion which price regulation could bring. Wellington et al expressed a concern that price regulation could distort the traditional, market driven, pattern of raw product supply provided by New England and New York farmers. The concern raised is that the Compact Over-order price regulation could create an incentive for increased milk supply from more distant portions of the milkshed in New York. This would represent a market distortion directly contrary to the intended purpose of the Compact.

These commenters qualified their concern by noting that processors ''will be reluctant to disrupt their current supply sources in reaction to a Compact program which is officially of limited duration.''[90] In his testimony at the hearing, Wellington also stated his opinion that such market change was not likely to occur as long as the Commission did not increase the regulated Class I price above $17.00.[91]

Neil Marcus, President of Marcus Dairy, Inc., described other potential market distortions that could result from price regulation. His concerns also centered on the alignment of a market subject to combined, Compact, and Federal Order regulation with adjoining markets regulated only under Federal Order.[92] The particular circumstances of the Marcus Dairy operation heightened his concern. According to the commenter, Marcus Dairy is located in Connecticut, on the border of New York. The commenter described the supply of packaged dairy products subject to price regulation under Federal Order 2 which is sold in New England and expressed concern that this milk must not escape regulations under the Compact. According to Marcus, such uniform regulation is necessary to ensure that the current, market, pattern of the supply of packaged product in the marketplace is maintained.

The Commission concludes that market alignment of prices and uniformity of regulation must be considered in establishing over-order price regulation. Present market patterns within the region and between the region and adjacent areas are derived from the integrated formula of Class I pricing in the federal Market Order System, which includes pricing under more than one federal Order. There is no doubt the Compact will introduce a new feature of market structure by adjusting the Class I price, in effect, for only one Order.

At the same time, even given that the Compact will introduce a novel feature of market structure, the Commission does not determine that market distortion will necessarily occur. The technical provisions of the Compact Over-order price regulation are precisely patterned upon the underlying federal Order System in significant part. This provides a structural basis for concluding that such distortion should not occur.

Nonetheless, the concerns raised by the commenters with regard to the potential for market distortion were a central consideration in the Commission's deliberations over price regulation. These concerns were also a controlling factor in the Commission's fashioning of the six months', limited duration, for the initial price regulation. The Commission here specifically notes Wellington et al's assertion that a ''limited duration'' of price regulation will minimize the potential for distortion of the market caused by the Compact Commission's initial price regulation.

L. Issue: The Potential Impact of a Flat, Combined, Regulated Federal Order and Compact Over-Order Price on Retail Prices for Fluid Milk Products

The Compact Commission sought comment on the critical issue of the potential impact, if any, of a flat, combined, regulated Federal Order and Compact Over-order price on retail prices for fluid milk products.

After reviewing all of the comments and testimony submitted, the Compact Commission concludes that the price regulation will have a positive impact on retail prices. The Commission determines that preventing further erosion of the milkshed through price regulation will itself have a positive impact on retail prices, in large part because of the avoidance of increased transportation costs. The Commission concludes that the further benefits of price stability will trace through the farm and wholesale markets to the end-point, retail market, and have a further, positive impact on retail prices.

The Commission bases its conclusion on the following analysis:

1. Change in the Epicenter of Milk Production and the Impact on Retail Prices

The Compact Commission previously determined that there has been a distinct movement away over time of the epicenter of the region's milk supply. The loss of dairy farms in the New England region, and in particular,

[88] Retail prices are also being monitored currently in Connecticut, Vermont and Maine. The Commission will have to establish a tracking program in Rhode Island.

[89] Berthiaume, Reply comment; April 8, 1997 (RC).

[90] Wellington et al, AC 3/3197 at 6.

[91] Wellington, 12/19/97 HT, pages 50–51.

[92] Marcus, 12/19/96 HT at 84–98.

in the Southern New England region, has forced the epicenter of the region's production further and further from the region's population centers. This movement has involved both the loss of supply by farms closest to the population centers and the replacement of that supply by more distant farms, primarily in New York and Vermont. The location of these more distant farms themselves, in turn, has moved ever father away from the region's population centers.[93]

This feature of the stressed circumstance of the region's milk supply described in the first finding analysis has had a direct, adverse impact on retail milk prices. The Commission bases this conclusion in part on the determination that transportation costs are a significant input of the retail price for milk. As noted, the federal Market Order System allows 72 cents per cwt to cover transportation costs from the representative ''country'' zone to the Boston, ''city'' zone.[94] This single cost input, alone, accounts for over three percent of the total delivered cost to the retail outlet, when measured against the Aplin et al extract identification of $1.93 for delivered cost/gallon. (11.6 gallons per cwt). It follows, by definition, that an increase in transportation costs attributable to greater hauling distance will result in an increase in retail prices.

The Commission's conclusion is also premised on a similar finding contained in the December 29, 1989 extension of the Massachusetts Milk Stabilization Order. This Order found that a 50 mile shift in milk prices causes a three cent increase in milk prices.

The evidence in the record thus demonstrates that the epicenter of the region's milkshed has moved away from the population center to a significant degree, and that this shift has had a measurable impact on retail prices. The Compact Commission concludes that this adverse impact on retail prices will continue as long as the milkshed is not stabilized.

2. Risk Avoidance in Commodity Purchasing—The Benefits of Price Stabilization

Senator Patrick Leahy submitted extended comment referencing studies in the economic literature of the adverse effects of commodity price uncertainty and, conversely, the utility of price stability.[95] One article described so-called ''risk avoidance'' pricing strategy in the wheat industry. The analysis indicated that increased price uncertainty and variability in the wheat industry led to significant increases in retail wheat marketing margins.[96] The article determined both theoretically and empirically that increased price variability results in higher margins. The authors theorized and then demonstrated empirically that the uncertainty created by wholesale price volatility, in essence, drives the retailer to retain a larger margin. The retailer acts to retain such a larger margin to avoid the risk created by the uncertainty in wholesale costs.[97]

The logical implication of this theory is that price stabilization reduces or eliminates the retailers' need to act in such a risk-avoiding manner, because the volatility and uncertainty that drove that behavior is reduced or eliminated.

The analysis of Hahn et al[98] demonstrates convincingly that price volatility within the meaning of the authors above cited defines market conduct and performance of the fluid milk industry. The pattern of pricing conduct described by these authors is consistent with the risk-avoidance strategy described by Brosen et al and Holt.

Based on this analysis, the Commission concludes that New England retail prices likely will respond positively to the stabilization of the wholesale price input which will result from imposition of Compact Over-order Price Regulation. The price established by this rule will be a certain one; Berthiaume suggests that the combined, federal Order and Compact Over-order price will not vary for the six month term of its duration. At least for the short-term duration of this price regulation, the uncertainty of price variability in the region's Class I market will have been significantly reduced if not eliminated. According to the analysis described above, the Compact Commission concludes that retail margins and, hence, prices, should positively adjust, accordingly.[99]

3. The Experience of the Southeast Region of the United States

Received comment and statistics indicate that the adverse experience of the southeast states could well serve as a model for the future of New England's supply pattern and retail prices, if the present stress on the milkshed is not abated. Many of those states have lost a significant measure of their local milk supply. For the southeast as a whole, between 1980 and 1995, the number of dairy farms declined from 33,900 to 7,250.[100] In Georgia, the percentage of milk supplied by Georgia farmers declined from 84% in 1973 to 50% in 1988.[101]

Two commenters, Ronald Harrell, Ph.D., of the Louisiana Farm Bureau Federation, Inc., and G.A. Benson, Ph.D., and Associate Professor and Extension Economist in the Department of Agriculture at North Carolina State University, voiced graphic concerns over the dwindling local milk supply patterns in the Southern states. According to Dr. Benson:

> Because milk production is decreasing, and because of seasonal imbalances between production and sales, more milk must be imported from out-of-region sources in the fall. The seasonal ''surplus'' in the spring months has virtually disappeared. Supplementary or other source milk is more expensive than locally produced milk because of give-up charges, transportation costs, and differences in classification in the originating and receiving orders. These statistics are not collected on a regular basis or published, but a reliable source in one of the regional cooperatives informed me that last year they imported an average of 8.5% of the total milk they needed to meet customer needs as supplementary milk at an average cost of $1.92 per 100 lb. above the cost of producer milk in the federal order. * * * On Average, this supplementary milk [reported by another cooperative] cost $2.58 per 100 lb. more than

[93] The 1989 Massachusetts Extension Order, at page 14, cites testimony that the transportation costs for this most distant supply ''would currently run $2.00 to $2.50/cwt (17–22 cents/gal) and would require capital investments that few truckers would be willing to undertake.'' Extension Order at 14.

[94] The discussion, supra, of transportation costs indicates that this regulated calculation of cost does not fully account for the true cost.

[95] Senator Patrick J. Leahy, WC 1/297.

[96] Brorsen, Chavas, Grant and Schnake, ''Marketing Margins and Price Uncertainty: The Case of the U.S. Wheat Market,'' Amer. J. Agr. Econ., (August, 1985) 521–527.

[97] The analysis is confirmed with regard to market conduct and performance in the beef industry. Holt, ''Risk Response in the Beef Marketing Channel: A Multivariate Generalized ARCH–M Approach'', Amer.

[98] See Hansen, Hahn, and Weimar, ''Determinants of the Farm-to-Retail Milk Price Spread'', Agriculture Information Bulletin Number 693 (March 1994). See also Kinnucan and Forker, ''Asymetry in Farm-Retail Price Transmission for Major Dairy Products'', Amer. J. Ag. Econ., 285–292 (May, 1987).

[99] The Commission recognizes that at least one comment suggested that the ''impact'' of any price regulation would be a straight dollar-for-dollar ''pass through'' from processors to consumers, resulting higher retail prices. Alan Rosenfeld, December 19, 1996 at pages 183 et seq. The Commission is not persuaded by Rosenfeld's predictions for several reasons. It is, in the Commission's view, contrary to the weight of the comments submitted and the prevailing economic literature and anecdotal evidence. More fundamentally, however, it is not descriptive and provides no reasoned explanation for the conclusion expressed therein. Nor does it respond in any way to the comprehensive literature suggesting precisely the opposite conclusion.

[100] National Agricultural Statistics Service, ''Milk Production'', 1970–1995.

[101] Gilmeister, 3/31/97 at 10.

local milk. It came from a variety of sources and the added costs ranged from a low of $1.52 per 100 lb. to a high of $4.15 per 100 lb.[102]

The comment indicated that dairy cooperatives were currently absorbing the cost as a loss rather than passing it on to customers, but that this is an unsustainable market pattern.[103]

The Commission is concerned that if the continued stress on the milkshed for the New England region continues unabated, without Commission intervention, then the New England states will begin to approach the increased market uncertainty currently facing the Southern states. Accordingly, the Commission bases its determination of the present need for Compact Over-order Price Regulation on the current experience on the southern states. The Commission concludes the Compact was designed precisely to avoid such a market pattern as currently experience by the southeast, and to permit the New England region to test the efficacy of the over-order price mechanism as a device for curtailing these very problems.

4. Summary Analysis

The Commission has analyzed the data and the comments submitted on the question of the impact of Compact Over-order Price regulation on retail prices and concluded the consumer component of the ''public interest'' will be served in the manner contemplated by the finding under this section. The Commission concludes that alleviating the stress on the milkshed will itself have a stabilizing impact on retail prices, if not result in outright reduction.

The Commission further determines that stabilization of the wholesale price will likely result in stabilized, and reduced, consumer prices. The Commission here notes, in summary, that an established price of $16.94 for July-December of 1997, in combination with the federal, Market Order #1 announced prices for January through May, 1997, would yield an average Class I (Zone 1) price for these 11 months of 1997 in the amount of $16.15.[104] This compares with the 1996 average price of $16.86.[105]

By contrast, as expressed by Gillmeister, there would be ''a considerable cost to consumers if nothing is done to assist farmers in New England.'' [106]

M. Issue: The Potential Impact of a Flat Combined Regulated Federal Order and Compact Over-Order Price on the School Lunch Program

Consistent with the need to protect the interests of consumers, the Commission sought comment on the impact, if any, of a flat, combined, federal Market Order price and Compact Over-order Price Regulation on the fluid milk procurement process in the context of the school lunch (and breakfast) programs. The comment received, while limited, does provide the Commission with an adequate basis to make an informed decision on this question.

Senator Jeffords submitted an analysis by the United States Department of Agriculture indicating total annual consumption of fluid milk by school districts amounted to 12,798,000 gallons.[107] This amounts to 148,456,800 pounds of milk, or approximately 5.9 percent of all fluid milk consumed in the region.

The comment also contained a discussion of a study by the General Accounting Office that described a comprehensive, 1980s Justice Department investigation into bid rigging associated with this market. The study describes how the school lunch program is designed to operate through a competitive bidding process, by which individual districts solicit bids for the supply of their milk program demands.

This description is, in effect, one of a competitive marketplace, despite the involvement of the government subsidization. The contracts between the districts and the suppliers result from a competitive bidding process, with price levels a function of market forces of supply and demand. The Compact Commission thereby concludes that the impact of Compact Over-order Price Regulation on the school lunch and breakfast programs can be understood as consistent with the impact of regulation on the larger, overall, retail market.

As discussed below, such analysis is distinctly different from the analysis of the potential impact of regulation on the Women, Infants and Children Special Supplemental Nutrition Program of the United States Child Nutrition Act of 1966, which is a capped reimbursement program.

N. Issue: The Potential Impact of a Flat, Combined, Regulated Federal Order and Compact Over-Order Price on the Women, Infants and Children Special Supplemental Nutrition Program of the United States Child Nutrition Act of 1966

Section 10 of the Compact sets forth a nonexhaustive list of issues that the Commission may, in its discretion, address in a Compact over-order price regulation. Subsection 10 therein provides that a price regulation may contain ''[p]rovisions for reimbursement to participants of the Women, Infants and Children Special Supplemental Food Program of the United States Child Nutrition Act of 1966.'' (WIC Program).

The Commission has been most concerned from the outset of its regulatory process with ensuring that this program is not adversely affected. Accordingly, the Commission sought, and received, testimony and both individual and joint written comments from each of the state WIC directors addressing the potential consequences of an over-order price regulation on the administration of the WIC Program.

The Commission is particularly impressed with the expertise and knowledge of these witnesses regarding the administration of the program. In light of the absence of any comments opposing the proposals set forth in the joint WIC directors' comments, the Commission hereby adopts that written statement, set forth in its entirety below.

About the WIC Program

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is a unique health and nutrition program serving women and children with—or at risk of developing—nutrition-related health problems. WIC provides access to healthcare, free nutritious food, and nutrition information to help keep low to moderate income pregnant women, infants and children under five healthy and strong.

WIC provides a monthly 'prescription' for nutritious foods tailored to supplement the individual dietary needs of each participant. Foods include milk, cheese, eggs, cereal, fruit juice and peanut butter. Included foods are specifically chosen to provide high levels of protein, iron, calcium, and Vitamins A and C—nutrients that have been scientifically shown to be lacking or needed in extra amounts in the diets of the WIC-eligible population. These five nutrients—plus calories and other essential nutrients provided by the WIC food prescription—are critical for good health, during periods of growth and

[102] Dr. G.A. Benson, 327/97 AC at 2.

[103] Gillmeister's analysis at 6–7 (sic) also indicates that southern retail costs are not reflecting these market conditions.

[104] Prices announced for Market Order 1, Zone 1 prices: January—$14.85; February—$14.58; March—$15.18; April—$15.70; May—$15.73.

[105] Wellington, Appendix to 12/19/96 HT Testimony, Table 1.

[106] Gillmeister comment, 3/31/97 at 8.

[107] RC 4/9/97.

development. Milk and other dairy products play a large and important role in every participant's food package. WIC also distributes coupons for fresh produce—redeemable at local farmers' markets—in conjunction with State Departments of Agriculture.

WIC is a prevention program designed to influence lifetime nutrition and health behaviors. Ongoing nutrition education—the centerpeice of WIC—is designed to ensure that program participants continue to make healthy choices at the grocery store even when they are no longer eligible.

WIC Works

WIC is widely acknowledged to be effective in the prevention of immediate health problems and in the improvement of long-term health outcomes. More than 70 evaluation studies have demonstrated the effectiveness of WIC and documented medical, health and nutrition successes for women, infants, and children:

- Women participating in the WIC Program have improved diets, received prenatal care earlier and have improved pregnancy outcomes
- Infants born to WIC mothers have better birth weights, larger head size, and are less likely to be premature
- WIC infants and children consume more iron, vitamin C and other nutrients, resulting in improved growth and nutritional status
- Children enrolled in WIC are more likely to have regular medical care and immunizations, and demonstrate better cognitive performance
- WIC families buy more nutritious foods than non-WIC families.

And WIC saves money! Studies have also shown that WIC *is* cost effective. Every WIC dollar spent on pregnant women produces $1.92 to $4.21 in Medicaid savings for newborns and their mothers.

How WIC Works

The WIC Program is a Federally funded program carried out according to provisions of the Federal Child Nutrition Act. The Program is funded through the Food and Consumer Service of the United States Department of Agriculture (USDA).

The Program is administered on the local level by State WIC Programs in the Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, the Vermont State Departments of Public Health (the States). State funds are also provided in Massachusetts. Participants are issued WIC checks or vouchers at local agencies for WIC authorized foods. The checks or vouchers—which do not have a predetermined value—are redeemed at authorized retail stores at current store prices in accordance with posted prices. The checks are processed through the banking system for reimbursement, except in New Hampshire where vouchers are paid through a state accounting system. Prepayment edits are performed on each check to ensure that specific food purchasing, pricing and payment requirements are met.

The average number of women and children provided WIC benefits and services in August, 1996 in the New England States was 212,760—individual State WIC participation was: Connecticut 47,673, Massachusetts 99,643; Maine 20,243; New Hampshire 14,700; Rhode Island 17,360; and Vermont 13,141 (Final August, 1997 FSC 298 Reports). These numbers do not include infants also served by the WIC Program.

WIC is not an entitlement program. As such, the number of participants that WIC is able to serve at any time is dependent upon availability of funds from Federal and State sources, and the costs of WIC food items. The national appropriation for WIC is capped by Congress. The amount of USDA funding each State received is determined through complex formulae taking into account such factors as the number of people served and the funding level of the previous year. The grant determines the number of people who can be serviced—not the number of people in need.

Since the amount of funds is fixed, any increase in the price of WIC foods has the effect of reducing the number of women and children the available grant dollars can serve. USDA estimated that there are 9.4 million women, infants, and children in the US who meet WIC's income eligibility guidelines (185% of the Federal poverty level.) The national WIC fiscal year 1997 Federal appropriation is approximately $4 billion. This sum would serve only about 5.5 million at full retail prices, about 60% of the eligible persons.

All the States have instituted measures to stretch food funds to the maximum, including restrictions on container size, brands and product price, requiring least expensive brands, competitive store selection procedures, and manufacturers' rebates on infant formula and infant cereal. Nationally, these measures have brought over $1 billion in savings, which are then used to provide services to an additional 1.9 million needy mothers and children. In New England, over 75,000 women and children receive WIC services as a direct result of these cost savings measures, the most significant of which are the result of cooperative projects of State WIC directors working together on an interstate basis.

Still, more than 20% of eligible women and children remain unserved. WIC's current funding is estimated to be $100 million short for this year, with several States reducing caseloads. Funding prospects for next year are not any better, and State WIC programs in New England are not eligible to receive funding to offset the impact of an Over-Order Price Regulation.

As such, it is imperative that WIC's funds be held harmless from adverse impact due to a Regulation.

The WIC Program and the Milk Over-Order Price Regulation

The WIC Program recognizes the important role that farms and farmers play in New England, including ensuring an ongoing supply of fresh milk at competitive prices, keeping important industry—and jobs—in our area, and providing open space that increases quality of life for all New England residents. The WIC Program also understands the need for dairy farmers' relief.

WIC is a major purchaser of locally produced dairy products in the New England region. Because, however, WIC recognizes the importance of dairy products at critical times of child development, and therefore, must continue its milk purchases, the Program must be concerned with the fact that food cost increases have a direct, inverse effect on the number of participants WIC is able to serve. An increase in milk prices is of particular concern because of the large quantity of milk WIC purchases each month.

Milk purchases are some 35% of WIC food dollars spent by participants. The number of quarts of Class 1 fluid milk purchased by WIC participants in New England in August 1996 was 3,779,015, which represents approximately 3.7% of the total amount sold by New England producers in the Region. WIC Class 1 fluid milk purchases in quarts by State were: Connecticut 1,100,000; Massachusetts, 1,481,163; Maine 457,852; New Hampshire 230,000; Rhode Island 300,000; and Vermont 210,000.

Given current WIC participation levels, a 1¢ per quart wholesale price increase in Class 1 Fluid milk reflected at the retail level would translate into an increase in monthly WIC program expenditures of $37,790 for New England as a whole. This increase would necessitate a decrease in monthly program funded participation of 1,260. A 5¢ per quart milk retail price increase would result in an increase in monthly

WIC expenditures of $189,950 and a participation decrease of 6,302.

In order to maintain services to eligible persons, without compromising the nutritional health effectiveness of its food benefits if food costs rise, WIC managers must achieve offsets to increased food benefit expenditures and use those offsets to serve a significant portion of the eligible women and children in need. Further, if the States in New England must reduce or limit participation levels due to higher Class 1 fluid milk costs, there will be negative impact on Federal WIC funding to the New England Region—and on the amount of milk purchased.

As important, low income women and children who WIC is not able to serve because of increased food costs will not receive the essential medical, health and nutritional benefits of WIC participation. It is critical, then, that the intended benefits to the regional economy and the continuation of dairy farming in New England not accrue at the cost of a significant risk to maternal and child health stemming from Regulation-related costs to WIC.

Retail Price Impact of An Over-Order

The Northeast Interstate Dairy Compact enables participating States collectively to regulate the New England farm price for Class 1 fluid milk, thereby enhancing and stabilizing dairy farmer income. This Regulation may have the effect of increasing the price paid for Class 1 fluid milk by WIC participants at retail stores, if the regulated farm price increase translates directly into an increase at the retail level. Other goals are to stabilize processor and retailer costs and consumer prices.

Concomitantly, the findings of Hansen et al [108] with regard to the variability of milk farm prices and asymmetric price transmission are the basis for the theory that an Over-Order Price Regulation of Class 1 fluid milk which brings about stable farm prices for Class 1 fluid milk will result in price stability—and potential price decreased—in Class 1 milk at the retail level for consumers over a period of time. Testing this concept, presented by US Senator Patrick Leahy of Vermont in public comment before the Northeast Dairy Compact Commission, would appear viable with regard to the impact of a Regulation on consumer milk prices.

[108] Hahn et al, ''Determinants of the Farm-to Retail Milk Price Spread'', Agriculture Information Bulletin #693, March 1994.

Demonstration Period and Continuing Assessment of Impact

The New England State WIC Programs understand that the Compact is considering an Over-Order Price Regulation on Class 1 fluid milk for a specific period of time. The State directors believe it appropriate that any initial Regulation be in effect for a limited period, such as six months. A potential outcome of such a demonstration could provide evidence which supports that milk farm price stability due to a Regulation will result in price stability, and perhaps decreases and related savings, on Class 1 fluid milk purchases by consumers—including WIC participants—over time.

To measure and document the impact of a Regulation, the Commission will need to develop systems and methodologies to gather, track and analyze Class 1 fluid milk retail price data in order to accurately assess and evaluate any Regulation-related adverse or beneficial impact on costs to consumers and WIC, and to make related adjustments to assure that the public interest is served and consumers and the WIC Program and its participants are protected. Such an analytical framework should include information which is appropriate to milk purchasing and pricing at both the New England Regional and individual State levels—including each State's WIC programs—comprising representative samples of market areas and retail store types, proportion of sales by package size (quarts, half falls and gallons), and the degrees to which retail price fluctuations differ for package sizes in relation to each other, since data reflect WIC operations and purchasing patterns in each State. WIC participants often purchase 2 half gallon containers, and the majority do not have ready access to supermarkets, especially for frequent purchase of a perishable product such as milk.

As important, analysis should include development of a baseline by which changes over time will be measured, as well as evaluation of the relationship between changes in the Regulation and Class 1 fluid milk prices at retail levels over time and the cost impact to WIC. WIC does not specify the fat content of milk purchased. Tracking and measuring product differentials based on fat content; therefore, it is not necessary to any WIC cost impact methodology.

Post Demonstration Reimbursement System

Given such analysis and evaluation and sufficient evidence, Commission reimbursement to WIC could be then based upon the Over-Order Price Regulation and—specifically, on the amount of any portion of the retail cost for Class 1 fluid milk to WIC attributable to the Regulation which would encompass and respond to individual state WIC programs.

Demonstration Period Reimbursement System

WIC recognized, however, that the theory and data which may justify the adoption of a demonstration period Regulation does not provide demonstrated, proven assurance that there would be no cost increase to WIC on its Class 1 fluid milk purchases. Notwithstanding any public interest or other justification for a Regulation, in the absence of such current evidence that a Regulation would be either cost neutral or beneficial to WIC's present year funding, the Commission should provide a way to protect and hold harmless the WIC Program—and its participants—in the New England States from potential increases in the Class 1 fluid milk retail price during a period of a demonstration Over-Order Price Regulation, for at least the period of any demonstration Regulation. It is clearly a part of the public interest under any Regulation to protect WIC's limited funds and the full number of women and children WIC would otherwise serve. WIC cannot support a Regulation which would leave women's and children's health and nutritional status at risk because appropriated WIC funds were diverted to pay higher milk prices, rather than remaining with the WIC Program to provide benefits to participants.

As such, the State WIC Programs in New England propose a method by which the WIC Program will be held harmless from any impact related to a demonstration of a Compact Over-Order Price Regulation for Class 1 fluid milk. The Commission would reimburse each respective State WIC Program. The amount of reimbursement would be based on (1) the quantities of milk purchased with WIC checks and (2) the amount of any Compact Over-Order Price Regulation.

This would allow the Commission to implement a Compact demonstration Regulation, providing essential relief to dairy farmers, and WIC could continue to serve the maximum number of participants in each State allowed by the grants during an Over-Order demonstration. This would also allow the Commission a period of time to develop a more finely attuned analysis of the impact of the Regulation, and the develop methods to most accurately

ascertain any cost to WIC and the most appropriate reimbursement levels.

The principles of the interim mechanism proposed by the State directors are:

1. The Commission should establish a Reserve Account, to assure that funds are on hand for timely reimbursement by the Commission to the States. This account will be funded from the Compact over-order price regulation based on the recent percentage of total milk sold in New England purchased by WIC participants.

2. Any Commission Over-Order Price Regulation in a given month will result in a cent for cent reimbursement for Class 1 fluid milk paid for by each State WIC Program in that month. The amount of reimbursement will be based on the quantities of milk actually paid for by each WIC state. Funds in the Reserve Account will only be drawn by individual States in proportion to the Over-Order Regulation. Unused funds would return to the Commission.

3. Each State WIC Program will invoice the Commission on a monthly basis for reimbursement due. When the refund amounts are small, individual States may elect to bill up to 3 months in one invoice to avoid unnecessary administrative costs for both parties.

Formal Agreement

Implementation will take place under the terms and conditions of a formal agreement between the Commission and the States, entered into by the State WIC Programs acting as a single entity. Such an agreement must contain the above provisions for interim reimbursement determination and procedures, continuing assessment of impact, how the parties will change to any post demonstration reimbursement system, conditions for mutual agreement for modifications to the agreement, term of the agreement and conditions for mutual or either party termination prior to expiration of the agreement.

The above proposal by the State WIC Programs in New England and any subsequent agreement are subject to approval by the Food and Consumer Service of the USDA. The State WIC Programs will collaborate with the Compact Commission and USDA Food and Consumer Service to develop and implement agreement provisions and operating procedures for any reimbursement system which meet the requirements of Compact legislation and Federal WIC guidance, rules and regulations.

Public Interest Finding—Summary Analysis

In view of this comprehensive marketwide analysis, the Compact Commission concludes that Compact Over-order Price Regulation in the amount of $16.94, for six months' duration, will ensure the ''public interest'' is served in the manner contemplated by the finding analysis under this section. The stated amount represents a limited market adjustment that accounts for its potential impact on all levels of the market, from farm to retail.

As noted throughout the analysis under this and the previous finding section, the Compact Commission has accounted for a number of potential market impacts in fashioning this initial, limited regulation. Most particularly, the Commission is concerned about the potential for market dysfunction in the wholesale market, and with regard to unanticipated impacts on consumer prices.

The Commission has concluded that the regulation should not adversely affect the wholesale market and should, indeed, have a positive impact on retail prices. Yet the Commission has purposefully limited the duration of the initial regulation to ensure against unanticipated consequences. As a final safeguard against unanticipated, adverse consequences, the Commission has acted to ''hold harmless'' the WIC program, despite its conclusion of the remoteness of such unanticipated consequences occurring.

The Compact Commission concludes further that the limited duration of this initial regulation ensures that its impact across markets can be carefully monitored and evaluated from the outset and then reconsidered as soon as a record has been established. Accordingly, the Commission will attempt specifically to monitor and assess the pattern of raw product supplies from New York and New England farms and the movement of packaged milk into the market from plants outside the region, as well as the impact of price regulation on retail prices, including the school lunch program, and the WIC program.[109]

III. Finding

Whether the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

The Compact Commission's responsibility to consider the public interest with respect to the non-price aspects of regulation are evident in two areas: First, as required by Compact Article IV, Section 9(f), the Commission has acted to insure that its regulation does not create an incentive for dairy farmers to produce additional, surplus supplies of milk, and second, the Commission's regulation is uniform and equitable and does not unduly distort traditional markets and marketing channels.

1. Surplus Production

Compact Requirement

Compact Section 9(f) provides that ''when establishing a Compact over-order price, the Commission shall take such action as necessary and feasible to ensure that the over-order price does not create an incentive for producers to generate additional supplies of milk.''

Compact, Article IV, § 9(f).

Accordingly, the Compact Commission sought comment on:

> The appropriate, necessary and feasible, action to take, as required by the Compact, to ensure that Compact Over-order Price Regulation does not result in additional supplies of milk.[110]

The Commission concludes that specific action is not necessary at the present time in light of the limited duration of the price regulation established by this rule. The Commission draws this conclusion from actual and projected data of regional and national production levels,[111] which indicate it is most unlikely that additional supplies of milk will be produced by New England as a region. The Commission also concludes from the testimony of farmers about their production planning decisions that it is unlikely individual farmers will make decisions to increase production based upon imposition of this price regulation.

The record contains abundant evidence demonstrating that farmers plan their activities based on the anticipated long-run rather than short-range changes in market structure. As cited previously, one dairy economist

[109] In reply comment, John Ghiorzi, Regional Director, supplemental Food Programs, Northeast Region, USDA, suggested that the demonstrational nature of the initial regulation would be better served if the initial period were eight or twelve months instead of six months. The Commission acknowledges this point. The Commission has determined still that a useful empirical record can be developed in six months', and that the relative efficacy of this record must be considered along with the other factors at issue in determining the proper duration of the initial regulation. The Commission has accordingly settled upon six months as the proper length of time.

[110] 62 CFR 12252.

[111] See discussion, infra, of CCC purchase requirement.

testified that price fluctuations and market instability ''makes it very difficult for farmers to effectively plan and make the type of investment necessary to position themselves for the future.'' [112] Jim Jenks, a dairy farmer from Vermont, echoed these sentiments. He testified, in essence, that the instabilities in the prices and in the market structure made such an investment too risky of a proposition to pursue. ''[I]f we're going to make a good decision with respect to putting my family's equity on the line, we need to know something about the stability of our markets and our future.'' [113]

Similar sentiments were expressed by Charlie Telly, a dairy farmer from Massachusetts. ''It is difficult for me to plan out—to financially plan out my future three, five or ten years in advance because of the uncertainty I face each month with the ever changing milk price.'' [114]

Combined with the statistical data of the lack of probability of region-wide production increases, this individual testimony leads the Commission to conclude that a price regulation of limited duration likely would not affect production behavior within the meaning of Section 9(f).[115]

Requirement of Enabling Legislation

Pub. L. 104–127(5) states that:

> [b]fore the end of each fiscal year that a Compact price regulation is in effect, the Northeast Interstate Dairy Compact Commission shall compensate the Commodity Credit Corporation for the cost of any purchases of milk and milk products by the Corporation that result from the projected rate of increase in milk production for the fiscal year within the Compact region in excess of the projected national average rate of the increase in milk production, as determined by the Secretary [of Agriculture].

7 U.S.C. sec. 7256(5). Accordingly, the Compact Commission requested comment on:

> The most appropriate means to account for the Compact Commission's responsibility to reimburse the Commodity Credit Corporation (CCC) for CCC purchases attributable to an increase in milk production in the New England region above the national average rate of increase.[116]

Although the comments received were few in number, they were sufficient to permit the Commission to address this issue.

For example, Wellington et al indicated the view that the appropriate response for the Commission was simply to monitor production levels and take action only if current circumstances changed markedly.[117] The comment is based on the assertion that the rate of increase in regional production is unlikely to exceed the rate of increase in national production. In the event of an unexpected change in circumstances, these commenters suggested a plan for the Commission to retain funds sufficient to cover any CCC purchases.

Statistical data and projections support the position set forth by these commenters. According to statistical data submitted, the national production average increased at a rate of 0.8768 percent between 1991 and 1996.[118] Production in the region increased 0.7121 percent over the same five-year time period.[119] According to projections, national production in1997 is expected to increase at a rate of between 1 and 2.07 percent. Regional production, however, for 1997 is projected to increase at a rate of only 0.6 percent, a rate that is significantly lower than the proposed projected national rate of increased production.[120]

The Commission notes that the CCC made no purchases of surplus milk in fiscal year 1996 or 1997. Therefore, in light of the comments submitted, the Commission agrees that action that is appropriate and necessary under these circumstances is presently limited to monitoring. The Commission concludes further, however, that it must be prepared in case production increases in an unexpected manner, and CCC purchases occur.

Accordingly, for each month price regulation is in place, in consultation with the United States Secretary of Agriculture, the Compact Commission will monitor the regional and national rates of production to determine whether the regional rate of increased production is within 0.25 percent of the national rate of increased production. If production does increase within this range, then for each such month, the Commission will estimate the potential cost of CCC surplus purchases of surplus which might occur should the rate of regional rate of increased production exceed the national rate. The Commission will retain a portion of the proceeds of the price regulation sufficient to cover such estimated cost, as necessary.

After the date of termination of the Compact Over-Order Price Regulation, if the Commission has retained any proceeds of the price regulation and no compensation has been made to the CCC for surplus purchases, the Commission will provide pro rata refunds to all pooled producers. The amount of each producer's refund will account for the marketing's of milk by each producer and the regulated price for such milk in effect for each month in which proceeds were retained.

If, after the date of termination, compensation has been made to the CCC and proceeds of the price regulation still remain, the Commission will provide refunds as follow: (1) A pooled producer shall become eligible to receive a refund by submitting to the Commission documentation that the producer did not increase marketing's of milk during the time that the price regulation was in effect as compared to the same period during the previous calendar year. Such documentation shall be filed with the Commission not later than 45 days after the date of termination of the over-order price regulation. (2) The Commission shall calculate the amount of refund to be provided to each eligible producer by taking into account the total amount of retained proceeds, the total marketing's of milk by all producers eligible for refunds, and the total amount of marketing's by each eligible producer.

Finally, the Commission notes, in accordance with 7 U.S.C. 7256(b)(5), that it is not required to take any action with respect to the CCC prior to its promulgation of a price regulation.

2. Technical Regulation

As described in the discussion on the potential impact of price regulation on the wholesale market, the Commission is most concerned that the price regulation established under this rule not cause market distortion. The Commission concludes that the technical regulation will avoid any such distortions.

The Commission's regulation is uniform and equitable, and will have a neutral impact on existing markets and marketing channels, other than operation of the regulated price. Assurance of this neutral impact promotes the public interest by preventing adverse consequences attributable to market distortions. The Commission has taken the following steps to insure the protection of the

[112] Smith, 12/17/96 HT at 38.

[113] Jenks, 12/17/96 HT at 153.

[114] Telly, 12/19/96 HT at 123.

[115] The rule's intended benefit regarding the maintenance and stabilization of the milkshed relates to promoting the viability of farming units rather than the promotion of increased production. It is expected that the rule will promote this benefit, despite its limited duration, by serving as a basis for existing producers to remain in production.

[116] 62 CFR 12252.

[117] 3/31/97 WC at 10–11.

[118] National Agricultural Statistics Service, Milk Production Summary.

[119] New England Agricultural Statistics, 1995–1996, ''Milk Production'', page 68.

[120] Northeast Regional Dairy Outlook Conference, November 6, 1996; Milk Production Worksheet and Food and Agricultural Policy Research Institute Staff Report #1–96, page 86.

public interest in this manner by carefully considering the following issues:

1. Proper construct of the definition of *pool plants* and *partially regulated plants* subject to regulation of the Compact. A *pool plant* is defined under Section 2(6) as *any milk plant located in a regulated area.* A *partially regulated plant* is defined in Section 2(7) as *a milk plant not located in a regulated area but having Class I distribution within such area, or receipts from producers located in such area.* Section 2(5) defines a *regulated area* as *any area within the region governed by and defined in regulations establishing a compact over-order price or commission market order.* Section 9(d) of the Compact establishes the Commission's authority to establish the minimum price for milk to be paid by pool plants, partially regulated pool plants and all other handlers receiving milk from producers located in a regulated area.[121]

2. Assuring that that Class I sales outside the New England region made by new England based plants or pool plants, are not subject to the regulation, through the use of the so-called ''competitive credits'' authorized by Section 10(4) of the Compact.

3. Providing for equitable distributions to producers shipping to pool plants and partially regulated plants. See Compact Section 9(d).[122]

4. Assuring the regulation does not disrupt the traditional pattern of raw product supply from New England and New York, and the existing market supply of packaged milk products. These issues are addressed comprehensively throughout the technical regulation.

5. Assuring complimentary operation of the Compact with the Federal Milk Market Order Program. The Compact's Statement of Purpose expressly declares this purpose. The technical regulation is expressly based on this principle. The Commission will also be utilizing the assistance of the Milk Market Administrator on an ongoing basis, as authorized by 7 U.S.C. § 7256(6), to ensure such efficient operation.[123]

Finally, the Compact Commission notes that one commenter argued that the Commission should regulate all classes of milk and not just Class I fluid milk (HT 177 12/19 Turner). The Commission's authority, however, is expressly limited by statute and by the Compact to the regulation of Class I fluid milk. *See* 7 U.S.C. § 7256(2); Compact, Art. IV, § 9(b).

IV. Administrative Assessment

Article VII, § 18(a) of the Compact provides that:

> if regulations establishing an over-order price * * * are adopted, they may include an assessment for the specific purpose of their administration. These regulations shall provide for establishment of a reserve for the Commission's ongoing operating expenses.

In accordance with this section, the Commission determined that this regulation will cost $400,000 to administer for its six month duration. Based on a projected total utilization of 1.25 billion pounds of Class I milk in the Compact region during this period, an assessment in the amount of $0.032 per cwt will be imposed. The funds will be held in an operating expense reserve account.

V. Required Findings of Fact

Pursuant to Compact Art. V. § 12, the Compact Commission hereby finds:

(1) That the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

(2) That, for purposes of this initial regulation, a level of price in the amount of $16.94 will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

(3) That the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.[124]

List of Subjects in 7 CFR Parts 1300, 1301, 1303, 1304, 1305, 1306 and 1307

Milk.

For the reasons set forth in the preamble, the Commission establishes in title 7 of the Code of Federal Regulations a new chapter XIII to read as follows:

CHAPTER XIII—NORTHEAST DAIRY COMPACT COMMISSION

Part

1300 Over-order price.
1301 Definitions.
1303 Handlers reports.
1304 Classification of milk.
1305 Class price.
1306 Compact over-order producer price.
1307 Payments for milk.
1308 Commission assessment.

PART 1300—OVER-ORDER PRICE REGULATIONS

Sec.

1300.1 Compact Commission.
1300.2 Continuity and separability of provisions.
1300.3 Handler responsibility for records and facilities.
1300.4 Termination of obligation.

Authority: 7 U.S.C. 7256.

§ 1300.1 Compact Commission.

(a) *Designation.* The agency for the administration of the Pricing Regulation shall be the compact commission.

(b) *Powers.* The compact commission shall have the following powers:

(1) Administer the pricing regulation in accordance with its terms and provisions;

(2) Make rules and regulations to effectuate the terms and provisions of the pricing regulation;

(3) Receive and investigate complaints of violations;

(4) Recommend amendments.

(c) *Duties:* The compact commission shall perform all the duties necessary to administer the terms and provisions of the pricing regulation, including, but not limited to the following:

(1) Employ and fix the compensation of persons necessary to enable them to exercise their powers and perform their duties:

(2) Pay out of funds provided by the administrative assessment all expenses necessarily incurred in the maintenance and functioning of their office and in the performance of their duties;

(3) Keep records which will clearly reflect the transactions provided for in the pricing regulation;

(4) Announce publicly at their discretion, by such means as they deem appropriate, the name of any handler who, after the date upon which he is required to perform such act, has not:

(i) Made reports required by the pricing regulation;

(ii) Made payments required by the pricing regulation; or

[121] One commenter, in effect, challenged the Commission's authority to rely upon the provision in § 9(d) of the Compact which permits the Commission to regulate such ''partially regulated pool plants.'' Vetne, 3/31/97 AC. The Commission disagrees with this legal conclusion of the commenter.

[122] One commenter indicated the Commission should include all producers supplying partially regulated plants, without regard to the relative volume of milk sales by such plants in the Compact region. Marcus, 12/19/96 HT at 92. The Commission concludes that this approach would cause undue distortion of the outside markets, and declines to adopt it.

[123] One commenter described the need for a butterfat adjustment in the regulation. Vetne, 3/31/97 AC. This necessary adjustment is already provided for and established in the structure of the underlying federal Order.

[124] Whether the terms of the proposed regional order are approved by producers as provided in section thirteen, as required by finding 4 of this section, is contingent on final action by the Commission and the consequent conduct of a referendum.

(iii) Made available records and facilities as required pursuant to § 1300.3;

(5) Prescribe reports required of each handler under the pricing regulation. Verify such reports and the payments required by the pricing regulation by examining records (including such papers as copies of income tax reports, fiscal and product accounts, correspondence, contracts, documents or memoranda, of the handler, and the records of any other person that are relevant to the handler's obligation under the pricing regulation, by examining such handler's milk handling facilities; and by such other investigation as the compact commission deems necessary for the purpose of ascertaining the correctness of any report or any obligation under the pricing regulation. Reclassify fluid milk product received by any handler if such examination and investigation discloses that the original classification was incorrect;

(6) Furnish each regulated handler a written statement of such handler's accounts with the compact commission promptly each month. Furnish a corrected statement to such handler if verification discloses that the original statement was incorrect; and

(7) Prepare and disseminate publicly for the benefit of producers, handlers, and consumers such statistics and other information covering operation of the pricing regulation and facts relevant to the provisions thereof (or proposed provisions) as do not reveal confidential information.

§ 1300.2 Continuity and separability of provisions.

(a) *Effective time.* The provisions of this pricing regulation or any amendment to the pricing regulation shall become effective at such time as the compact commission may declare and shall continue in force until suspended or terminated.

(b) *Suspension or termination.* The compact commission shall suspend or terminate any or all of the provisions of the pricing regulation whenever they find that such provision(s) obstructs or does not tend to effectuate the declared policy of the compact. The pricing regulation shall terminate whenever the provisions of the compact authorizing it cease to be in effect.

(c) *Continuing obligations.* If upon the suspension or termination of any or all of the provisions of the pricing regulation there are any obligations arising under the pricing regulation, the final accrual or ascertainment of which requires acts by any handler, by the compact commission, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspensions or termination.

§ 1300.3 Handler responsibility for records and facilities.

Each handler shall maintain and retain records of his operations and make such records and his facilities available to the compact commission. If adequate records of a handler, or of any other person, that are relevant to the obligation of such handler are not maintained and made available, any fluid milk product required to be reported by such handler for which adequate records are not available shall not be considered accounted for or established as used in a class other than the highest price class.

(a) *Records to be maintained.* (1) Each handler shall maintain records of his operations (including, but not limited to, records of purchases, sales, processing, packaging and disposition) as are necessary to verify whether such handler has any obligation under the pricing regulation and if so, the amount of such obligation. Such records shall be such as to establish for each plant or other receiving point for each month:

(i) The quantities of fluid milk product contained in, or represented by, products received in any form, including inventories on hand at the beginning of the month, according to form, time and source of each receipt;

(ii) The utilization of all fluid milk product showing the respective quantities of such fluid milk product in each form disposed of or on hand at the end of the month; and

(iii) Payments to producers, dairy farmers and cooperative associations, including the amount and nature of any deductions and the disbursement of money so deducted.

(2) Each handler shall keep such other specific records as the compact commission deems necessary to verify or establish such handler's obligation under the pricing regulation.

(b) *Availability of records and facilities.* Each handler shall make available all records pertaining to such handler's operation and all facilities the compact commission finds are necessary to verify the information required to be reported by the pricing regulation and/or to ascertain such handler's reporting, monetary or other obligation under the pricing regulation. Each handler shall permit the compact commission to observe plant operations and equipment and make available to the compact commission such facilities as are necessary to carry out their duties.

(c) *Retention of records.* All records required under the pricing regulation to be made available to the compact commission shall be retained by the handler for a period of three years to begin at the end of the month to which such records pertain. If, within such a three year period, the compact commission notifies the handler in writing that the retention of such records, or of specified records, is necessary in connection with a proceeding or court action specified in such notice, the handler shall retain such records, or specified records, until further written notification from the compact commission. The compact commission shall give further written notification to the handler promptly upon the termination of the litigation or when the records are no longer necessary in connection therewith.

§ 1300.4 Termination of Obligation.

The provision of this section shall apply to any obligation under the pricing regulation for the payment of money:

(a) Except as provided in paragraphs (b) and (c) of this section, the obligation of any handler to pay money required to be paid under the terms of the pricing regulation shall terminate two years after the last day of the month during which the compact commission receives the handler's report of receipts and utilization on which such obligation is based, unless within such a two year period, the compact commission notifies the handler in writing that such money is due and payable. Service of such written notice shall be complete upon mailing to the handler's last known address and it shall contain but need not be limited to the following information:

(1) The amount of the obligation;

(2) The month(s) on which such obligation is based; and

(3) If the obligation is payable to one or more producers or to a cooperative association, the name of such producer(s) or such cooperative association, or if the obligation is payable to the compact commission, the account for which it is to be paid;

(b) If a handler fails or refuses, with respect to any obligation under the pricing regulation, to make available to the compact commission all records required by the pricing regulation to be made available, the compact commission may notify the handler in writing, within the two year period provided for in paragraph (a) of this section, of such failure or refusal. If the compact commission so notifies a handler, the said two year period with respect to such obligation shall not

begin to run until the first day of the month following the month during which all such records pertaining to such obligation are made available to the compact commission;

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under the pricing regulation to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed; and

(d) Unless the handler files a petition to the compact commission to commence litigation within the applicable two year period indicated below, the obligation of the compact commission:

(1) To pay a handler any money which such handler claims to be due him under the terms of the pricing regulation shall terminate two years after the end of the month during which the fluid milk product involved in the claim were received; or

(2) To refund any payment made by a handler (including a deduction or offset by the compact commission) shall terminate two years after the end of the month during which payment was made by the handler.

PART 1301—DEFINITIONS

Sec.
1301.1 Compact.
1301.2 Commission.
1301.3 Northeast Dairy Compact Regulated Area.
1301.4 Plant.
1301.5 Pool plant.
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1301.8 Milk.
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1301.17 Cooperative association.
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1301.20 Distributing plant.
1301.21 Supply plant.
1301.22 State dairy regulation.
1301.23 Diverted milk.

Authority: 7 U.S.C. 7256.

§ 1301.1 Compact.

Compact means the Northeast Dairy Compact as approved by section 147 of the Federal Agriculture Improvement and Reform Act (Fair Act), Pub. L. 104–127.

§ 1301.2 Commission.

Commission means the commission established by the Northeast Dairy Compact.

§ 1301.3 Northeast Dairy Compact Regulated Area.

Northeast Dairy Compact Regulated Area hereinafter called the *Regulated Area* means all territory within the boundaries of the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. All waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by any governmental installation, institution, or other similar establishment.

§ 1301.4 Plant.

Plant means the land and buildings, together with their surroundings, facilities and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment for the receiving, processing or packaging of milk or milk products. The term plant shall not include:

(a) Distribution points (separate premises used primarily for the transfer to vehicles of packaged fluid milk products moved there from processing and packaging plants); or

(b) Bulk reload points (separate premises used for the purpose of transferring bulk milk from one tank truck to another tank truck while en route from dairy farmers' farms to a plant). If stationary storage tanks are used for transferring milk at the premises, the operator of the facility shall make an advance written request to the compact commission that the facility be treated as a reload point; otherwise it shall be a plant. The cooling of milk, collection or testing of samples, and washing and sanitizing of tank trucks at the premises shall not disqualify it as a bulk reload point.

§ 1301.5 Pool Plant.

Pool Plant means any milk plant located in the regulated area.

§ 1301.6 Partially Regulated Plant.

Partially Regulated Plant means a milk plant not located in the regulated area but having Class I distribution in the regulated area, or receipts from producers located in the regulated area.

§ 1301.7 Non Pool Plant.

Non Pool Plant means any milk plant that is not a pool plant pursuant to section 1301.5 and not a partially regulated plant pursuant to section 1301.6.

§ 1301.8 Milk.

Milk means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation of any other process and as defined pursuant to prevailing standards of identity.

§ 1301.9 Handler.

Handler means:

(a) Any person, except a producer-handler, who operates a pool plant;

(b) Any person who operates a partially regulated plant;

(c) Any person who operates any other plant, or a pool bulk tank unit as defined under the Federal order, from which fluid milk products are disposed of, directly or indirectly, in the regulated area;

(d) Any cooperative association with respect to the milk that is moved from farms in tank trucks operated by, or under contract to, the association to pool plants or as diverted milk to non pool plants for the account of, and at the direction of, the association. The association shall be considered as the handler who received the milk from the dairy farmers. However, the cooperative association shall not be the handler with respect to the milk moved from any farm if the association and the operator of the pool plant to which milk from such farm is moved both submit a request in writing, on or before the due date for filing the monthly reports of receipts and utilization, that the operator of the pool plant be considered as the handler who received the milk from the dairy farmer, and the pool plant operator's request states that the pool plant operator is purchasing the milk from such farm on the basis of the farm bulk tank measurement readings and the butterfat tests of samples of the milk taken from the farm bulk tank; or

(e) Any person who does not operate a plant but who engages in the business of receiving fluid milk products for resale and distributes to retail or wholesale outlets packaged fluid milk products received from any plant described in paragraph (a), (b) or (c) of this section.

§ 1301.10 Producer-handler.

Producer-handler means any person who, during the month is both a dairy farmer and a handler and who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

(b) The person's own route disposition constitutes the majority of the route disposition from the plant.

(c) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer of diversion.

§ 1301.11 Producer.

Producer means:

(a) A dairy farmer who produces milk in the regulated area that is moved to a pool plant or a partially regulated plant, having Class I distribution in the regulated area,

(b) A dairy farmer who produces milk outside of the regulated area that is moved to a pool plant *provided* that dairy farmer milk was moved to a plant located in the regulated area during December 1996. *Provided further:* to be considered a qualified producer, milk from the dairy farmer's farm must move to a pool plant during the current month and must have been moved to a pool plant for five (5) months subsequent to July of the preceding calendar year;

(c) A dairy farmer who produces milk outside of the regulated area that is moved to a partially regulated plant and allocated to Class I pursuant to § 1304.5. However, the term shall not include:

(1) A producer handler;

(2) A dairy farmer who is a local or state government that has non-producer status for the month under § 1301.13(c);

(3) A dairy farmer who is a governmental agency that is operating a plant from which there is route disposition in the regulated area;

(4) Dairy farmer milk received at a pool plant or a partially regulated plant which is rejected and segregated in the handler's normal operations for receiving milk and which receipts are accepted and disposed of by the handler as salvaged product rather than milk.

§ 1301.12 Producer milk.

Producer milk means milk that the handler has received from producers. The quantity of milk received by a handler from producers shall include any milk of a producer that was not received at any plant but which the handler or an agent of the handler has accepted, measured, sampled, and transferred from the producer's farm tank into a tank truck during the month. Such milk shall be considered as having been received at the pool plant at which other milk from the same farm of that producer is received by the handler during the month, except that in the case of a cooperative association in its capacity as a handler under § 1301.9(d), the milk shall be considered as having been received at a plant in the zone location of the pool plant, or pool plants within the same zone, to which the greatest aggregate quantity of the milk of the cooperative association in such capacity was moved during the current month or the most recent month.

§ 1301.13 Exempt milk.

Exempt milk means:

(a) Fluid milk products received at a pool plant in bulk from a non pool plant to be processed and packaged, for which an equivalent quantity of package fluid milk products is returned to the operator of the non pool plant during the same month, if the receipt of bulk fluid milk products and return of packaged fluid milk products occur during an interval in which the facilities of the non pool plant at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm or similar extraordinary circumstances completely beyond the non pool plant operator's control;

(b) Packaged fluid milk products received at a pool plant from a non pool plant in return for an equivalent quantity of bulk fluid milk products moved from a pool plant for processing and packaging during the same month, if the movement of bulk fluid milk products and receipt of package fluid milk products occur during an interval in which the facilities of the pool plant at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm, or similar extraordinary circumstances completely beyond the pool plant operator's control;

(c) Milk received at a pool plant in bulk from the dairy farmer who produced it, to the extent of the quantity of any packaged fluid milk products returned to the dairy farmer, if:

(1) The dairy farmer is a State or local government that is not engaged in the route disposition of any of the returned products, and

(2) The dairy farmer has by written notice to the compact commission and the receiving handler, elected non-producer status for a period of not less than 12 months beginning with the month in which the election was made and continuing for each subsequent month until canceled in writing, and the election is in effect for the current month.

(d) All fluid milk product disposed outside of the regulated area.

§ 1301.14 Fluid milk product.

(a) Except as provided in paragraph (b) of this section *fluid milk product* means any milk products in fluid or frozen form containing less than nine percent butterfat, that are in bulk or are packaged, distributed and intended to be used as beverages. Such products include, but are not limited to: Milk, skim milk, low fat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, culture, modified with added nonfat milk solids, sterilized, concentrated (to not more than 50 percent total milk solids), or reconstituted.

(b) The term *fluid milk product* shall not include:

(1) Plain or sweetened evaporated milk, plain or sweetened evaporated skim milk, sweetened condensed milk or skim milk, formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

§ 1301.15 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream), including sterilized cream, or a mixture of cream and milk or skim milk containing nine percent or more butterfat, with or without the addition of other ingredients.

§ 1301.16 Filled milk.

Filled milk means any combination of nonmilk fat (or oil) with skimmed milk (whether fresh, cultured, reconstituted, or modified by the addition of nonfat milk solids), with or without milk fat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product, and contains less than six percent nonmilk fat (or oil).

§ 1301.17 Cooperative association.

Cooperative association means any cooperative marketing association of producers which the Secretary of Agriculture of the United States determines:

(a) To be qualified under the provisions of the Act of Congress of February 18, 1922, known as the ''Capper-Volstead Act'';

(b) To have full authority in the sale of milk of its members; and

(c) To be engaged in making collective sales of, or marketing milk or its products for its members.

§ 1301.18 Person.

Person means individual, partnership, corporation, association, or other business unit.

§ 1301.19 Route disposition.

Route disposition means distribution of Class I milk by a handler to retail or wholesale outlets, which include vending machines but do not include plants or distribution points. The route disposition of a handler shall be attributed to the processing and packaging plant from which the Class I milk is moved to retail or wholesale outlets without intermediate movement to another processing and packaging plant.

§ 1301.20 Distributing plant.

Distributing plant means a processing and packaging plant.

§ 1301.21 Supply plant.

Supply plant means a plant at which facilities are maintained and used for washing and sanitizing cans and to which milk is moved from dairy farmers' farms in cans and is there accepted, weighed or measured, sampled, and cooled, or it is a plant to which milk is moved from dairy farmers' farms in tank trucks.

§ 1301.22 State dairy regulation.

State dairy regulation means any state regulation of dairy prices, and associated assessments, whether by statute, marketing order or otherwise.

§ 1301.23 Diverted milk.

Diverted milk means milk, other than that excluded under § 1301.11 from being considered as received from a producer, that meets the conditions set forth in paragraph (a) or (b) of this section and is not excluded from diverted milk under paragraph (c) of this section.

(a) Milk that a handler in its capacity as the operator of a pool plant reports as having been moved from a dairy farmer's farm to the pool plant, but which the handler caused to be moved from the farm to another plant, if the handler specifically reports such movement to the other plant as a movement of diverted milk, and the conditions of paragraph (a) (1) or (2) of this section have been met. Milk that is diverted milk under this paragraph shall be considered to have been received at the pool plant from which it was diverted.

(1) During any two (2) months subsequent to July of the preceding calendar year, or during the current month, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the month, all of the milk that the handler caused to be moved from that farm was physically received as producer milk at the handler's pool plant or at another of the handler's pool plants that is not longer operated as a plant.

(2) During the current month and not more than five (5) other months subsequent to July of the preceding calendar year, milk from the dairy farmer's farm was received at or diverted from the handler's pool plant as producer milk, and during the current month all of the milk from that farm that the handler reported as diverted milk was moved from the farm in a tank truck in which it was intermingled with milk from other farms, the milk from a majority of which farms was diverted from the same pool plant in accordance with the preceding provisions of this paragraph.

(b) Milk that a cooperative association in its capacity as a handler under § 1301.9(d) caused to be moved from a dairy farmer's farm to a partially regulated plant if the association specifically reports the movement to such plant as a movement of diverted milk, and the conditions of paragraph (b) (1) and (2) of this section have been met. Milk that is diverted under this paragraph shall be considered to have been received by the cooperative association in its capacity as a handler under § 1301.9(d).

(1) During any two (2) months subsequent to July of the preceding calendar year, or during the current month, on more than half of the days on which the cooperative association in its capacity as a handler under § 1301.9(d) caused milk to be moved from the farm as producer milk during the month, all of the milk that the association cause to be move from the farm was physically received at a pool plant.

(2) During the current month and not more than five (5) other months subsequent to July of the preceding calendar year, the cooperative association in its capacity as a handler under § 1301.9(d) caused milk to be moved from the dairy farmer's farm as producer milk, and during the current month all of the milk from that farm that the cooperative association in its capacity as a handler under § 1301.9(d) reported as diverted milk was moved from the farm in a tank truck in which it was intermingled with milk from other farms, the milk from a majority of which farms was diverted by the association in accordance with the preceding provisions of this paragraph.

(c) Milk moved, as described in paragraphs (a) and (b) of this section, from dairy farmer's farms to partially regulated plants in excess of 35 percent in the months of September through November and 45 percent in other months, of the total quantity of producer milk received (including diversions) by the handler during the month shall not be diverted milk. Such milk, and any other milk reported as diverted milk that fails to meet the requirements set forth in this section, shall be considered as having been moved directly from the diary farmers' farms to the plant of physical receipt, and if that plant is a nonpool plant the milk shall be excluded from producer milk.

PART 1303—HANDLERS REPORTS

Sec.

1303.1 Reports of receipts and utilization.
1303.2 Other reports of receipts and utilization.
1303.3 Reports regarding individual producers and dairy farmers.
1303.4 Notices to producers.

Authority: 7 U.S.C. 7256.

§ 1303.1 Reports of receipts and utilization.

On or before the eighth day after the end of each month, each handler shall report for such month to the compact commission, in the detail and on the forms prescribed by the compact commission as follows:

(a) Each handler, with respect to each of the handler's pool plants shall report the quantities of fluid milk products contained in or represented by:

(1) Receipts of producer milk (including the specific quantities of diverted milk and receipts from the handler's own production);

(2) Receipts of milk from cooperative association in their capacity as handlers under § 1301.9(d);

(3) Receipts of fluid milk products from other pool plants;

(4) Receipts of fluid milk products from partially regulated plants;

(5) Inventories at the beginning and end of the month of fluid milk products;

(6) All Class I utilization or disposition of milk, filled milk, and milk products required to be reported pursuant to this paragraph.

(b) Each handler operating a partially regulated plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk.

(c) Each handler described in § 1301.9(d) shall report:

(1) The quantities of all fluid milk product contained in receipts of milk from producers; and

(2) The utilization or disposition of all such receipts.

(d) Each handler shall report bulk milk received at a handler's pool plant from a cooperative association in its capacity as the operator of a pool plant or as a handler under § 1301.9(d), if such milk was rejected by the handler subsequent to such handler's receipt of the milk on the basis that it was not of marketable quality at the time the milk was delivered to the handler's plant, and such milk was removed from the plant in bulk form by the cooperative association and was replaced in the other milk from the association. Except for purposes of this paragraph and § 1303.2(a), such milk that was so removed from the handler's plant shall be treated for all other purposes of the pricing regulation as though it had not been delivered to and received at the handler's plant.

(e) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to the handler's receipts and utilization of milk, filled milk, and milk products in such manner as the compact commission may prescribe.

(f) Any handler who operates a pool plant which has no Class I disposition and receives no milk from producers is exempted from reporting to the compact commission under this section.

§ 1303.2 Other reports of receipts and utilization.

(a) Each handler who intends to have a receipt of unmarketable milk replaced with the other milk in the manner described under § 1303.1 shall give the compact commission, at the request and in accordance with instructions of the compact commission, advance notice of the handler's intention to have such milk replaced.

(b) In addition to the reports required pursuant to paragraph (a) of this section and § 1303.1 and § 1303.3 each handler shall report such other information as the compact commission deems necessary to verify or establish such handler's oblitation under the order.

§ 1303.3 Reports regarding individual producers and dairy farmers.

(a) Each handler shall report on or before the 15th day after the end of each month the information required by the compact commission with respect to producer additions, producer withdrawals, changes in farm locations, and changes in the name of farm operators.

(b) Each handler that is not a cooperative association, upon request from any such association, shall furnish it with information with respect to each of its producer members from whose farm the handler begins, resumes, or stops receiving milk at his pool plant. Such information shall include the applicable date, the producer-member's post office address and farm location, and, if known, the plant at which his milk was previously received, or the reason for the handler's failure to continue receiving milk from his farm. In lieu of providing the information directly to the association, the handler may authorize the compact commission to furnish the association with such information, derived from the handler's reports and records.

(c) Each handler shall submit to the compact commission within ten (10) days after their request made not earlier than twenty (20) days after the end of the month, his producer payroll for the month, which shall show for each producer:

(1) The daily and total pounds of milk delivered and its average butterfat test; and

(2) The net amount of the handler's payments to the producer, with the prices, deductions, and charges involved.

§ 1303.4 Notices to producers.

Each handler shall furnish each producer from whom he receives milk the following information regarding the weight and butterfat test of the milk:

(a) Whenever he receives milk from the producer on the basis of farm bulk tank measurements, the handler shall give the producer at the time the milk is picked up at the farm a receipt indicating the measurement and the equivalent pounds of milk received;

(b) Whenever he receives milk from the producer on a basis other than farm bulk tank measurements, the handler shall give the producer within three (3) days after receipt of the milk a written notice of the quantity so received;

(c) If butterfat tests of the producer's milk are determined from fresh milk samples, the handler shall give the producer within ten (10) days after the end of each month a written notice of the producer's average butterfat test for the month. Such notice shall not be required if the handler has given the producer a written notice of the butterfat test for each of the sampling periods within the month; and

(d) If butterfat tests of the producer's milk are determined from composite milk samples, the handler shall give the producer within seven (7) days after the end of each sampling period a written notice of the producer's average butterfat test for the period.

PART 1304—CLASSIFICAITON OF MILK

Sec.
1304.1 Classification of milk.
1304.2 Classification of transfers and diversions.
1304.3 General classification rules.
1304.4 Classification of producer milk at a pool plant.
1304.5 Classification of milk at a partially regulated plant.

Authority: 7 U.S.C. 7256.

§ 1304.1 Classification of milk

All fluid milk products required to be reported by a handler pursuant to this section shall be classified as follows:

(a) Class I milk shall be all fluid milk products disposed of in the regulated area, and in packaged inventory of fluid milk products at the end of the month, except as otherwise provided in paragraphs (b), (c), and (d) of this section;

(b) Fluid Milk Products:

(1) Disposed of in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or six percent or more nonmilk fat (or oil) that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section and in bulk concentrated fluid milk products in inventory at the end of the month;

(3) In bulk fluid milk products and bulk fluid cream products disposed of or diverted to a commercial food processor if the compact commission is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in one-quart containers or larger and intended to be used in soft or semi-solid form:

(iii) Aerated cream, frozen cream, sour cream and sour half-and-half, sour cream mixtures containing nonmilk items, yogurt and any other semi-solid product;

(iv) Eggnog, custards, puddings, pancake mixes, buttermilk biscuit mixes, coatings, batter and similar products;

(v) Formulas especially prepared for infant feeding or dietary use (meal

replacement) that are packaged in hermetically sealed containers;

(vi) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products; and

(vii) Any product not otherwise specified in this section.

(c) All fluid milk products:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheeses of types that may be shredded, grated, or crumbled, and are not included in paragraph (b)(4)(i) of this section;

(ii) Butter, plastic cream, anhydrous milkfat and butteroil;

(iii) Any milk product in dry form, except nonfat dry milk;

(iv) Evaporated or sweetened condensed milk in a consumer-type package and evaporated or sweetened condensed skim milk in a consumer-type package; and

(2) In inventory at the end of the month of unconcentrated fluid milk products in bulk form and products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (b)(4) (i)–(iv) of this section, that are disposed of by a handler for animal feed;

(4) In fluid milk products, products specified in paragraph (b)(1) of this section, and products processed by the disposing handler that are specified in paragraphs (v)(4) (i)–(iv) of this section, that are dumped by a handler. The compact commission may require notification by the handler of such dumping in advance for the purpose of having the opportunity to verify such disposition. In any case, classification under this paragraph requires a handler to maintain adequate records of such use, if advance notification of such dumping is not possible, or if the compact commission so requires, the handler must notify the compact commission on the next business day following such use;

(5) In fluid milk products and products specified in paragraph (b)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the compact commission.

(6) In skim milk in any modified fluid milk product or in any product specified in paragraph (b)(1) of this section that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1301.14 and the fluid cream product definition pursuant to § 1301.15.

(d) All fluid milk products used to produce nonfat dry milk.

§ 1304.2 Classification of transfers and diversions

(a) *Transfers and diversions to pool plants.* Fluid milk products transferred or diverted from a pool plant to another pool plant or partially regulated plant shall be classified as Class I milk unless the operators of both plants request not to classify it Class I. In either case, the classification of such transfer or diversion shall be subject to the following conditions: The fluid milk products classified in Class I shall be limited to the amount of fluid milk products, respectively, remaining in Class I at the transferee-plant or diverted-plant.

(b) *Transfers and diversions to producers-handlers.* Fluid milk products transferred or diverted from a pool plant to a producer-handler shall be classified as Class I.

§ 1304.3 General classification rules.

In determining the classification of producer milk pursuant to § 1304.4, the following rules shall apply:

(a) Each month the compact commission shall correct for mathematical and other obvious errors all reports filed pursuant to § 1303.1 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1301.9(d) the pounds of skim milk and butterfat, respectively, in Class I in accordance with § 1304.1 and § 1304.2;

(b) The classification of producer milk for which a cooperative association is the handler pursuant to § 1301.9(d) shall be determined separately from the operations of any pool plant operated by such cooperative; and

(c) If receipts from more than one pool plant are to be assigned, the receipts shall be assigned in sequence according to the zone locations of the plants, beginning with the plant in the lowest-numbered zone for assignments to Class I milk.

§ 1304.4 Classification of producer milk at a pool plant.

For each month the compact commission shall determine the classification of producer milk of each handler described in § 1301.9(a) for each of the handler's pool plants separately and of each handler described in § 1301.9(d) by allocating the handler's receipts of fluid milk products to the handler's utilization pursuant to paragraphs (a) and (b) of this section.

(a) Fluid milk products shall be allocated in the following manner:

(1) Subtract from the total pounds of fluid milk products in Class I the pounds of fluid milk products in:

(i) Beginning inventory packaged fluid milk products;

(ii) Receipts of Class I fluid milk products from other pool plants and partially regulated plants;

(iii) Disposition of Class I fluid milk products outside of the regulated area;

(iv) Receipts of exempt fluid milk products pursuant to § 1301.13 (a), (b), and (c).

(b) The quantity of producer milk in Class I shall be the combined pounds of fluid milk product remaining in Class I.

§ 1304.5 Classification of producer milk at a partially regulated plant.

For each month the compact commission shall determine the classification of producer milk of each handler described in § 1301.9(b) for each of the handler's partially regulated plants separately by allocating the handler's receipts of fluid milk products to the handler's utilization pursuant to paragraphs (a) through (c) of this section.

(a) Fluid milk products shall be allocated in the following manner. Subtract from the total pounds of fluid milk product in Class I the pounds of fluid milk products in:

(1) Beginning inventory packaged fluid milk products;

(2) Receipts of Class I fluid milk products from other pool plants and partially regulated plants;

(3) Disposition of Class I fluid milk products outside of the regulated area;

(4) Receipts of exempt fluid milk product pursuant to § 1301.13 (a), (b), and (c).

(b) The quantity of producer milk in Class I shall be the combined pounds of fluid milk product remaining in Class I, not to exceed the total pounds of fluid milk products disposed of in the regulated area.

(c) Producer milk will be allocated pursuant to paragraph (b) of this section in the following manner:

(1) Receipts from producers located in the regulated area;

(2) Receipts of diverted pool milk;

(3) Receipts from producers not located in the regulated area shall then be assigned to any remaining Class I in the regulated area.

PART 1305—CLASS PRICE

Sec.
1305.1 Compact over-order class I price and compact over-order obligation.
1305.2 Announcement of compact over-order class I price and compact over-order obligation.
1305.3 Equivalent price.

Authority: 7 U.S.C. 7256.

§ 1305.1 Compact over-order class I price and compact over-order obligation.

The compact over-order Class I price per hundredweight of milk shall be as follows:

(a) The Class I price shall be announced pursuant to § 1305.2.

(b) The compact over-order obligation shall be computed as follows:

(1) The compact Class I price;

(2) Deduct Federal Order #1, Zone 1 price;

(3) The remainder shall be the compact over-order obligation.

§ 1305.2 Announcement of compact over-order class I price and compact over-order obligation.

The compact commission shall announce publicly on or before the 5th day of each month the Class I over-order price and the compact over-order obligation for the following month.

§ 1305.3 Equivalent price.

If, for any reason, a price specified in this part for use in computing class prices or for other purposes is not reported or published in the manner described in this part, the compact commission shall use one determined by the commission to be equivalent to the price that is specified.

PART 1306—COMPACT OVER-ORDER PRODUCER PRICE

Sec.
1306.1 Handler's value of milk for computing basic over-order producer price.
1306.2 Partially regulated plant operator's value of milk for computing basic over-order producer price.
1306.3 Computation of basic over-order producer price.
1306.4 Announcement of basic over-order producer price.

Authority: 7 U.S.C. 7256.

§ 1306.1 Handler's value of milk for computing basic over-order producer price.

For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1301.9(d) with respect to milk that was not received at a pool plant, as directed in this section: Multiply the pounds of Class I fluid milk products as determined pursuant to § 1304.1(a) by the compact over-order obligation.

§ 1306.2 Partially regulated plant operator's value of milk for computing basis over-order producer price.

For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk disposition in the regulated area by the operator of a partially regulated plant, as follows: Multiply the pounds of Class I fluid milk products as determined pursuant to § 1304.1(a) by the compact over-order obligation.

§ 1306.3 Computation of basic over-order producer price.

The compact commission shall compute the basic over-order producer price per hundredweight applicable to milk received at plants as follows:

(a) Combine into one total the values computed pursuant to § 1306.1 and § 1306.2 for all handlers from whom the compact commission has received at the compact commission's office prior to the 9th day after the end of the month the reports for the month prescribed in § 1303.1 and the payments for the preceding month required under § 1307.3(a).

(b) Add an amount equal to not less than one-half of the unobligated balance of the producer-settlement fund at the close of business on the 8th day after the end of the month;

(c) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk;

(2) The total hundredweight for which a value is computed pursuant to § 1306.2 (a); and (d) Subtract not less than four (4) cents nor more than five (5) cents for the purpose of retaining a cash balance in the producer-settlement fund. The result shall be the basic over-order producer price for the month.

§ 1306.4 Announcement of basic over-order producer price.

The compact commission shall announce publicly on or before: The 13th day after the end of each month the over-order producer price resulting from the adjustment of the basic over-order producer price for such month, as computed under § 1306.3.

PART 1307—PAYMENTS FOR MILK

Sec.
1307.1 Producer-settlement fund.
1307.2 Handler's producer-settlement fund debits and credits.
1307.3 Payments to and from the producer-settlement fund.
1307.4 Payments to producers.
1307.5 [Reserved]
1307.6 Statements to producers.
1307.7 Adjustment of accounts.
1307.8 charges on overdue accounts.

Authority: 7 U.S.C. 7256.

§ 1307.1 Producer-settlement fund.

(a) The compact commission shall establish and maintain a separate fund known as the *producer-settlement fund*. They shall deposit into the fund all amounts received from handlers under § 1307.3, § 1307.7, and § 1307.8 and the amount subtracted under § 1306.3(d). They shall pay from the fund all amounts due handlers under § 1307.3, § 1307.7, and § 1307.8 and the amount added under § 1306.3(b) subject to their right to offset any amounts due from the handler under these sections and under § 1308.1

(b) All amounts subtracted under § 1306.3(d), including interest earned thereon, shall remain in the producer-settlement fund as an obligated balance until it is withdrawn for the purpose of effectuating § 1306.3(b).

(c) The compact commission shall place all monies subtracted under § 1306.3(d) in an interest-bearing bank account or accounts in a bank or banks duly approved as a Federal depository for such monies, or invest them in short-term U.S. Government securities.

§ 1307.2 Handlers' producer-settlement fund debits and credits.

On or before the 15th day after the end of the month, the compact commission shall render a statement to each handler showing the amount of the handler's producer-settlement fund debit or credit, as calculated in this section.

(a) The producer-settlement fund debit for each plant and each cooperative association in its capacity as a handler under § 1301.9(d) shall be the value computed pursuant to § 1306.1 and § 1306.2.

(b) The producer-settlement fund credit for each plant and each cooperative association in its capacity as a handler under § 1310.9(d) shall be computed as specified in this paragraph.

(1) Multiply the quantities of producer milk that were allocated to Class I pursuant to § 1304.4 and the quantities of route disposition in the marketing area by partially regulated plants for which a value was determined pursuant to § 1306.2(a) by the basic over-order producer price computed under § 1306.3.

(2) For any cooperative association in its capacity as a handler under § 1301.9(d), multiply the quantities of

milk moved to each pool plant by the basic over-order blended price computed under § 1306.3; and to the result add the value determined under § 1306.1.

(c) The producer-settlement fund debit or credit of any handler shall be the net of the producer-settlement fund debits and credits as computed for all of its operations under paragraph (a) and (b) of this section.

§ 1307.3 Payments to and from the producer-settlement fund.

(a) On or before the 18th day after the end of the month, each handler shall pay to the compact commission the handler's producer-settlement fund debit for the month as determined under § 1307.2(a).

(b) On or before the 20th day after the end of the month, the compact commission shall pay to each handler the handler's producer-settlement fund credit for the month as determined under § 1307.2(b). If the unobligated balance in the producer-settlement fund is insufficient to make such payments, the compact commission shall reduce uniformly such payments and shall complete them as soon as the funds are available.

§ 1307.4 Payments to producers.

(a) On or before the 20th day after the end of the month, each handler shall make payment to each producer for the milk received from him during the month at not less than the basic over-order producer price per hundredweight computer under § 1306.3. If the handler has not received full payment for the compact commission under § 1307.3(b) by the date payments are due under this paragraph, he may reduce pro rata his payments to producers by an amount not to exceed such underpayment. Such payments shall be completed after receipt of the balance due from the compact commission by the next following date for making payments under this paragraph.

(b) If the handler's net payment to a producer is for an amount less than the total amount due the producer under this section, the burden shall rest upon the handler to prove to the compact commission that each deduction from the total amount due is properly authorized and properly chargeable to the producer.

(c) In making payment to producers under paragraph (b) of this section for milk diverted from a pool plant the handler may elect to pay such producers at the price of the plant from which the milk was diverted, if the resulting net payment to each producer is not less than the otherwise required under this section and the rate of payment and the deduction shown on the statement required to be furnished under § 1307.6 are those used in computing the payment.

(d) If a handler claims that the required payment cannot be made because the producer is deceased or cannot be located, such payment shall be made to the producer-settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the compact commission shall make such payment from the producer-settlement fund to the handler or to the lawful claimant, as the case may be.

(e) If not later than the date when such payment is required to be made, legal proceedings have been instituted by the handler for the purpose of administrative or judicial review of the compact commission findings upon verification as provided above such payment shall be made to the producer-settlement fund and shall be held in reserve until such time as the above-mentioned proceedings have been completed or until the handler submits proof to the compact commission that the required payment has been made to the producer in which latter event the payment shall be refunded to the handler.

(f) At a partially regulated plant each handler shall make payments, on a pro rata basis, to all producers and dairy farmers for milk received from them during the month, the payment received pursuant to § 1307.3(b).

§ 1307.5 [Reserved]

§ 1307.6 Statements to producers.

In making the payments to producers required under § 1307.4, each handler and each cooperative shall furnish each producer, in addition to the information required under Federal and State regulations, a supporting statement, in such form acceptable to the commission, which shall show: The rate and amount of the compact over-order producer price.

§ 1307.7 Adjustment of accounts.

(a) Whenever the compact commission verification of a handler's reports or payments discloses an error in payments to or from the compact commission under § 1307.3 or § 1308.1, the compact commission shall promptly issue to the handler a charge bill or a credit, as the case may be, for the amount of the error. Adjustment charge bills issued during the period beginning with the 10th day of the prior month and ending with the 9th day of the current month shall be payable by the handler to the market administrator on or before the 18th day of the current month. Adjustment credits issued during that period shall be payable by the compact commission to the handler on or before the 20th day of the current month.

(b) whenever the compact commission's verification of a handler's payments discloses payment to a producer or a cooperative association of an amount less than is required by § 1307.4, the handler shall make payment of the balance due the producer not later than the 20th day after the end of the month in which the handler is notified of the deficiency.

§ 1307.8 Charges on overdue accounts.

Any producer-settlement fund account balance due from or to a handler under § 1307.3, § 1307.7 or § 1307.8 for which remittance has not been received in or paid from the compact commission office by close of business on the 18th day of any month, shall be increased one percent effective the following day.

PART 1308—ADMINISTRATIVE ASSESSMENT

Authority: 7 U.S.C. 7256

§ 1308.1 Assessment for pricing regulations administration.

On or before the 18th day after the end of the month, each handler shall pay to the compact commission his pro rata share of the expense of administration of this pricing regulation. The payment shall be at the rate of .032¢ per hundredweight. The payment shall apply to:

(a) The quantity of fluid milk products disposed in the regulated area from a pool plant for which a value is determined under § 1306.1;

(b) All receipts and beginning inventory of a cooperative association in its capacity as handler under § 1301.9(d) for the month less its ending inventory for the month; and

(c) The quantity distributed as route disposition in the regulated area from a partially regulated plant for which a value is determined under § 1306.2.

Daniel Smith,

Executive Director.

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