DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1007

[Docket Nos. AO–366–A36, et al.; DA–93–21]

Milk in the Georgia and Certain Other Marketing Areas; Decision on Proposed Amendments to Marketing Agreements and to Orders

7 CFR part	Marketing area	Docket No.
1007	Georgia	AO–366–A36
1093	Alabama-West Florida.	AO–386–A14
1094	New Orleans-Mississippi.	AO–103–A56
1096	Greater Louisiana	AO–257–A43
1099	Paducah, Kentucky.	AO–183–A45
1108	Central Arkansas	AO–243–A46

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision combines five Federal milk order marketing areas with unregulated counties in Arkansas, Georgia, Mississippi, and Tennessee to form the Southeast marketing area. The decision is based on industry proposals to merge the individual marketing areas so as to more equitably divide the markets' proceeds in what essentially has become a single, large market with significantly overlapping sales and procurement areas.

FOR FURTHER INFORMATION CONTACT: Nicholas Memoli, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 690–1932.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. The amendments will promote orderly marketing of milk by producers and regulated handlers.

The proposed amendments have been reviewed under Executive Order 12778, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the entry of the ruling.

Prior Documents in This Proceeding

Notice of Hearing: Issued September 3, 1993; published September 10, 1993 (58 FR 47653).

Supplemental Notice of Hearing: Issued October 13, 1993; published October 15, 1993 (58 FR 53436).

Extension of Time for Filing Briefs: Issued January 24, 1994; published February 3, 1994 (59 FR 5132).

Recommended Decision: Issued November 21, 1994; published November 29, 1994 (59 FR 61070).

Extension of Time for Filing Exceptions: Issued December 27, 1994; published January 3, 1995 (60 FR 65).

Preliminary Statement

A public hearing was held to consider proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice (7 CFR Part 900), in Atlanta, Georgia, on November 1–5, 1993. Notice of such hearing was issued on September 3, 1993, and published September 10, 1993 (58 FR 47653) and a supplemental notice of hearing was issued October 13, 1993, and published October 15, 1993 (58 FR 53436).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on November 21, 1994, issued a recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein, subject to the modifications contained in this final decision. Certain sections of this final decision differ from the recommended decision only by discussing comments that were received, correcting obvious typographical errors, or adding footnotes to reflect new information, such as a cooperative merger. These sections include marketing area, unit pooling, producer, producer-handler, balancing plants, and seasonal adjustment to Class III and III–A prices. Other sections have been revised substantially and/or contain actual changes in order provisions. Sections which fall into this category include producer milk, product prices, Class III price, Class II price, plant location adjustments, and base-excess plan. In addition to these changes, the Map of the Southeast marketing area and the Map Guide (i.e., Table No. 1) have been revised to reflect the new pricing zones, a clarifying paragraph has been added at the end of the discussion of lock-in provision, and a discussion has been added at the end of the findings and conclusions regarding Motions to Reopen the Hearing.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Interstate commerce, merger of marketing areas under one order, and expansion of the marketing area.[1] The handling of milk in the proposed merged and expanded marketing area is in the current of interstate commerce and directly burdens or obstructs interstate commerce in milk and milk products. Interstate commerce is involved in both the procurement and sales of fluid milk and dairy products by handlers operating plants in the proposed marketing area.

The record evidence clearly shows the movement of bulk milk from Georgia to Alabama and Tennessee; from Alabama to Georgia, Mississippi, Louisiana, and Tennessee; from Louisiana to Texas, Mississippi, and Alabama; from Texas to Arkansas, Louisiana and Mississippi; from Tennessee to Georgia, Alabama,

[1] The changes to this section include an updated map of the marketing area and an updated Table 1.

Kentucky, and Mississippi; from Kentucky to Alabama, Mississippi, and Tennessee; and from Arkansas to Georgia, Tennessee, and Mississippi. In addition, the record indicates that packaged fluid milk products regularly move across States into each of the separate marketing areas involved in this proceeding.

The proposed merged and expanded marketing area, designated as the ‘‘Southeast’’ marketing area, is shown on the map entitled ‘‘Southeast Marketing Area.’’ The map has been modified to reflect changes in pricing zones that are discussed under ‘‘plant location adjustments.’’ Table No. 1 is a map guide for the plants that corresponds to the numbers shown on the map. The table has been modified to delete four plants: McClendon Cheese (Zone 4), Meadow Gold, Gadsden (Zone 5), Flav-O-Rich, Montgomery (Zone 8), and Meadow Gold, Nashville (Zone 2). In addition, one new plant has been added to the table: Publix Supermarkets, Zone 7, which is scheduled to commence operations this spring.

The proposed Southeast marketing area includes the present adjacent marketing areas of Orders 7, 93, 94, and 96; the Central Arkansas (Order 108) marketing area; the northeastern Georgia county of Rabun; the northwestern Mississippi counties of Canola, De Soto, Lafayette, Marshall, Tate, and Tunica; all of the territory within the State of Tennessee that is not included within the Tennessee Valley Federal marketing area; and all of the presently unregulated counties in the State of Arkansas. The proposed merged order would use the part number for the present Georgia order, part 1007. The amended Part 1007, upon issuance, would supersede Parts 1093, 1094, 1096, and 1108.

Although the present five orders would no longer exist upon effectuation of the Southeast order, this merger action is not intended to preclude the completion of those procedures that would otherwise have existed under the separate orders with respect to milk handled prior to the effective date of the merger. Such procedures, which would need to be carried out after the merger date, include the announcement of certain class prices, submission of reports, computation of uniform prices, payment of obligations and verification activities. The provisions of the merged order would apply only to that milk handled after the effective date of the merger.

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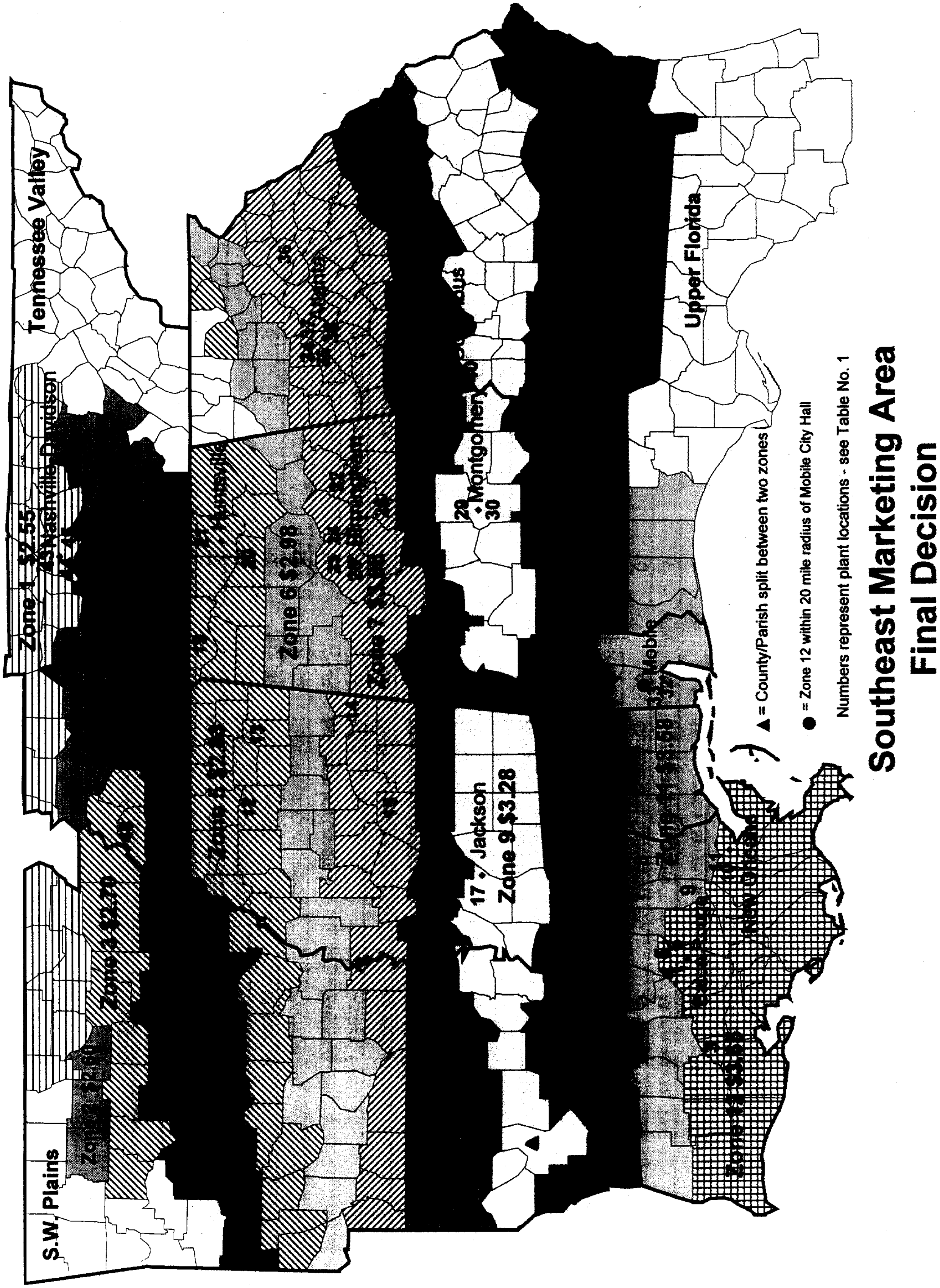

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TABLE NO. 1.—MAP GUIDE FOR THE SOUTHEAST MARKETING AREA

No.	Plant name	Location	Zone
1	Foremost Dairy, Inc	Shreveport, LA	8
2	Borden, Inc	Monroe, LA	8
3	Borden, Inc	Lafayette, LA	12
4	Borden, Inc	Baton Rouge, LA	12
5	Dairy Fresh of LA	Baker, LA	12
6	Kleinpeter Farms Dairy	Baton Rouge, LA	12
7	Mid-America Dairymen, Inc	Kentwood, LA	11
8	Mid-America Dairymen, Inc	Franklinton, LA	11
9	Superbrand Dairy Products	Hammond, LA	11
10	Barbe's Dairy	Westwego, LA	12
11	Schepps-Foremost	New Orleans, LA	12
12	Avent's Dairy, Inc	Oxford, MS	5
13	Barber Pure Milk Company	Tupelo, MS	5
14	Brookshire Dairy Products	Columbus, MS	7
15	LuVel Dairy Products, Inc	Kosciusko, MS	7
16	Flav-O-Rich	Canton, MS	8
17	Borden, Inc	Jackson, MS	9
18	Dairy Fresh Corporation	Hattiesburg, MS	10
19	Shoals Cheese	Florence, AL	5
20	Dasi Products, Inc	Decatur, AL	5
21	Meadow Gold Dairies, Inc	Huntsville, AL	5
22	Barber Pure Milk Company	Oxford, AL	7
23	Baker and Sons Dairy	Birmingham, AL	7
24	Barber Pure Milk Company	Birmingham, AL	7
25	Barber Ice Cream	Birmingham, AL	7
26	Flav-O-Rich Ice Cream	Sylacauga, AL	7
27	Dairy Fresh Ice Cream	Greensboro, AL	8
28	McClendon Cheese	Uniontown, AL	7
29	Superbrand Dairy Products	Montgomery, AL	9
30	Barber Pure Milk Company	Montgomery, AL	9
31	Dairy Fresh Corporation	Cowarts, AL	10
32	Barber Pure Milk Company	Mobile, AL	12
33	Dairy Fresh Corporation	Prichard, AL	12
34	Southern Ice Cream	Marrietta, GA	7
35	Kraft General Foods	Atlanta, GA	7
36	Peeler Jersey Farms	Athens, GA	7
37	New Atlanta Dairies, Inc	Atlanta, GA	7
38	Publix Supermarkets, Inc	Atlanta, GA	7
39	Borden, Inc	Macon, GA	8
40	Kinnett Dairies, Inc	Columbus, GA	8
41	Kinnett Ice Cream	Columbus, GA	8
42	Hershey Chocolate, USA	Savannah, GA	10
43	Fleming Companies, Inc	Nashville, TN	1
44	Purity Dairies, Inc	Nashville, TN	1
45	Cumberland Creamery, Inc	Antioch, TN	1
46	Heritage Farms Dairy	Murfreesboro, TN	2
47	Mid-America Dairymen, Inc	Lewisburg, TN	2
48	Turner Dairies	Covington, TN	3
49	Forest Hill Dairy	Memphis, TN	4
50	Harbin Mix	Memphis, TN	4
51	Borden, Inc	Little Rock, AR	4
52	Coleman Dairy	Little Rock, AR	4
53	Gold Star Dairy, Inc	Little Rock, AR	4
54	Humphrey's Dairy	Hot Springs, AR	4

The marketing area proposed herein is a combination of several of the proposals presented at the hearing. A group of four cooperative associations, comprised of Dairymen, Inc., Gulf Dairy Association, Inc.,[2] Southern Milk Sales, Inc., and Carolina Virginia Milk Producers Association, Inc., proposed the merger of the marketing areas of Orders 7, 93, 94, 96, together with the former Nashville, Tennessee (Order 98), marketing area,[3] and the four unregulated Tennessee counties of Franklin, Lincoln, Moore, and Van Buren. In this decision, these cooperatives will be referred to as the ''cooperative coalition,'' and their proposal will be referred to as Proposal No. 1. At the time of the hearing, these groups represented approximately 54 percent of the producers and 55 percent of the milk pooled under Orders 7, 93, 94, and 96.

Malone & Hyde Dairy (aka Fleming Dairy), Nashville, Tennessee, proposed expanding the area proposed by the cooperative coalition by including the one remaining unregulated county in

[2] Effective March 1, 1994, September 1, 1994, and February 1, 1995, respectively, Gulf Dairy Association, Dairymen, Inc., and Southern Milk Sales became part of Mid-America Dairymen, Inc. (Mid-Am).

[3] Official notice is taken of the termination of the former Memphis, Tennessee (Part 1097), and Nashville, Tennessee (Part 1098) Federal milk marketing orders effective July 31, 1993. The marketing areas of these former orders may be found in §§ 1097.2 and 1098.2 of 7 CFR, revised as of January 1, 1992 and 1993, respectively.

Georgia (i.e., Rabun County), the six unregulated counties between the Tennessee Valley marketing area and the former Nashville marketing area (four of which were also included in Proposal No. 1), the former Memphis, Tennessee (Order 97), marketing area, and the remaining unregulated Tennessee counties that are bordered on the east by former Order 98, on the west by former Order 97, on the north by Order 99, and on the south by Order 94. Malone & Hyde Dairy hereinafter will be referred to as ''Fleming Dairy,'' and their proposal will be referred to as Proposal No. 9.

Arkansas Dairy Cooperative Association, Inc., which also will be referred to as ''ADCA,'' proposed including the Central Arkansas marketing area and the former Memphis marketing area in the merged order proposed by the cooperative coalition. Their proposal will be referred to as Proposal No. 2.

Finally, Associated Milk Producers, Inc., or ''AMPI,'' proposed and testified in support of a proposal (i.e., Proposal No. 13) to merge the former Memphis marketing area with the Paducah, Kentucky, and Central Arkansas marketing areas to form a ''Mid-South'' marketing area. Under this proposal, the marketing area also would include all presently unregulated counties in Arkansas, the unregulated Missouri county of Dunklin, and the two unregulated Texas counties of Bowie and Cass.

Testimony in support of Proposal No. 1. The Vice President of Dairymen, Inc., testified on behalf of the cooperative coalition in support of Proposal No. 1.

The thrust of his testimony was that fluid milk processors in the proposed merged marketing area had increasingly expanded their distribution to serve larger geographic areas and, as a result, a larger order is now needed to maintain market stability, to insure that producers in the proposed marketing area would be able to share pro rata in the classified uses of their milk, and to provide assurance to handlers that their competitors were paying at least the order's minimum prices regardless of where their milk supply originated.

He also stated that a merged order was in the public's interest because it would establish orderly marketing conditions for producers and handlers in the marketing area and assure a continuing, adequate supply of high-quality milk.

The Chairman of the Louisiana Dairy Advisory Committee of the Louisiana Farm Bureau Federation testified that the proposal was significant because it could eliminate price disparities among producers in the Southeast, facilitate the movement of milk to where it is needed, and provide a more equitable sharing among producers of higher-valued fluid milk sales.

The division manager for milk procurement for The Kroger Company testified that Heritage Farms Dairy, a Kroger Company plant located in Murfreesboro, Tennessee, also expressed qualified support for the merger of milk orders in the Southeast, but said that Proposal No. 1 fell short of addressing all the problems or answering all the questions facing Federal milk marketing orders in the Southeast. He said that markets not contained in this proceeding present challenges that need to be addressed at a future hearing.

Testimony in opposition to Proposal No. 1. A consultant for Barber Pure Milk Company and Dairy Fresh Corporation testified that Barber Pure Milk Company, a handler under Orders 7, 93, and 94, and Dairy Fresh Corporation, a handler under Orders 7, 93, 94, and 96, opposed Proposal No. 1 because it did not include Orders 5 (Carolina) and 11 (Tennessee Valley). He stated that, in May 1993, 52 percent of all Class I sales in the Order 7 marketing area were made by plants pooled on other orders, with 26.4 percent and 11.6 percent from Orders 5 and 11, respectively.

With respect to raw milk procurement, the Barber/Dairy Fresh spokesman testified that Order 7 and 93 handlers competed with Order 5 and 11 handlers for their milk supply. Because of the intermingling of producers among these orders, the milk of some producers is shipped alternatively between Orders 7 and 5 handlers, he said, and differences in utilization in these markets result in different pay prices for milk of neighboring producers, creating instability in the milk supply. Further, to create a large marketing area including most of five or six states with small orders nearby could lead to undesirable pooling practices, he added.

A representative for Kinnett Dairies (Kinnett) in Columbus, Georgia, testified that Kinnett purchased raw milk from a group of independent producers located in Georgia, Alabama, and Tennessee and also purchased a portion of its raw milk needs from Carolina-Virginia Milk Producers Association, Charlotte, North Carolina. He stated that while Kinnett generally supported the concept of merging Federal Orders 7, 93, 94, and 96, with the area covered by the terminated Nashville order, it was opposed to Proposal No. 1 because it did not include the Tennessee Valley and Carolina orders (Orders 11 and 5, respectively). He explained that in August 1993—after the Kroger plant at Murfreesboro, Tennessee, and the Fleming Dairy plant at Nashville, Tennessee, became regulated under Order 7—35.4 percent of the Class I disposition on Order 7 was marketed by other order distributing plants. He pointed out that this was a higher percentage of other order Class I sales than that accounted for by any of the other orders involved in the merger proceeding.

Testimony in support of Proposal No. 9. The assistant operations manager for Fleming Dairy, Nashville, Tennessee, testified in support of Proposal No. 9. He explained that the Fleming Company operated two distributing plants: One plant located in Nashville, Tennessee, and a second plant located in Baker, Louisiana, which is jointly owned with Dairy Fresh of Alabama.

The Fleming spokesman testified that Fleming's Nashville plant distributed approximately 25 million pounds of Class I and Class II dairy products per month in the former Nashville and Memphis Federal order marketing areas, as well as in the marketing areas of Order 46 (Louisville-Lexington-Evansville), Order 99 (Paducah), Order 108 (Central Arkansas), Order 106 (Southwest Plains), Order 94 (New Orleans-Mississippi), Order 93 (Alabama-West Florida), Order 6 (Upper Florida), Order 7 (Georgia), Order 5 (Carolina), and Order 11 (Tennessee Valley). He stated that Fleming procured most of its raw milk supply from dairy farmers located in central Tennessee and south central Kentucky, with approximately 55 percent of Fleming's raw milk supply purchased from Kentucky dairy farmers and 45 percent purchased from Tennessee dairy farmers. In addition to purchasing milk from independent producers, Fleming purchases raw milk from Carolina-Virginia Milk Producers and other dairy cooperatives and proprietary handlers, he added.

The witness testified that a southeast merger which does not include the Chattanooga area will result in blend price differences between the Tennessee Valley order and the new Southeast order which will cause problems where the two orders' procurement areas overlap. He said the Department should address this potential problem of blend price differences by considering the merger of the Louisville order with the Tennessee Valley order and possibly the Carolina order in the very near future and that the implementation of such a merger should coincide with the merger of other Federal orders in the Southeast.

The Fleming spokesman stated that the former Memphis marketing area should be included in the merged order because Fleming Dairy has significant sales in that area. However, the merged order should not include several Kentucky counties in former Order 98, he said, because those counties do not have a significant level of milk sales from Nashville distributing plants. He stated there were no distributing plants in that area, but there was a cheese plant there that could attach unnecessary milk to the market if that plant were in the marketing area.

Testimony in support of Proposal No. 2 and in opposition to Proposal 13. The general manager of the Arkansas Dairy Cooperative Association, Incorporated, testified that ADCA, which has 113 dairy farmer members located within the State of Arkansas, was formed in 1991 by its members to provide an alternative to Associated Milk Producers, Inc. (AMPI), the only outlet then available for their milk. He indicated that ADCA sold its milk to the Borden, Incorporated, plant in Little Rock, the Turner Dairies plants in Memphis and Covington, Tennessee, and the Turner Dairy plant in Fulton, Kentucky.

The witness stated that ADCA supported the merger of Orders 7, 93, 94, 96, 97, 98, and 108, and that ADCA also supported the inclusion of presently unregulated counties south and west of the present Central Arkansas marketing area, as well as two unregulated Arkansas counties (Mississippi and Crittenden) on the eastern edge of the Central Arkansas marketing area. He said that the sales of Little Rock plants in the former Memphis area and the overlap of procurement areas for the two markets supported the adoption of ADCA's proposal.

The ADCA spokesman indicated that a larger merged market would provide market and regulatory stability for ADCA in the future. He emphasized that since ADCA's formation, AMPI had successfully terminated the Memphis order, attempted to terminate the Paducah order, terminated the base-excess plan on Order 108, and now was attempting to establish a new Mid-South order which it could dominate.

The witness stated that with AMPI's proposed Mid-South order, ADCA would be at the whim of AMPI management with respect to whether there would be an order at all, or for how long there would be an order. He said that situation would be intolerable for ADCA and would create highly disorderly marketing conditions. He concluded that a seven-market (i.e., including former Orders 97 and 98) merged order would eliminate this problem.

A dairy farmer from Guy, Arkansas, who farms 300 acres and milks 200 cows, also testified in support of the inclusion of Central Arkansas in the merged southeastern order and in opposition the AMPI's proposal to form a Mid-South order. The witness, who is the immediate past president of the Board of Directors of Arkansas Dairy Cooperative Association, Inc., stated that he was speaking on behalf of himself, the ADCA Board of Directors, and the 113 members of ADCA.

Testimony in support of Proposal No. 13. A spokesman representing the Associated Milk Producers, Incorporated, Southern Region, Arlington, Texas, stated that his testimony in support of Proposal No. 13 was on behalf of the Southern Region of AMPI, Mid-America Dairymen, Inc. (Mid-Am), and Dairymen, Inc. (DI), co-proponents of Proposals 13, 14, and 15.

The AMPI spokesman testified that in September 1993 AMPI pooled 18.4 million pounds of milk in the Central Arkansas market, a quantity which represented 50.1 percent of the milk pooled on the order during that month. He said the 387 AMPI members who produced that milk represented about 69 percent of the total number of dairy farmers on the market during September.

According to the witness, AMPI supplied the Turner Dairy Covington plant, which, since the termination of Order 97, had been a partially regulated distributing plant. He said that in September 1993 AMPI supplied about 3.2 million pounds of milk to the Covington plant but could not divert the milk of any producer from the plant because it was not a fully regulated facility.

The witness also testified that AMPI provided supplemental milk to the Turner plant in Fulton, Kentucky, jointly with D.I. and Mid-Am. During September 1993, he said the three cooperatives supplied about 5.2 million pounds of the milk required by Turner to operate the Fulton facility.

The AMPI representative said that the supply situation at the Fulton facility had changed significantly in recent years. He noted that through 1982 the plant was completely supplied and balanced by cooperative milk and that beginning in 1983 a total of 4.41 percent of the milk came from independent producers. The percentage of supply to the Fulton facility increased every year since then, he said, except for 1986. For the first 10 months of 1993, the percentage of independent supply was almost 47 percent of the handlers' needs, he added. He stressed that although the Turner plant had changed its source of supply over the last 10 years, the facility continued to rely on cooperative associations to balance its supply.

The AMPI witness pointed out that throughout 1993 most of the Fulton supply originated from Kentucky, Missouri, and Tennessee. In September 1993, he noted, 93.5 percent of the Fulton supply came from these areas.

The spokesman also observed that Exhibits 5 and 31, which contain data introduced by the market administrators of the respective orders, indicate a significant overlap in procurement among the areas proposed for merger. He noted that in May 1993, for instance, 8.2 million pounds of the 22.1 million pounds of producer milk pooled on the Memphis order came from Arkansas producers (just over 37 percent) and that another 30 percent came from nearby Tennessee counties from which 6.6 million pounds of milk were pooled on the Central Arkansas order.

With respect to the Central Arkansas order, the witness testified that in May 1993 about 6.5 percent of the producer milk originated in nearby counties in Kentucky and Tennessee while 69.1 percent of the producer milk pooled on the order originated in Arkansas. Most of the remainder of the milk originated in Missouri and Texas, he said.

The AMPI spokesman testified that route disposition in the Memphis area has generally consisted of fluid milk products from about ten handlers under other Federal orders. He said that handlers regulated under Orders 99 and 108 consistently distribute fluid milk products on routes in the Memphis area.

In Central Arkansas, route disposition from handlers regulated under other Federal orders, including Memphis and Paducah, has ranged from 28.7 percent in January 1990 to 49.6 percent in March 1993, according to the witness. He noted that specific percentages for route disposition by Order 97 and 99 handlers cannot be included because less than three handlers are involved.

With respect to the Paducah order, the witness said that at the current time the order operates as an individual-handler pool and that, as such, the order promotes instability among similarly situated producers because blend prices under the Paducah order exceed significantly those of surrounding orders. Surrounding markets must carry the burden of balancing the supply of the single plant operator under that order, he said.

The witness testified that blend prices generated under the Paducah order are unreasonable given the significant overlap of supply and distribution patterns that exists today. He said the situation was very similar to that of the Milwaukee individual handler pool prior to its inclusion in the Chicago Regional pool in 1968 and referenced the final decision (33 FR 7516) in that proceeding.

The AMPI spokesman testified that a situation similar to that described in the 1968 decision is currently at play in the Paducah milk market. He said that under the proposed Mid-South order, however, producers will share pro rata in the returns from the sale of milk utilized in all classes; all producers will carry their fair share of lower prices of reserve milk not needed at any particular time for fluid purposes.

The witness indicated that the fluid sector of the dairy industry has evolved to fewer but larger handlers who distribute their products over an increasingly larger territory. He predicted that this trend will likely continue in the future. He concluded that whenever consolidation of areas is considered, the Department must look at the area where the significant majority of the overlap occurs in sources and in distribution to delineate merged marketing areas.

Testimony in opposition to Proposal No. 13. Two dairy farmers from Martin, Tennessee (Weakley County), testified in opposition to the merger of Order 99 with any other order. Both of these witnesses indicated that they were independent dairy farmers delivering their milk to the Turner plant in Fulton, Kentucky. They stated that they were opposed to making any change to Order 99 because it would lower the price to dairy farmers delivering milk to the Fulton plant.

Testimony in support of other merger combinations. A consultant appearing on behalf of Southern Foods Group, Inc. (SFG), testified that SFG supported the widest possible merger of orders under consideration. He said the proposed marketing area should include not only the area covered by Proposal 1, but also the marketing area proposed for inclusion by both Proposals 2 and 9. He stated that there was ample evidence of milk handlers from those additional areas (i.e., former Order 97 and Order 108) competing with handlers in the marketing area encompassed by Proposal 1 to support the inclusion of those areas in the merged order.

This witness testified that SFG owns and operates six fluid processing plants in Texas and Louisiana. The plants owned by SFG in Louisiana are the Foremost operation in Shreveport (regulated under Order 96) and the Brown's Velvet plant in New Orleans, which is regulated by Order 94.

The witness introduced a table showing the ratio of other order and partially regulated plants to pool distributing plants. He pointed out that the table showed that the ratio is greater than 2:1 for all of the present orders under consideration at this hearing, except for Greater Louisiana. The Georgia order had a better than 6:1 ratio, he said, while Memphis and Central Arkansas had 5:1 and 3:1 ratios, respectively.

The SFG spokesman stated that there was ample justification for a single large order based solely on the existing inter-order handler competition, the ratio of nonpool to pool plants in the separate orders, and the volume of out-of-area shipments of packaged products as shown in hearing exhibits. He said the Department should not create a new merged order without including all areas which are logically part of it, particularly if that would leave small orders right on the border of the new large order.

The witness also focused on the ability of the market administrator to collect and disseminate meaningful statistical data as a basis for supporting a merger of orders. He pointed out that confidentiality rules do not permit the market administrator to publish data for a zone or an order if less than three regulated handlers are included in that zone or order. More meaningful data and less cumbersome data can be released for a merged marketing area, he concluded.

The witness remarked that while SFG did not contest the idea of including Shreveport, Lake Charles, and the rest of western Louisiana in the new merged marketing area, it was important to note that handlers in Shreveport and Lake Charles sell significant quantities of milk into east Texas in competition with east Texas handlers and that east Texas handlers sell significant quantities of milk into western Louisiana.

He also pointed out that the record data showed that significant quantities of bulk milk from Texas were received at Louisiana plants and that the surplus Texas milk was available for reserve use in Louisiana. The existence of that reserve supply, he said, is a factor in the analysis of proper pricing in the new proposed order.

A spokesman testifying on behalf of Gold Star Dairy, Little Rock, Arkansas, stated that Gold Star supported the merger of the Federal orders based on the proposals before the Secretary. He emphasized that the proposed mergers in this hearing ''were not big enough for Gold Star,'' commenting that Gold Star's flexibility would be limited if it were not included in a much larger order.

Goldstar's representative said that based upon September marketings, Gold Star would be pooled under the Texas order in the event of a five-order merger and would be regulated under the proposed Gulf States order in the event of a seven-market merger. It would not be pooled under the proposed Mid-South order based upon sales, he added. He cautioned, however, that much of Gold Star's sales are to wholesalers so that the loss of one customer could determine under which order the plant is regulated.

The witness stated that Gold Star has a manufacturing plant in Clovis, New Mexico, in addition to its bottling plant in Little Rock. He said that the company also has a bottling agreement with the Flav-O-Rich Company to distribute products out of their Atlanta, Georgia, facility.

The witness indicated that Gold Star did not wish to be a high-utilization plant regulated and pooled in a low-utilization order because eventually it would be required to pay more for its milk. He added that Gold Star does not wish to be part of an order with a base-excess plan because it would limit Gold Star's flexibility in obtaining supplemental supplies during the base-excess months. He said that the proposed base-excess plan, coupled with the proposed ''dairy farmer for other markets'' provision, potentially builds barriers to the movement of milk. Gold Star's unique location outside the marketing area makes it vulnerable to those barriers, he said. He remarked that the fact that such provisions are needed to protect year-round supplies from pool riders indicates that the merger is too small.

The record supports a Southeast Federal milk marketing order. The evidence in this record clearly indicates the need to merge all but one of the separate orders in this proceeding into a ''Southeast'' order that will encompass all of the existing marketing areas of these orders as well as the presently unregulated territory specified at the outset of this discussion. The basis for reaching this conclusion is threefold: (a) There is a clear overlap in milk production areas—not between every order with every other order, but significant enough to link the orders together; (b) there is a clear overlap in the distribution of packaged fluid milk products by handlers regulated under the individual orders; and (c) there is an obvious need to insure marketing stability for all producers within the proposed marketing area. Since there was overwhelming support for the merger of Orders 7, 93, 94, 96, and former Order 98, and a clear unanimity of opinion expressed with regard to the overlap of milk production and sales in those areas, this discussion will focus primarily on the need to combine Proposals 1, 2, 9, and 13 to form one order comprised of existing orders 7, 93, 94, 96, and 108, the two orders terminated in 1993 (Orders 97 and 98), and the unregulated territory in Georgia, Tennessee, and Arkansas.

a. Overlap in Milk Production Areas

The overlap in milk production areas among two or more orders often results in producer unrest and market instability when blend prices differ to any extent between the orders. This happens because producers are generally aware of the prices being received by their neighbors and seek to find the most lucrative market for themselves. Sometimes, this may result in a producer leaving the cooperative association with which he or she has been associated or switching from one proprietary handler to another. It may also result in producers entering into business relationships with handlers of questionable financial stability, which could lead to the problem of handler defaults described on the hearing record.

The difference in two orders' blend prices at a particular location may be caused by a variety of factors, including order provisions, institutional factors, and the location of surplus manufacturing facilities, as well as obvious differences in class prices.

In the States of Louisiana, Mississippi, Alabama, and Georgia, the blend prices are greatly influenced by the presence of DI's butter-powder manufacturing plant at Franklinton, Louisiana, and Mid-America Dairymen Association's cheese plant at Kentwood, Louisiana, both of which are Order 94 pool plants that process surplus milk into lower-valued Class III and III-A products. The influence of these plants on blend prices in this region is evident when comparing the difference in Class I utilization between Order 94 and its neighbors: Orders 7, 96, and 93. As can be seen from Table 2, in 1991 the average Class I utilization for Order 94 was 69.7 percent, compared to 74.6 percent for Order 7, 80.4 percent for Order 96, and 79.7 percent for Order 93. A similar comparison of the utilization percentages contained in Table 2 shows that this pattern continued in 1992 and during the first seven months of 1993.

TABLE 2.—PERCENT CLASS I UTILIZATION OF PRODUCER MILK BY FEDERAL ORDER, 1991–93

	Order 7	Order 93	Order 94	Order 96	Order 97	Order 98	Order 99	Order 108
1991	74.6	79.7	69.7	80.4	73.7	80.2	78.6	73.3
1992	76.5	76.9	68.2	78.9	69.2	80.8	82.6	63.9
1993 [1]	80.4	76.1	59.1	69.9	59.8	80.4	87.4	58.7

[1] January–July.

The extremely high utilization of the Paducah market (Order 99), which increased from 78.6 percent in 1991 to 87.4 percent during the first nine months of 1993, can be attributed to the fact that there is only one handler, Turner Dairy, with a pool plant under that order and to the institutional changes that have occurred in that market, particularly the growth of a non-member milk supply and a corresponding reduction in cooperative association milk. Consequently, the single plant operator in that market has an incentive to keep the utilization as high as possible so as to generate a high blend price for its non-member producers. From a different perspective, it means keeping any reserve supplies associated with the plant to a minimum. This situation is far different from a market with manufacturing facilities, such as Order 94, which is handling a disproportionate share of the region's reserve supplies. It is noteworthy that as the Class I utilization of the Paducah order increased by 19 points from 1991 to 1993, the Class I utilizations of the neighboring Central Arkansas and Memphis orders dropped by 14 points.

The differences in blend prices resulting from these utilizations can be seen in Table 3, which compares average blend prices for 1991, 1992, and the first 7 months of 1993. With respect to Orders 97, 99, and 108, it should be noted that the higher Class I utilization for the Paducah order more than offset the fact that its Class I price was 38 cents lower than the Class I price for Orders 108 and 97.

TABLE 3.—BLEND PRICES BY FEDERAL ORDER 1991–93

[In dollars]

	Order 7	Order 93	Order 94	Order 96	Order 97	Order 98	Order 99	Order 108
1991	[1] 13.35	[1] 13.71	13.51	[1] $13.84	12.88	12.75	12.67	12.90
1992	[1] 14.64	[1] 14.83	14.63	[1] 15.01	13.94	13.99	14.02	13.86
1993 [2]	[1] 14.37	[1] 14.52	14.05	[1] 14.32	13.31	14.03	13.62	13.32

[1] Order 7 price adjusted to southern zone, Order 93 price adjusted to Zone IV, and Order 96 price adjusted to Zone III to be comparable to Order 94, which is reported for the highest-priced, southernmost zone.
[2] January–July.

The blend prices shown in Table 3 for Orders 7, 93, and 96 were adjusted to the highest-priced, southernmost zone, to be comparable with the Order 94 blend price, which is reported in that way. The lower utilization of Order 94 is evidenced by its blend price, which is far below that of Order 93 on the east or Order 96 on the west.

When price differences are related to location, there may be adequate grounds for justifying such differences. When they occur within a common production area, however, they cause market instability. Data in this record show many common production areas which are subject to significantly different blend prices.

Production data in the record shows a heavy production area in southern Mississippi and in the ''Florida parishes'' of Louisiana north of New Orleans. Milk from this area moves to Orders 96, 94, and 93. The record also indicates there is a very pronounced overlap in production areas between Orders 7 and 93 throughout northern

Georgia. The production area for the Georgia market also overlaps the procurement area for the former Nashville market in southeastern Tennessee. In addition, the counties throughout central Tennessee provide a significant share of the milk supply for Order 93 as well as former Order 98.

Table 4 shows the number of counties in various States from which producer milk was supplied to various combinations of orders. The table shows, for example, that in May 1993 there were 14 Arkansas counties from which producer milk was supplied to Orders 97 and 108; that the Memphis and Paducah orders shared a common supply area in four Tennessee counties, four Kentucky counties, three Arkansas counties, and four counties in south central Missouri; and that, in aggregate, the production area for Orders 93 and 98 overlapped in 38 counties in four different States. Order combinations that were left out of the table—for example, 108/96—had no production counties in common.

In each of the overlapping production areas referenced above, a pricing disparity problem either presently exists or potentially could exist as a result of the difference in the blend prices prevailing in those areas. A single merged marketing area will largely eliminate this problem, but it will, of course, persist to some extent wherever the merged marketing area abuts a neighboring marketing area (i.e., the Texas order, the Southwest Plains order, the Louisville-Lexington-Evansville order, the Tennessee Valley order, the Carolina order, and the Upper Florida order).

TABLE 4: NUMBER OF COUNTIES IN DESIGNATED STATES PROVIDING MILK TO SPECIFIED FEDERAL ORDER MARKETS IN MAY 1993

State	97/108	97/98	97/99	97/94	108/94	108/99	7/93	93/94	94/96	93/98	7/98
Arizona	14		3	3	3	3					
Missouri	8		4	4	5	4					
Tennessee		1	4	2				1		26	5
Kentucky			4	2						2	
Massachusetts				2				20	7		
Georgia							33			6	14
Alabama								2		4	
Florida								1			
Louisana								1	19		
Texas									1		
Total	22	1	15	13	8	7	33	25	27	38	19

b. Overlap in Sales Distribution Areas

Market instability may occur when handlers in one marketing area have significant distribution in another order's marketing area. Problems may arise because of Class I price misalignment between orders resulting in an undue price advantage for a handler in another market. Problems also arise when a handler in one marketing area has enough sales in another order's marketing area to become regulated under such other order. If the blend prices differ significantly at the plant's location, the handler may be forced to pay over-order charges to maintain its local milk supply, which, in turn, could put it at a competitive disadvantage vis-a-vis its competitors in the marketing area where it is located.

Data in the record indicate a significant overlap in distribution areas within the proposed Southeast marketing area.

In August 1993, 37.5 percent of the route disposition in Order 108 came from plants regulated under Orders 7, 49 (Indiana), 99, 106, and 126. These sales came from the following plants:

Plant/location	Federal order
Fleming Dairy, Nashville, Tennessee.	7.
Heritage Farms, Murfreesboro, Tennessee.	7.
Gold Star Dairy, Little Rock, Arkansas.	126.
Turner Dairies, Fulton, Kentucky	99.
Others	106, 126, 49.

In July 1993, during the last month of the Memphis order, the percentage of route disposition represented by other order plants was 30 percent of the total route disposition in the marketing area. These sales came from the following plants:

Plant/location	Federal order
Fleming Dairy, Nashville, Tennessee.	98.
Heritage Farms, Murfreesboro, Tennessee.	98.
Gold Star Dairy, Little Rock, Arkansas.	126.
Turner Dairies, Fulton, Kentucky	99.
Avents Dairy, Oxford, Mississippi	94.
Borden, Inc., Little Rock, Arkansas.	108.
Others	106, 126, 49.

The Paducah market also has an extremely high ratio of Class I sales represented by other order and partially regulated plants. In July 1993, 67 percent of the Class I sales in the Paducah marketing area originated from other order and partially regulated plants. These sales came from the following plants:

Plant/location	Federal order
Fleming Dairy, Nashville, Tennessee.	98.
Heritage Farms, Murfreesboro, Tennessee.	98.
Purity Dairies, Nashville, Tennessee.	98.
Others	32, 46, 49.

In the Georgia marketing area, other order and partially regulated distributing plants accounted for nearly 34 million pounds of Class I sales in August 1993. These sales, which represented roughly 28 percent of the total Class I sales that month, came from the following plants:

Plant/location	Federal order
Baker and Sons Dairy, Inc., Birmingham, AL.	93.
Barber Pure Milk Company, Birmingham, AL.	93.
Barber Pure Milk Company, Mobile, AL.	93.

Plant/location	Federal order
Dairy Fresh Corporation, Cowarts, AL.	93.
Flav-O-Rich, Inc., Montgomery, AL.	93.
Meadow Gold Dairies, Inc., Gadsden, AL.	93.
Superbrand Dairy Products, Montgomery, AL.	93.
Gold Star Dairy, Inc., Little Rock, AR.	126.
Others	2, 5, 6, 11, 13, 49, 131.

In the Alabama-West Florida market, Class I sales accounted for by other order and partially regulated plants in August 1993 totaled 15.4 million pounds or 17 percent of total Class I sales that month. These sales came from the following plants:

Plant/location	Federal order
Borden, Inc., Macon, Georgia	7.
Flav-O-Rich, Inc., Atlanta, GA	7.
Fleming Companies, Inc., Nashville, TN.	7.
Heritage Farms Dairy, Murfreesboro, TN.	7.
Flav-O-Rich, Inc., Atlanta, GA	7.
Kinnett Dairies, Inc., Columbus, GA.	7.
Superbrand Dairy Products, Inc., Greenville, SC.	7.
Avent's Dairy, Inc., Oxford, MS	94.
Barber Pure Milk Company, Tupelo, MS.	94.
Borden, Inc., Jackson, MS	94.
Turner Dairies, Fulton, Kentucky	99.
Gold Star Dairy, Inc., Little Rock, AR.	126.
Others	11, 46, 49, 131.

Class I sales by other order and partially regulated distributing plants in August 1993 accounted for 12 million pounds of Class I sales in the New Orleans-Mississippi marketing area or roughly 22 percent of the total Class I sales that month. These sales came from the following plants:

Plant/location	Federal order
Fleming Companies, Inc., Nashville, TN.	7.
Heritage Farms Dairy, Inc., Murfreesboro, TN.	7.
Barber Pure Milk Company, Mobile, AL.	93.
Brookshire Dairy Products Co., Columbus, MS.	93.
Dairy Fresh Corporation, Prichard, AL.	93.
Flav-O-Rich, Montgomery, AL	93.
Meadow Gold Dairies, Inc., Huntsville, AL.	93.
Superbrand Dairy Products, Montgomery, AL.	93.
Borden, Inc., Lafayette, Louisiana	96.
Dairy Fresh of LA, Baker, LA	96.
Kleinpeter Farms Dairy, Baton Rouge, LA.	96.
Turner Dairies, Fulton, KY	99.
Forest Hill Dairy, Memphis, TN	108.
Gold Star Dairy, Inc., Little Rock, AR.	126.
Others	13, 49, 139.

Finally, in August 1993, other order and partially regulated distributing plants accounted for 16.3 million pounds of Class I sales in the Greater Louisiana marketing area or roughly 40 percent of the total Class I sales that month. These sales came from the following plants:

Plant/location	Federal order
Borden, Inc., Baton Rouge, LA	94.
Borden, Inc., Jackson, MS	94.
Brown's Velvet Dairy Prod., Inc., New Orleans, LA.	94.
Dairy Fresh Corp., Hattiesburg, MS.	94.
Superbrand Dairy Products, Inc., Hammond, LA.	94.
Borden, Inc., Conroe, TX	126.
Borden, Inc., Tyler, TX	126.
Gold Star Dairy, Inc., Little Rock, AR.	126.
Southwest Dairy, Tyler, TX	126.
Vandervoorts Dairy, Fort Worth, TX.	126.

The Class I sales data discussed above indicate clearly that each of the markets involved in this proceeding is closely integrated with neighboring Federal order markets. However, it still leaves open the question of how best to combine these orders because sales data alone do not provide sufficient guidance to answer this question.

c. Market Stability

The third factor that must be considered in determining the appropriate marketing area is the need to insure market stability, a prime objective of the Agricultural Marketing Agreement Act.

The record testimony paints a picture of a rapidly evolving industry. The marketing of milk products continues to change with ever-wider distribution areas, centralized operations, inter-handler marketing agreements, two-way containers, back-hauling arrangements, plant closings, and changes in ownership, among others. As handlers widen their distribution patterns, blend prices are buffeted by the changing Class I utilization that a large plant can cause in a marketwide pool. The shifting of a plant from one order to another can, and does, result in handlers being placed in a position where they can no longer hold on to their milk supply. Most of these changes were described in the record; some were not. Official notice is taken of the closing of Guth Dairy in Lake Charles, Louisiana; Acadia Dairy in Thibodaux, Louisiana; and Walker Resources in Metairie, Louisiana; and the minority financial interest acquired by Mid-America Dairymen, Inc., in Southern Foods Group effective February 17, 1994.

On the producer side, there have also been significant changes in marketing arrangements. Producers have left their cooperative associations, formed new cooperative associations, and merged existing cooperatives. Official notice was previously taken of the merger of Gulf Dairy Cooperative Association and Mid-America Dairymen, Inc., effective March 1, 1994.

The record evidence in this proceeding—specifically, the overlap of procurement and sales areas, together with the need for stability in a rapidly changing marketing environment—lead us to conclude that orderly marketing will best be served by a market that is large enough to equitably share the region's reserve supplies, to provide regulatory stability for the plants in this area, and to provide producers with the freedom to market their milk in whatever manner and to whomever they wish.

Although there are many instances of plants that are located in one market, but regulated in another market, there are also many price alignment problems that result from these situations.[4] It is best, if possible, to avoid them. The Gold Star plant would enjoy a more stable marketing environment if it were located in the Southeast marketing area, instead of the Mid-South marketing area proposed by AMPI.

The larger Southeast market will give producers in the Central Arkansas and former Memphis markets more choices in marketing their milk. At present, there are a limited number of distributing plants available to producers in those markets and those that are available are primarily supplied

[4] Official notice is taken of the suspension of certain provisions of the Greater Louisiana order effective November 1, 1993, (58 FR 63031) to keep a Lake Charles, Louisiana, plant from becoming regulated under the Texas order, under which the plant would have experienced a sharp reduction in its blend price.

by AMPI. Under the merged order, however, producers will have a choice of many different handlers and cooperatives through which to market their milk. With a uniform set of regulations applicable to the larger market, it will be easier for producers to supply different handlers at different times of the year without fear of being shut out of the market because of separate base and excess plans that are now, or have in the past, been applicable to several of the individual orders involved in the merger.

As indicated in the record, the Paducah market is, for all intents and purposes, an individual handler pool. Producers that are fortunate enough to have a market with Turner Dairies enjoy extremely high blend prices and a stable marketing environment. Their neighbors, on the other hand, who are not part of Turner Dairies' nonmember supply but instead belong to cooperative associations such as AMPI, Mid-Am, or ADCA, must move their milk to whatever market is available to them and, according to the testimony of Turner producers who have compared milk checks, receive less money for their milk. This is not the essence of a marketwide pool: To preserve a market for one group of producers, while their neighbors, who balance the Class I needs of the market, must ship their milk hundreds of miles away and receive lower prices for it. In fact, the fluid market and the reserve market should be shared equally among all producers in a marketwide pool.

The Paducah market is not equitably distributing returns to producers supplying that market and should be considered for incorporation within a larger market, but it should not be incorporated in the proposed Southeast market. An analysis of the Federal order exhibits entered into the record indicates that in August 1993 there were 11.5 million pounds of milk pooled under Order 99, of which 88.4 percent was Class I. Since Turner Dairies' Fulton, Kentucky, plant was the only pool plant that month, its Class I sales were approximately 10.2 million pounds (i.e., $.884 \times 11.5$). The exhibits also show that there were 2.0 million pounds of Class I sales in the marketing area from the Fulton plant, leaving about 8.2 million which were distributed in other marketing areas. Although the exact distribution of these 8.2 million pounds was not shown in the record, it is known from the exhibits that there was distribution from this plant into the Central Arkansas, Memphis, New Orleans-Mississippi, and Alabama-West Florida marketing areas. If this pattern of distribution were to continue under the proposed Southeast order, the Fulton, Kentucky, plant would become regulated under that order.

According to the data in the hearing record, in July 1993—the most recent month in which separate data for the Nashville market was available—33 percent of the Class I sales in the Paducah marketing area were made by Turner Dairies, Fulton, Kentucky; 22 percent of the sales were made by handlers regulated under Order 32; 18 percent of the Class I sales were made by Nashville area plants; and the remaining 27 percent of Class I sales were made by plants that were regulated under Orders 46 or 49 (Indiana), or by handlers that were partially regulated or unregulated. With this distribution pattern, the Paducah marketing area may fit more appropriately with one of these other orders than it does with the proposed Southeast marketing area.

The Memphis market in July 1993, its last month of operation, resembled the Paducah market in having only Turner Dairies plants. In addition to its Memphis plant, Turner Dairies also operated a plant at Covington, Tennessee, 36 miles northeast of Memphis. Unlike the Paducah market, a majority of the other order sales in the Memphis market are from handlers that would be regulated under the proposed Southeast order. Also, there is a significant overlap in procurement areas between the Memphis order and the Central Arkansas and New Orleans-Mississippi orders. There is clearly sufficient evidence in the record to warrant regulation of the Memphis area as part of the Southeast marketing area.

In August 1993, the Central Arkansas market had four fully regulated distributing plants: The Borden, Inc., plant in Little Rock; the Forest Hill Dairy Plant (i.e., Turner Dairies) that was regulated under the Memphis order in July 1993; Coleman Dairy, Inc., in Little Rock; and Humphrey's Dairy in Hot Springs, 55 miles southwest of Little Rock.

Before it shifted to the Texas order in January 1993, the Gold Star plant also was regulated under the Central Arkansas order. During December, its last month under Order 108, there were 49.1 million pounds of producer milk pooled under that order; in January the pounds of producer milk dropped to 24.9 million pounds. There was a similar drop in Class I producer milk, from 30.2 million pounds in December 1992 to 15.4 million pounds in January 1993.

In August 1993, there were 38.4 million pounds of producer milk pooled under the Central Arkansas order, including the producer milk of Forest Hill Dairy (i.e., Turner Dairies), which had been pooled under Order 97. Combining this amount with the 11.5 million pounds of producer milk pooled under the Paducah market that month yields a combined total of approximately 50 million pounds, which would have made it one of the smallest Federal order markets that month.

The point of this comparison is to show that, if the AMPI proposal had been adopted, it would have created a market that would not have provided the marketing stability that is needed in this area. In fact, it is very likely that the proposed Mid-South market would have been the subject of another lengthy merger proceeding within the near future.

AMPI and Mid-Am filed exceptions objecting to the denial of the proposal for a Mid-South marketing area. Mid-Am stated that there is very little overlap of distribution and procurement between the proposed Mid-South marketing area and the other areas included in the Southeast marketing area. In addition, Mid-Am argues that the minimal overlap in distribution between Central Arkansas and the rest of the Southeast marketing area is from two plants: the Gold Star plant in Little Rock that distributes into the Greater Louisiana and New Orleans-Mississippi marketing areas and the Fleming Dairies plant in Nashville that distributes into the Central Arkansas and former Memphis marketing areas.

The findings in this decision specifically note that the Gold Star plant has distribution in the Georgia marketing area and the Alabama-West Florida marketing area, in addition to the Greater Louisiana and New Orleans-Mississippi marketing areas. The former Memphis market not only receives distribution from the Fleming Dairies plant at Nashville, but also from the Heritage Farms plant at Murfreesboro, Tennessee (Order 7), and Avents Dairy at Oxford, Mississippi (Order 94). Finally, the Heritage plant and the Fleming plant distribute fluid milk products into the Central Arkansas marketing area.

The overlap in procurement between Orders 7, 93, 94, and 96 with Orders 108, 97, and 99 is not as great as it is among other marketing areas being merged. Nevertheless, there is an overlap in procurement between Order 94 and former Order 97 (13 counties in May 1993) and between Orders 94 and 108 (8 counties in May 1993). Moreover, the need to merge these marketing areas is justified by a combination of factors (distribution, procurement, and marketing stability) that justifies the inclusion of Central Arkansas and Memphis in the Southeast marketing area.

The Southeast marketing area adopted in this decision encompasses all of the areas involved in this proceeding, with the exception of the Kentucky portion of the former Nashville, Tennessee, order, the Texas counties of Cass and Bowie, the Missouri county of Dunklin, and the Paducah marketing area. This excluded area (other than the already discussed Paducah area), and the previously unregulated area in Tennessee, Georgia, and Arkansas that has been included are discussed below.

Kentucky portion of former Nashville marketing area. The Kentucky counties of Allen, Barren, Metcalf, Monroe, Simpson, and Warren, and the Fort Campbell military reservation should not be included in the Southeast marketing area.

Proponents of Proposal No. 1 indicated that they had included these counties in their proposal because they had been in the previously regulated Nashville marketing area.

There are no plants in these counties, except the Glasgow Cheese Plant, which, according to the record, is not capable of supplying the market because it does not have a Grade A receiving facility.

These counties are surrounded on three sides by the Louisville-Lexington-Evansville order. There are no distributing plants in these counties, and there are no significant population centers, other than Bowling Green (population: 42,017) and Fort Campbell. According to the witness for Fleming Dairy in Nashville, there are no significant sales in these counties from Nashville distributing plants.

In view of their northernmost location and their proximity to the Order 46 marketing area, the Fort Campbell Military Reservation and the six Kentucky counties that were part of the Nashville marketing area should not be included in the Southeast marketing area, but instead should be left unregulated at this time. There are no plants that would be unregulated by their exclusion from the marketing area.

The Georgia county of Rabun. This county, in the extreme northeast portion of the State of Georgia within the Chattahoochee National Forest, is surrounded on the west and south by the Georgia marketing area and on the east and north by the Carolina marketing area. There are no milk plants located within the county and no change in the regulatory status of any plant would occur as a result of its inclusion in the Southeast marketing area. It should be included in the marketing area for administrative convenience.

The Tennessee counties of Van Buren, Bledsoe, Grundy, Franklin, Lincoln, and Moore. These previously unregulated counties are located between the Tennessee Valley marketing area on the east, the terminated Nashville marketing area on the west, and the Alabama-West Florida marketing area on the south. This is a sparsely populated area from which milk is produced for the Nashville and Alabama-West Florida markets. There are no milk plants in these counties and no currently-unregulated plants outside of these counties would be regulated by the inclusion of these counties in the marketing area. This area should also be included in the proposed marketing area.

The Tennessee counties of Henry, Carroll, Benton, Decatur, Henderson, Chester, and McNairy. These seven counties, bordered on all sides by the proposed Southeast marketing area, should also be part of the marketing area. There are no milk plants in this area, nor are there any plants that would become regulated as a result of their addition to the marketing area. Since they would be bordered on all sides by other parts of the marketing area, no useful purpose would be served in leaving them out of the marketing area.

The unregulated Arkansas counties. These counties, which were proposed by AMPI for inclusion in the Mid-South marketing area, should be included in the Southeast marketing area. There are no distributing plants in these counties, and no new plants will become regulated as a result of the inclusion of these counties in the marketing area.

The unregulated Texas counties of Bowie and Cass. The Texas counties of Bowie and Cass should not be included in the Southeast marketing area. The apparent reason for including these counties in the proposed Mid-South marketing area was for administrative convenience since these two unregulated Texas counties would have been surrounded by regulated area. This is a good reason to include these two counties, but they may, in fact, be more closely associated with the Texas market. Rather than introduce the State of Texas into the Southeast marketing area for the sake of two counties that do not include any distributing plants, the counties of Bowie and Cass should be left unregulated for possible inclusion in the Texas marketing area when the opportunity presents itself.

Similarly, since the Paducah marketing area has not been included in the Southeast marketing area, there is no point in adding one Missouri county to the marketing area for the sake of map-drawing convenience. Therefore, Dunklin County, Missouri, should not be part of the Southeast marketing area.

2(a). Milk to be priced and pooled.[5] It is necessary to designate what milk and which persons would be subject to the merged order. This is accomplished by providing definitions to describe the persons, plants, and milk to which the applicable provisions of the order relate.

The definitions included in the order serve to identify the specific types of milk and milk products to be subject to regulation and the persons and facilities involved with the handling of such milk and milk products. Definitions relating to handling and facilities are ''route disposition,'' ''plant,'' ''distributing plant,'' ''supply plant,'' ''pool plant,'' and ''nonpool plant.'' Definitions of persons include ''handler,'' ''producer-handler,'' ''producer,'' and ''cooperative association.'' Definitions relating to milk and milk products include ''producer milk,'' ''other source milk,'' ''fluid milk product,'' ''fluid cream product,'' and ''filled milk.''

Several of these definitions were of particular issue at the hearing: i.e., ''route disposition,'' ''pool plant,'' ''producer-handler,'' and ''producer.'' All of the remaining definitions are patterned after those contained in one or more of the orders involved in this proceeding. Official notice of the final decisions setting forth the need and basis of such provisions was taken at the hearing. A discussion of those definitions that were of particular issue at the hearing, as well as those that involve substantive modifications, is set forth below.

Route disposition: § 1007.3. The route disposition definition sets forth the type of deliveries that are considered in determining whether a distributing plant qualifies for pooling under the order.

As proposed in Proposal No. 1, route disposition means any delivery to a retail or wholesale outlet (except to a plant) either direct or through any distribution facility (including disposition from a plant store, vendor or vending machine) of a fluid milk product classified as Class I milk. This definition should be modified slightly to include, for the limited purpose of determining pool plant qualification, packaged fluid milk products that are transferred from a plant with route disposition in the marketing area to a

[5] The findings and conclusions in this section are identical to those of the recommended decision, except for ''lock-in provision,'' ''unit pooling,'' ''supply plants,'' ''producer-handler,'' ''producer,'' and ''producer milk.''

distributing plant if such transfers are classified as Class I milk.

This language, which is also included in the Eastern Colorado Federal milk order (See § 1137.3) is necessary to preclude a plant from becoming partially regulated because it ships significant quantities of packaged fluid milk products to another distributing plant, which then distributes those fluid milk products to retail and wholesale outlets. This precise situation has occurred in the neighboring Southwest Plains order, where a previously fully regulated plant failed to qualify as a pool plant because it shipped more than 50 percent of its packaged fluid milk products to a distributing plant which it operated in another city.[6] As a partially regulated plant with a Class I utilization higher than the market average, the handler was in a position to pay its producers a price in excess of the order's blend price. In addition, during one month AMPI was required to depool milk that it had diverted from the plant in order to insure that the plant qualified as a pool plant. This resulted in financial loss to the cooperative.

To prevent this situation from occurring in the Southeast marketing area, the route disposition definition should include, for the limited purpose of determining pool plant qualification, packaged fluid milk products that are transferred from a plant with route disposition in the marketing area to a distributing plant if such transfers are classified as Class I milk.

As a general application of the order, packaged fluid milk products that are transferred from one handler to another will be treated as an interhandler transfer. Thus, each transaction should be properly identified and specifically reported as such to the market administrator. This will facilitate orderly operations and eliminate ambiguous or dual reports.

The modified route disposition definition adopted herein will not change this treatment. It merely provides that such transfers, which are classified as Class I and emanate from a plant with route disposition in the marketing area, shall be considered as route disposition from the transferor plant, rather than the transferee plant, for the single purpose of qualifying the transferor plant as a pool distributing plant under § 1007.7(a).

Plant: § 1007.4. A plant definition should be included in the merged order to remove any uncertainty with respect to what constitutes a plant and what constitutes a reload point.

The cooperative coalition's proposed plant definition is identical to the definition now found in Order 93. Order 96 contains a slightly different plant definition, while Orders 7, 94, and 108 do not define this term.

The cooperatives' proposed definition should be adopted for the merged order. The proposal defines plant as the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products, including filled milk, are received, processed, or packaged. Separate facilities without stationary storage tanks and used only as reload points for transferring bulk milk from one tank truck to another or separate facilities used only as distribution points for storing packaged fluid milk products in transit for route disposition would not be plants under this definition.

There was no opposition to this proposal at the hearing or in the briefs that were filed. This definition is widely used in other Federal orders and is familiar to the industry. It should be included in the merged order.

Pool plants: § 1007.7. Essential to the operation of a marketwide pool is the establishment of minimum performance standards to distinguish between those plants substantially engaged in serving the fluid needs of the regulated market and those plants that do not serve the market in a way or to a degree that warrants their sharing in the Class I utilization of the market. The pooling standards that are contained in the attached order would carry out this concept under present marketing conditions.

Distributing plants: § 1007.7(a). To be pooled under the merged order, a distributing plant's total route disposition each month must be equal to 50 percent or more of the fluid milk products physically received at the plant or diverted from the plant during the month. In addition, the plant's daily average route disposition in the marketing area must be equal to at least 1,500 pounds per day or 10 percent of the plant's receipts of fluid milk products, except filled milk, physically received at the plant or diverted from it during the month.

Citing an expected Class I utilization under the merged order that is likely to exceed 68 percent during all months of the year, the cooperative coalition proposed a total route disposition requirement of 50 percent each month of the year and an in-area route disposition requirement of 10 percent. These requirements are similar to those of the five existing markets, except for the Georgia market, which has a 15 percent in-area requirement. These standards are reasonable and should be adopted for the merged order.

Lock-in provision: § 1007.7(d). With a 10 percent in-area route disposition requirement, it is possible that a distributing plant may meet the pooling standards of more than one order. A question then arises concerning under which order the plant should be regulated. Under Proposal No. 1, a distributing plant that met the order's pooling standards would be regulated under the Southeast order if the plant is located in the Southeast marketing area. This is a sensible provision to have in this area and should be adopted.

Testifying in support of the lock-in provision, the spokesman for the cooperative coalition stated that this provision differs slightly from the traditional Federal order method of determining where a distributing plant should be regulated when the plant qualifies for pooling under more than one order. He explained that the traditional method provides that a plant should be pooled under the order in which it has the most sales. The principle behind that rule, he added, was to insure that all handlers having sales in an order area were subject to the same price and other regulatory provisions as their competition.

The coalition's witness stated that with the advent of processing plants with sales distribution over wide geographic areas, the traditional method of pooling distributing plants is outdated. He said that another, and equally important, reason for adopting a lock-in provision is to minimize any inequities which may occur between producers located within the same geographic supply area. These inequities are created when a distributing plant is located within one marketing area and obtains its milk supply within that marketing area, but is regulated by another Federal order.

The witness referred to an exhibit which compared blend prices under the Greater Louisiana and the adjacent Texas orders. He noted that the Greater Louisiana order blend prices, f.o.b. Lake Charles and Shreveport, Louisiana, have been substantially above the Texas order prices at similar locations. He said that the 73 to 77 cents per hundredweight average difference in blend prices between the two orders, considering the overlap of supply for both plants, would create unstable and disruptive marketing conditions in the proposed merged order supply area and that these differences in producer pay prices would create difficulties in maintaining

[6] Official notice is taken of the suspension of certain provisions of the Southwest Plains order effective February 1, 1994 (59 FR 11180).

sales and attracting adequate supplies of milk for handlers under the merged order.

In its brief, Southern Foods Group urged the Secretary to reject any lock-in provisions, arguing that it was philosophically opposed to a lock-in provision unless the provision is designed to avoid switching the regulation of a plant from one market to another on a frequent basis. It stated that ''in general, a plant should be regulated where it has a plurality of its milk distribution since that is where it is competing the most against other regulated handlers.'' The brief also stated that the problem experienced by Guth Dairy, Lake Charles, Louisiana, is irrelevant because that plant has gone out of business. Finally, focusing on Gold Star Dairy in Little Rock, SFG argued that if that plant has greater sales in the Texas marketing area than in the Southeast marketing area it should be regulated under the Texas order.

The question of where to regulate a plant that meets the standards of more than one order may actually depend upon the circumstances involved. While SFG holds that the plant should be regulated in the market in which it mostly competes for sales, problems that have surfaced in the past year in the Greater Louisiana, Tennessee Valley, and Louisville-Lexington-Evansville orders would indicate that a handler's procurement area may be more important than its distribution area in determining where the plant should be regulated.

Given proper Class I price alignment between two orders (i.e., the same Class I price at a given location regardless of which order a plant is regulated under), a plant which meets the pooling standards of more than one order will be in a better position to procure a milk supply by being regulated in the marketing area in which it is located unless it is shipping milk into a market which is generating a higher blend price at the plant's location. Even with the higher blend price under the other order, however, it may still not be appropriate to regulate the plant under the higher-priced market if, in doing so, it causes disorderly marketing conditions in the market where the plant is located.

With the exception of the Upper Florida market, the Southeast marketing area is surrounded by markets with equal or lower prices. In addition, it is expected that the Class I utilization of the Southeast market will exceed the utilization of these surrounding markets with the exception of the Upper Florida market. Consequently, the blend price at any location within the Southeast marketing area is likely to be higher than the blend price at that location under any of the surrounding orders.

As indicated, the sole exception to this statement is in southern Georgia or southern Alabama, where there are no plants at the present time that would qualify for pool status in the Upper Florida market. In view of this, the lock-in provision proposed for the Southeast market is a prudent measure that will avoid the disorderly marketing conditions that result when a plant becomes regulated in a lower blend price market or switches back and forth between two orders.

Under the proposed Southeast order, a plant that qualifies as a pool distributing plant and which is located within the marketing area will be regulated under this order even if it has greater sales in another order's marketing area. The adjacent Texas, Southwest Plains, Paducah, Louisville-Lexington-Evansville, and Upper Florida orders contain provisions (§§ 1126.7(f)(4), 1106.7(f)(2), 1099.7(c)(3), 1046.7(e)(3), and 1006.7(d)(3), respectively) that will conform to this provision by yielding regulation of the plant to the Southeast order. However, §§ 1005.7(d)(3) and 1011.7(d)(3) of the Carolina and Tennessee Valley orders, respectively, do not contain this type of provision, setting up a potential conflict with § 1007.7(d), which will only release a plant that has more sales in another marketing area if the plant is not located in the Southeast marketing area.

At the present time, there is no distributing plant in the Southeast marketing area that has, or is likely to have, more sales in the Carolina or Tennessee Valley marketing areas than in the Southeast marketing area. Should this situation change, however, and a plant located in the Southeast marketing area does develop more route disposition under Order 5 or 11 than under Order 7, the plant should remain regulated under Order 7 notwithstanding the provisions of Orders 5 and 11.

The Southeast order should also contain a provision releasing a plant from regulation if the other order contains a provision that requires regulation of the plant because of its location within that order's marketing area. For example, the Louisville-Lexington-Evansville order, in § 1046.7(e)(2)(ii), requires regulation of a distributing plant if the plant meets the pooling standards of § 1046.7(a), is located in the marketing area, and is subject to a Class I price under Order 46 that is not less than the Class I price under another order in which it also qualifies as a pool plant and in which marketing area it has more route disposition. Accordingly, a paragraph is included in the proposed Southeast order, § 1007.7(e)(4), which recognizes the jurisdiction of Order 46 to regulate such a plant.

A new paragraph—§ 1007.7(d)—has been added to the pool plant rules in this final decision to clarify the application of the lock-in provision. Although the order language would clearly regulate such a plant by not releasing it to another order in either § 1007.7(g) (3) or (4), the inclusion of the new paragraph (d) leaves no doubt about the matter.

Multiple order pooling. At the hearing, Gold Star suggested another way of handling a plant with sales in more than one market. It suggested prorating the plant's sales among the markets in which it qualifies for pooling and in which it has at least 25 percent of its sales. Producers supplying the plant would receive a weighted average price based upon the blend prices of the various markets in which the plant so qualifies.

This proposal should not be adopted. It would result in paying producers different prices in a common supply area—one of the problems cited for merging these orders—and it would be cumbersome to administer. With this merger and perhaps others to follow, the regulatory problems experienced with large plants distributing over wide areas should be significantly diminished.

Unit pooling: § 1007.7(e). Barber Pure Milk Company (Barber) and Dairy Fresh Corporation (Dairy Fresh) proposed the ''unit pooling'' of a distributing plant and one or more other plants. Under their proposal, a unit consisting of one distributing plant and one or more additional plants of a handler at which Class I and/or Class II products only are processed and packaged would be considered as one plant for the purpose of meeting the pool distributing plant requirements if all of the plants in the unit were located within the marketing area, and if, prior to the first of the month, the handler operating such plants filed a written request for unit pooling with the market administrator. The proposal would permit only one unit per handler, require that all plants in a unit be located in the marketing area, and exclude plants producing frozen desserts from being part of a unit.

Barber's spokesman testified that Barber Pure Milk Company operates two non-pool plants that process and package Class II products, one located in Montgomery, Alabama, and the other located in Oxford, Alabama. The Montgomery plant processes dessert and ice cream mix and buttermilk for baking and currently receives about 700,000 pounds of milk from producers per month. The Oxford plant processes and packages cottage cheese, sour cream, and sour cream dip and receives about 400,000 pounds of milk from producers each month.

The witness stated that, up until early 1992, Barber operated four plants on the Alabama-West Florida order, located at Birmingham, Mobile, Montgomery, and Oxford, Alabama, which is 60 miles east of Birmingham. Each of the four plants engaged in the manufacture of Class II products in varying degrees. He said that, for efficiency purposes, the Class I processing and packaging at the Montgomery and Oxford plants was moved to the Birmingham and Mobile plants, while the Class II processing and packaging at the Birmingham and Mobile plants was moved to the Montgomery and Oxford plants.

The Barber witness stated that to accommodate this economical specialization of plant operations and not create any chaos in the marketplace, it was necessary to make some changes in the order. If the unit pooling proposal is not adopted, he said, it will become necessary to incur unnecessary costs of moving milk to pool distributing plants, unloading the milk, reloading the milk, and transporting it back to the Class II specialty plants. He noted that the diversion provisions will accommodate the movement of some of the needed milk directly from the farm to the Class II plants, but not all of the milk required.

The Barber witness testified that the milk supply for the Oxford plant comes from six producers located in the Alabama counties of Calhoun, Etowah, and Talladega who produce approximately 500,000 pounds of milk per month or about 80 percent of the plant's requirements. He said that without the unit pooling provision, about two-thirds of this milk could be diverted to the Oxford plant, but the remaining third would have to be delivered to the Birmingham pool plant, unloaded at the plant, reloaded, and hauled the 60 miles back to Oxford. The additional cost involved in this, he estimated, was approximately 47 cents per hundredweight or $225 per load.

This witness also testified that milk to supply the Montgomery plant of approximately 700,000 pounds per month is located in northern Alabama and Tennessee and must be transported through the city of Birmingham on its way to Montgomery. There is no additional hauling cost if the milk is received at Birmingham; however, the cost of receiving the milk, washing the truck, and reloading the milk adds an additional .20 cents per hundredweight to the cost of the milk at Montgomery or an additional $95 for each load of milk received at Birmingham and then transferred to Montgomery.

The witness stated that unit pooling should not be rejected because of concerns about attracting additional supplies of milk to the market for Class II products. He said that the production of Class II products was demand driven and that no additional quantity beyond the demand would be produced by the specialized plants. Nevertheless, to allay any concerns that these plants would be used for surplus disposal, he said the proposal restricts unit pooling to plants which produce Class I and II products only, excluding ice cream.

In its proposal concerning the proposed Mid-South marketing area, AMPI also proposed the unit pooling of plants that are located within the marketing area. Unlike the Barber/Dairy Fresh proposal, the AMPI proposal did not exclude plants making ice cream from the unit.

In its post-hearing brief, the Fleming Companies urged that unit pooling be rejected. It stated that pool performance standards should be fixed so that each producer, each plant, and each supply organization demonstrate a close association with the Class I requirements of the market.

The unit pooling proposals make economic sense and should be adopted for the merged marketing area, but with certain restrictions.

The order's pooling standards insure that each distributing plant and each unit of plants consisting of at least one distributing plant perform at the same minimum level to be eligible for pool plant status. The total route disposition requirement—50 percent each month of the year—recognizes that not all of the plant's receipts will be needed for Class I use. That standard permits up to 50 percent of the plant's receipts to be used in Class II, III, or III-A products.

If Handler A chooses to operate one large distributing plant in which 40 percent of the plant's receipts are used in Class II products, while Handler B chooses to operate a distributing plant exclusively for fluid use and another plant exclusively for Class II products and the Class I utilization of both plants added together is 60 percent, it makes no sense to preclude Handler B from separating the operations. Both handlers are performing at precisely the same levels; they simply differ in their modes of operation. They should be permitted to operate in whatever manner they deem most efficient.

As proposed by Barber and Dairy Fresh, a unit should be restricted to plants located in the marketing area that make only Class I or Class II products. If a handler wishes to add or remove plants from the unit, the handler would have to file a request with the market administrator before the first day of the month in which the change is to be effective.

The provision adopted here deviates from the Barber/Dairy Fresh proposal by permitting plants that make frozen desserts to be included in a unit. No convincing rationale was given for excluding ice cream or other frozen dessert plants from a unit. This restriction would be unfair to a handler who makes ice cream in a separate plant, as compared to another handler who bottles milk and makes ice cream in the same plant. It also would require a set of standards to determine what is a frozen dessert plant and what is not. For example, if 50 percent of a manufacturing plant's milk was used to make cottage cheese and 50 percent was used to make ice cream, one would have to determine whether this plant was a cottage cheese plant or a frozen dessert plant. There is no basis for distinguishing frozen desserts from other Class II products for the purpose of unit pooling. Accordingly, this part of the Barber/Dairy Fresh proposal is not adopted.

One additional restriction should be added to the proposal, however. It would be inappropriate to permit a Class II operation in a higher-priced zone to unit pool with a distributing plant in a lower-priced zone. An example will illustrate the point.

If a handler with a plant in Montgomery, Alabama, processed 6 million pounds into Class I products and 4 million pounds into Class II products, it would pay into the pool—based on prices proposed in this decision—a Class I location adjustment of $12,000 (i.e., 6 million pounds x $.20 per cwt.), but in paying producers supplying the plant, the handler would draw out of the pool a location adjustment value of $20,000 (i.e., 10 million pounds x $.20 per cwt.). In effect, the handler would take out of the pool in location value $8,000 more than it contributed.

It is universally true that a handler in a higher-priced zone will draw out of the pool more location value in the blend price to its producers than it contributes on the basis of its location adjustment for Class I milk. This is because the pooling standards do not require a handler to use all its milk in Class I. Because the market for Class II products is more of a regional market, location value has not been added to Class II products. The pool, in effect, absorbs a certain amount of transportation cost to provide a handler with milk for Class II use. When both the Class I and II products are processed at the same plant, this subsidization is limited by the amount of milk that may be used in Class II at that location.

Under the unit pooling proposal of Barber and Dairy Fresh, it would be possible to unit pool a Class I distributing plant in a lower-priced zone (e.g., Montgomery, Alabama) with a Class II operation in a higher-priced zone (e.g., Franklinton, Louisiana). Assuming that in this unit, the Montgomery plant processed 6 million pounds of Class I milk, while the Franklinton plant processed 4 million pounds of Class II milk, the handler would contribute $12,000 to the pool in location value on Class I milk, but it would draw out of the pool $32,000 (i.e., 6 million pounds x $.20 in Montgomery plus 4 million pounds x $.50 cents in Franklinton). In other words, it would take out of the pool $20,000 more than it contributed in location value.

It would not be fair to expect all of the market's producers to subsidize the delivery of milk for Class II use in the Montgomery/Franklinton unit example described above. As previously noted, a certain amount of subsidization will always occur to the extent that Class I route disposition requirements are less than 100 percent and no location value is attached to the Class II price. However, the opportunity to take advantage of this situation is equally available to all of the market's handlers. On the other hand, under the Barber/Dairy Fresh unit pooling proposal large handlers with multiple plants would be able to take a disproportionate share of location value out of the pool if their Class II operation were located in a higher-priced zone than their Class I operation.

To correct this inequity, the composition of units should be further restricted. Specifically, in a unit consisting of two or more plants, any plant that, by itself, would not qualify as a pool plant must be located in a pricing zone providing the same or a lower Class I price than the price applicable at the unit distributing plant that would, by itself, qualify as a pool plant. Thus, for example, a Class II operation in Nashville may unit pool with a Class I operation in Atlanta, but a Class II operation in Atlanta may not unit pool with a Class I operation in Nashville.

This additional restriction on unit pooling will insure a degree of fairness to all of the market's handlers in processing Class II products and to all of the market's producers in the distribution of pool funds. It also will tend to encourage milk in lower-priced areas to be used in lower-valued products while encouraging milk to move to the market's higher-priced areas for use in Class I.

In their exceptions, Barber Pure Milk Company (Birmingham, Alabama) and Dairy Fresh Corporation (Greensboro, Alabama) objected to the additional unit pooling restriction. They contend that any handler can accomplish the same result—i.e., pool milk at a higher-priced location—by diverting milk to a Class II plant located in the higher-priced zone. They argue that it is more efficient to permit unit pooling for Class II plants located in higher-priced zones than the pricing zone of the qualifying distributing plant and urge that the restriction be removed.

First of all, it is not possible to accomplish the exact same result by diverting milk to a Class II plant in a higher-priced zone. The Barber witness testified that some milk could be pooled in this manner, but not all of the milk that might be required. Before a handler can divert milk, the milk to be diverted must become eligible for diversion. This is accomplished by delivering the milk to a pool plant for a minimum number of days. Under the Southeast order, at least 10 days' production (4 days' production during January through June) must be received at a pool plant during the months of July through December.

Because of this requirement, there is a practical limit on where milk will be diverted in relation to the pool plant from which diverted. For example, it is unlikely that a handler in Nashville will divert milk to a nonpool plant in Hattiesburg. With unit pooling, however, milk going to a Class II operation may have no association with a Class I operation that is hundreds of miles away.

There is no indication of how the removal of this restriction would promote greater efficiencies. However, the decision clearly sets forth the reasons for the restriction: to promote a degree of fairness to all market handlers, whether their Class I and Class II uses are in the same or separate facilities, and to the market's producers in the distribution of pool funds.

Supply plants: § 1007.7(b). A supply plant should be defined as a plant that is approved by a duly constituted regulatory agency for the handling of Grade A milk and from which fluid milk products are transferred during the month to a pool distributing plant. This is the definition now included in Orders 93 and 108 and proposed by the cooperative coalition for the merged order.

To qualify as a pool plant, a supply plant should be required to transfer a certain portion of its receipts each month to a pool distributing plant. In that way, it will be contributing to the fluid needs of the market.

As proposed by the cooperative coalition, a supply plant would have to transfer 60 percent of its receipts to pool distributing plants during each of the months of July through November and 40 percent during each of the months of December through June. The supply plant's ''receipts'' would include milk that is diverted from the plant as ''producer milk,'' but would exclude milk that is diverted to the supply plant from another pool plant. In addition, receipts would include not only the milk received from individual dairy farmers, but also the milk received from a cooperative association acting as a handler on milk delivered directly from producer-members' farms (i.e., pursuant to § 1007.9(c) of the order).

At the hearing, a spokesman for Kraft Foods testified that a pool supply plant should be allowed to use the most efficient form of milk movement to meet supply plant shipping requirements. He said that in addition to including transfers from the plant, diversions to pool distributing plants directly from producers' farms also should be counted in meeting those pooling requirements. In its Proposal No. 9, the Fleming Companies also proposed that diversions be used to meet a supply plant's shipping requirement.

The record indicates that distributing plants in the Southeast marketing area are supplied with milk that comes directly from producers' farms. Pool supply plants, as defined in Section 7(b) of the individual orders, have not been a factor in this area for many years. To the extent that any plant milk is transferred to distributing plants, such milk generally comes from cooperative association ''balancing plants,'' which qualify as pool plants based on the cooperatives' total deliveries of milk to pool distributing plants, as opposed to individual plant performance. Such deliveries may include transfers of plant milk but, as a general rule, the milk comes directly from producers' farms without being first delivered to the cooperative's plant.

Despite the fact that this market may have little need for true supply plants, the merged order should continue to accommodate the possible pooling of such plants in case plant milk from a distant location is needed to supplement locally-produced milk. However, there is no reason to facilitate the pooling of manufacturing plants as ''pool supply plants'' by allowing such plants to qualify on the basis of direct deliveries from the farm when the very fact that such deliveries can be economically made belies the need for the ''supply plant'' in the first place. For this reason, the Kraft and Fleming proposals to permit diversions to be used as qualifying shipments for a supply plant should not be adopted.

Balancing plants: § 1007.7(c). While the term ''balancing plant'' is not actually used in the order, as described in § 1007.7(c) of the proposed Southeast order it means a plant located in the marketing area and operated by a cooperative association which delivers 60 percent of the producer milk of its members to pool distributing plants during each of the months of July through November and 40 percent during each of the months of December through June. The deliveries to pool distributing plants may include deliveries directly from the farms of producer members of the association as well as transfers from the cooperative's plant.

To be eligible for pool status, the plant must not qualify as a pool distributing plant or a pool supply plant under the Southeast order or any other Federal order. Also, the plant must be approved to handle Grade A milk by a duly constituted regulatory agency.

This provision is essentially the same as the proposal of the cooperative coalition, except that it requires a plant that qualifies under this paragraph to be located within the Southeast marketing area. The plants that are likely to become cooperative balancing plants under the Southeast order are DI's plants in Franklinton, Louisiana, and Lewisburg, Tennessee, and Mid-America Dairymen's plant in Kentwood, Louisiana. Therefore, the in-area location requirement should not affect the regulatory status of any plant that is expected to be pooled as a balancing plant under this order.

Unlike a supply plant, which must incur the cost of shipping milk to the market, a balancing plant could be located in New Mexico, Arizona, or some other distant location and not incur the cost of shipping milk from those locations to the market. Such a plant could qualify based on the direct deliveries of locally-produced milk. For this reason, it would be imprudent not to require a balancing plant to have some association with the Southeast marketing area, as urged by the Fleming Companies, Barber, and Dairy Fresh in their briefs.

In its joint brief, Barber and Dairy Fresh urged the Secretary to not only require a balancing plant to be located in the marketing area, but also to require the plant to transfer 10 percent of the plant's receipts to pool distributing plants each month. The Fleming Companies made a similar plea in its brief.

These handlers provided no convincing reason why any shipments from a balancing plant that is located within the marketing area are needed. Such plants, in fact, provide a service to the market in balancing its reserve supplies. The performance standards applicable to the cooperatives which operate these plants assure that milk will be made available to meet the Class I needs of the market. Therefore, in the absence of a compelling reason for adopting these seemingly unnecessary milk handling and transportation requirements, the request for specific performance from such a plant is denied.

The Fleming Companies, Kraft General Foods, and Southern Foods Group urged that consideration be given to establishing pooling provisions for proprietary handlers that are the same as those for cooperatives. They contend that the cooperatives are able to attach milk supplies to the market which are devoted exclusively for manufacturing use, but that proprietary manufacturing plants and fluid milk handlers are prohibited from doing the same thing. Specifically, they stated that cooperative association ''balancing'' plants are allowed to pool based on the organizational performance of the cooperative, an option that obviously is not available to proprietary handlers. Instead, proprietary handlers would have to rely on supply plants that are required to receive, unload, reload, and transfer producer milk to distributing plants in order to qualify as pool supply plants. The issue, they argue, is not one of ''need'' for supply plant milk to supply the fluid market, but whether the order should permit the dominant cooperative to service the market efficiently while requiring non-cooperative sources of milk to be encumbered with great inefficiency.

It is questionable how the ability of proprietary handlers to attach additional supplies of milk for manufacturing use with the market promotes inefficiencies in supplying the fluid milk needs of the market. The primary objective of pooling provisions is to provide the incentive to supply the fluid milk needs of the market and to accommodate the pooling of the reserve supplies of milk that are available and are necessary to serve or balance the fluid milk needs.

To the extent that supply plants are necessary, the pooling standards are the same for cooperatives and proprietary handlers. The shipping standards are set at a level to ensure a sufficient association with the fluid market to warrant a share in the Class I use of the market.

Cooperative association ''balancing plants'' serve a different role. These plants are the outlets of last resort. When surplus milk has no other place to go on weekends or during the spring and summer months, it is manufactured into storable products at Mid-Am's manufacturing plants in Franklinton and Kentwood, Louisiana, and Lewisburg, Tennessee. When production decreases, these plants may shut down completely or operate at minimal capacity. There has to be some place for surplus milk to go and dairy farmers, through their cooperative associations, have assumed the burden of processing this surplus milk. At the same time, the overall pooling standards ensure that milk is supplied for fluid use, which is a primary objective of the cooperative associations supplying the market.

A proprietary cheese plant operates on a different premise. The primary objective of a proprietary cheese plant operator is to produce as much cheese as possible as efficiently as possible. Ideally, such plants prefer to operate at full operating capacity all the time. To give up any more milk than is absolutely necessary is to forgo profits.

There is no basis for incorporating order provisions in this market that would encourage additional cheese production by making it easier to pool cheese plants. In an area such as the Southeast marketing area that has a high Class I price to assure an adequate supply of milk for fluid use, the adoption of provisions to facilitate the proliferation of cheese plants is unwarranted. There is no shortage of milk for cheese in the United States, and there is no reason to encourage additional milk production for cheese plants in the Southeast. Fluid milk processors in the Southeast pay relatively high Class I prices to assure an adequate supply of milk for fluid use, and the blend prices resulting from those Class I prices should not be reduced by encouraging additional production destined for Class III use.

Revisions of pooling standards: § 1007.7(f). Kraft Foods proposed that the market administrator be given the authority to adjust pool supply plant shipping standards. The Kraft witness stated that this will afford the Department more flexibility in meeting the changing needs of the market. The witness cited the lengthy delays that are now frequently incurred in suspending regulations when market conditions change. He also noted that while some orders permit the Director of the Dairy Division to issue revisions of shipping standards, this process is also a lengthy procedure.

The Kraft proposal should be adopted, but it should be modified to include the distributing plant route disposition standards in § 1007.7(a), the supply plant shipping standards in § 1007.7(b), the cooperative ''balancing plant'' performance standards in § 1007.7(c), the ''touch base'' standards in § 1007.13(d) (1) and (2), and the diversion limitations in § 1007.13(d) (3) and (4). The authority to increase or decrease a percentage performance level should be restricted to not more than 10 percentage points above or below the levels established in the order. The authority to increase or decrease the producer ''touch base'' standards in § 1007.13(d) (1) and (2) should be restricted to 50 percent of the standard specified in the order.

Most milk order actions involve temporary adjustments to pooling standards to recognize changes in supply and demand conditions. These adjustments are accomplished in most orders by ''suspending'' certain language from a provision of the order so as to reduce the regulatory burden on handlers and assure the continued pooling of milk that has been historically associated with a market without the need for making costly and inefficient movements of milk. A large percentage of these suspensions could be avoided by permitting the order's pooling standards to be adjusted slightly at the direction of the market administrator, who is the person delegated by the Secretary to administer the order.

Suspension actions only provide a means for reducing pooling standards. These actions cannot be used to increase pooling standards in the event that additional supplies of milk are needed. A few orders provide authorization for the Director of the Dairy Division to either increase or decrease pooling standards as a result of changes in supply and demand conditions. This authority is intended to provide a greater degree of flexibility to adjust performance standards to the varying needs of the market. However, the process for implementing the changes has made it extremely difficult to respond as expeditiously as is necessary to reflect frequent and rapid changes in marketing conditions.

As proposed herein, the authority to modify pooling standards and diversion limitations would be restricted to not more than 10 percentage points up or down. Following a written request to make such an adjustment, the market administrator will notify all parties in the market who would have an interest in the request. This would include, at a minimum, every handler and every cooperative association representing producers in the market. In addition, the market administrator will notify the Director of the Dairy Division, Agricultural Marketing Service, of the request. The market administrator will provide at least seven days for the submission of written comments, which may be faxed or mailed, before making a decision concerning the request. Prior to making such a decision, the market administrator will confer with the Director of the Dairy Division.

The flexibility accorded in the order by this provision should be helpful in meeting any fluctuating needs of the market in a timely manner.

Nonpool plant: § 1007.8. The nonpool plant definition proposed for the merged order should be adopted. The plants defined as nonpool plants include other order plants, plants of producer-handlers, partially regulated distributing plants, unregulated supply plants, and exempt plants. With the exception of the exempt plant definition, these terms are standard among the separate markets involved in this proceeding.

The exempt plant definition proposed by the cooperative coalition includes, in addition to a plant operated by a governmental agency, a plant with monthly route disposition of less than 100,000 pounds.

At the hearing, the cooperative coalition spokesman indicated that if the two small producer-handlers now in the Georgia market—Etowah Maid Dairies, Inc., at Canton, Georgia, and Sheppard Brothers Dairy Farm at Stone Mountain, Georgia—were not exempt from regulation under the producer-handler provisions proposed for the merged order, they would be under the proposed exempt plant definition. Although neither producer-handler testified at the hearing or filed a post-hearing brief, it is not certain that they would, in fact, be exempt from regulation under the proposed exempt plant definition.

According to the cooperatives' witness, the purpose of the 100,000-pound exemption ''is to exempt from pricing and pooling those producer-handlers who are fairly small in size, whether or not they might otherwise qualify as a producer-handler.'' As written and as explained at the hearing, however, this provision would apply to any plant with monthly route disposition under 100,000 pounds, whether or not the handler otherwise meets the criteria for being a producer-handler.

The proposed exemption from regulation based on monthly route disposition should be adopted. As a practical matter, the exemption of plants of this size would pose no threat to the order's regulated handlers. In addition, the regulatory burden on a handler of this size is much greater than it is on an average size handler. Although it is not certain that the two producer-handlers in this market would be exempt under this provision, it should nevertheless be included in the order to preclude the regulation of any small handler who may distribute fluid milk products in the Southeast marketing area.

Handler: § 1007.9. The impact of regulation under a Federal order is primarily on handlers. A handler definition is therefore necessary to identify those persons from whom the market administrator must receive reports, or who have a financial responsibility for payment for milk in accordance with its classified use value. This will assure that all information necessary to determine a person's status under the order can be readily determined by the market administrator.

As proposed by the cooperative coalition, the handler definition should include the operator of a pool plant, a cooperative association that diverts milk to nonpool plants or delivers milk to pool plants for its account, a producer-handler, and any person who operates a partially regulated distributing plant, an-other order plant, an unregulated supply plant, or an exempt plant.

With the exception of the operator of an exempt plant, these terms are standard definitions, which are included in virtually all Federal milk orders. The inclusion of the operator of an exempt plant in the handler definition is somewhat unusual. Although most of the individual orders, except Order 108, exempt government plants from regulation, none of them include the exemption for a plant based on minimum route disposition. Because of this additional basis for exemption, the operator of an exempt plant should be included in the handler definition. Although the operator of an exempt plant is, as the name implies, exempt from full regulation under the order, the plant operator must still file reports with the market administrator so that the basis for exemption can be determined and milk handled by the plant can be properly classified. For this reason, it is logical to include an exempt plant operator in the handler definition.

Producer-handler: § 1007.10. The merged order should exempt a producer-handler from regulation if the producer-handler meets certain specified requirements. The only two producer-handlers now operating in the proposed marketing area have been subject to the provisions of the Georgia order. Since this provision is short, simple, easily understood and virtually identical to the producer-handler provisions contained in the separate orders, it should be adopted for the merged order.

The cooperative coalition's proposed producer-handler provision defines a producer-handler as a person who is engaged in the production of milk and also operates a plant from which during the month fluid milk products are disposed of directly to consumers through home delivery retail routes or through a retail store located on the same property as the plant. A person meeting all of the other requirements for a producer-handler, but who disposes of fluid milk products through wholesale outlets, jobbers, independent route distributors, or retail outlets other than a plant store would not qualify as a producer-handler.

As described by the cooperatives' spokesman, the retail-wholesale distinction is designed to address the point at which the pricing advantage granted to producer-handlers contributes to disorderly marketing. The witness testified that a producer of medium farm size who bottles his or her own product and sells to his/her neighbors is not a serious threat to orderly marketing. While such a person still has the same buying advantage, such savings are less than the additional cost inherent with small size.

The cooperatives' spokesman also stated that even a producer-handler of substantial size who develops home-delivery routes will probably not pose a serious threat to orderly marketing under current economic circumstances. He noted that where such distribution does exist, it is far less price sensitive than sales from supermarket shelves. Although the producer-handler would have a cost advantage by exemption from pricing and pooling, this advantage would be eroded through the cost associated with the manner of distribution, according to the witness.

The witness also testified that a producer-handler who distributes fluid milk products through a plant store does not pose a serious threat to orderly marketing since the consumer must come to the producer-handler's place of operation. Moreover, the product is not in the regular price-sensitive channels of distribution.

The witness said that most fluid milk product disposition now takes place through wholesale distribution to multiple store outlets. These wholesale accounts are generally high volume in nature and highly sensitive to price differentials, he added, and those handlers who engage in trade through wholesale channels should not be exempt from pricing and pooling, even if such handler deals exclusively with its own raw milk production.

The spokesman argued that the purpose of Federal orders is to insure an adequate amount of pure and wholesome milk for consumers by establishing a regulatory scheme that insures equitable treatment of all handlers and producers. Unless there is a very good reason to exempt a plant from regulation under an order, each handler should be subject to the same pricing and pooling provisions to insure the integrity of the regulatory scheme, he said.

The witness also claimed that while Congress intended to exempt small family production/distribution units from regulation under an order, it did not envision the large, multi-million pound units that now compete in the wholesale milk trade in many parts of the country. For this reason, he said, the cooperatives' proposed language was designed to insure that any single person, partnership, or corporation that establishes a production/distribution unit of this magnitude and which competes in the wholesale market would come under full regulation.

Experience in the markets involved in this proceeding indicates that effective regulation can be achieved without adopting the type of overly restrictive producer-handler provision proposed by the cooperative coalition. In particular, there is no basis for absolutely precluding a producer-handler from having wholesale customers.

As adopted in this decision, a producer-handler is any person who operates a dairy farm and a distributing plant which has route disposition of more than 100,000 pounds per month and who receives no Class I milk from sources other than his/her own farm production and pool plants. The producer-handler must provide proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled and the operation of the processing and packaging business are his/her personal enterprise and risk.

In conjunction with their proposal to revise the producer-handler definition, the cooperative coalition proposed that the administrative assessment that is applied to other handlers also apply to producer-handlers. The coalition spokesman testified that the market administrator must audit producer-handlers and may do so for no other reason than to determine that the handler is, in fact, eligible under the provisions of the order to be exempt from pricing and pooling. He said that if producer-handlers do not pay their pro-rata share of administrative expenses, the total cost would unjustly fall on the remaining handlers under the order.

Currently, under each of the separate orders, the administrative assessment is applied to handlers on their receipts of producer milk and on other receipts on which there is a pool obligation. Producer-handlers, on the other hand, who have no receipts of producer milk or any pool obligation, are not subject to an administrative assessment.

To the extent that administrative costs are incurred in administering the producer-handler provisions, fully and partially regulated handlers who bear the administrative costs associated with this activity are assured that producer-handlers continue to operate in the manner provided under the order. This insures that producer-handlers are not able to transfer the costs and risks of their operation to others and, consequently, are not able to gain an advantage relative to other producers or handlers. Despite proponents' testimony, there is no basis for the payment of administrative assessments by producer-handlers and, therefore, must deny the proposal.

Mid-Am filed an exception to the producer-handler provisions contending that there was no basis for denying its producer-handler proposal. It reiterated its arguments that effective regulation of producer-handlers cannot be achieved without the adoption of its proposal and that producer-handlers should have to pay the administrative assessment that is applied to other handlers.

Mid-Am's arguments do not provide a basis for altering the findings and conclusions on this issue. There is no indication in the record that producer-handlers are causing marketing problems in the proposed marketing area. This demonstrates that effective regulation of producer-handlers can be achieved without the unduly restrictive regulations proposed by Mid-Am. Also, there is not a sufficient basis to conclude that there is a need for producer-handlers to pay an administrative assessment.

Producer: § 1007.12. The term producer defines those dairy farmers who constitute the regular source of supply for the order. Under the

Southeast order, producer status should be provided for any dairy farmer who produces milk approved by a duly constituted regulatory agency for fluid consumption as Grade A milk and whose milk is received at a pool plant directly from the producer's farm or is picked up at the farm by a cooperative as a bulk tank milk handler for delivery to a pool plant.

Producer status should also be accorded to a dairy farmer who has an established association with the market and whose milk is diverted from a pool plant to a nonpool plant by a cooperative association or a pool plant operator. To establish an association with the market, a dairy farmer's milk must be delivered to a pool plant each month to be eligible to be diverted to a nonpool plant as ''producer milk.'' These delivery requirements will be explained further under the discussion of producer milk.

Since producer-handlers and exempt plants are not subject to the order's pricing and pooling provisions, milk which is in excess of the needs of such operators will not be treated as producer milk when it is moved directly from the farms of such operations to a pool plant. Any such milk delivered to a pool plant would be ''other source milk.''

A dairy farmer should not be a producer under two Federal orders with respect to the same milk. The producer definition should exclude a dairy farmer with respect to milk which is received at a pool plant under the Southeast order by diversion from a pool plant under another Federal order if the dairy farmer is a producer under the other order with respect to the milk and the milk is allocated to Class II or Class III use under the Southeast order. Also, as proposed by the cooperative coalition, the producer definition would exclude a dairy farmer with respect to milk which is diverted to a pool plant under another Federal order if any portion of such person's milk is assigned to Class I milk under the other Federal order.

In its proposed producer definition, the cooperative coalition included a paragraph dealing with a ''dairy farmer for other markets.'' This provision would exclude from the producer definition during the flush production months a dairy farmer who delivered more than one-fifth of his/her milk to plants as other than producer milk during the short season. Specifically, if during the immediately preceding months of August through December more than one-fifth of the milk from the same farm was caused to be delivered to plants as other than producer milk, then no milk of such a dairy farmer would be considered to be producer milk during the following months of January through July.

The cooperative coalition's spokesman explained that this provision was designed to prevent producers of other Federal order markets from pooling their milk on the merged order during the flush spring months [perhaps because the blend price was more attractive] when such milk was not pooled on the merged order during the fall months [when the milk may have been needed]. This provision was supported by Barber Pure Milk Company, Dairy Fresh Corporation, and the Arkansas Dairy Cooperative Association. It was opposed by Southern Foods Group and Gold Star Dairy.

In its post-hearing brief, Southern Foods Group stated that it strongly opposed this provision because it would make it impossible for milk from nearby areas to be pooled on the Southeast order except in extraordinary circumstances. SFG acknowledged that it had brought Texas milk into the Greater Louisiana market to provide an independent milk supply from nearby areas. It stated that the flexibility to deliver a producer's milk to different plants during the month avoids uneconomic shipments of milk and has permitted SFG flexibility in providing milk to a deficit market.

The dairy farmer for other markets provision was also opposed by Gold Star Dairy, which characterized the provision as a ''trade barrier.'' Gold Star stated that it will interfere with the seamless movement of milk between the new order and neighboring orders and noted that it was inappropriate to penalize a producer for not delivering milk to the market when it was not needed.

The ''dairy farmer for other markets'' provision should not be adopted for the merged order. As discussed later in this decision, the proposed order contains a base-excess plan which will substantially remove the incentive for a dairy farmer who has been associated with another market during the base-building months to become a producer under the Southeast market during the base-paying months. In addition, this order has stringent pool plant performance standards and fairly tight diversion limitations. In order to be eligible for diversion during the months of July through November (December through June), 10 days' (4 days') production of a producer's milk must be received at a pool plant. This ''touch-base'' requirement will help to keep distant milk from associating with this market when the milk is not really needed at a pool distributing plant. Finally, with the flexibility accorded the market administrator in this order, the pooling standards and diversion limitations can be adjusted quickly to forestall any abuse of the order should it occur. For these reasons, there is no need to adopt the dairy farmer for other markets provision in this market.

Mid-Am filed an exception to the denial of a ''dairy farmer for other markets'' provision. Mid-Am contends that even though the proposed Southeast order contains a base-excess plan, ''this does not substantially remove the incentive for a dairy farmer who has been associated with another market during the base-forming months to become a producer under the Southeast market during other months of the year.''

The record does not support the adoption of a ''dairy farmer for other markets'' provision. As indicated, there was considerable opposition to this provision both at the hearing and in post-hearing briefs. Those opposed to the provision argued that it was a barrier that would remove a handler's flexibility to shift milk economically between plants.

The amount of milk that may be pooled under the Southeast order is dictated by the order's pooling standards and diversion limits. The market cannot be flooded with outside milk during the months of January through July because four days' production of a producer's milk must be received at a pool plant during the month, and during the months of December through June only 50 percent of the producer milk physically received at a plant may be diverted to nonpool plants.

The need for marketing flexibility outweighs the concerns of Mid-Am regarding the possibility of surplus milk pooling on the Southeast market. The ''dairy farmer for other markets'' provision should not be adopted.

Producer Milk: [7] *§ 1007.13.* The producer milk definition of the proposed Southeast order defines the milk that will be priced and pooled under the order. The provisions proposed by the cooperative coalition, and adopted, with some modifications, in this decision, would require that each individual producer deliver at least 4 days' production to a pool plant in each of the months of December through June and 10 days' production in each of the months of July through November. This requirement will insure that each

[7] As explained in the last two paragraphs at the end of this section, the diversion limits applicable to pool plant units which are qualified pursuant to § 1007.7(e) have been changed from those contained in the recommended decision.

producer has a direct association with a pool plant each month of the year.

Without a ''touch base'' requirement of this nature, milk of a producer could be pooled without ever having to come to a pool plant. With the provision, however, there is certainty that the milk of that producer is at least partially associated with a pool plant of the order every month.

So long as the touch-base requirement has been met during the month, all of the other milk of a producer that is not needed at a pool plant may be diverted directly from the farm to a nonpool plant if it is not needed at the pool plant. In aggregate, however, the total quantity of milk of all producers so diverted should be restricted to 50 percent during the months of December through June and 33 percent during the months of July through November.

Ten days' production is a reasonable minimum number of days for associating an individual producer's milk with this market during the short production months. Based on data in the record, the Class I utilization in this market is expected to exceed 80 percent during the months of July through November and should range from 65 to 75 percent during the months of December through June. These projections support a 10-day delivery requirement for the short production season. If at least 10 days' production of a producer's milk is not delivered to a pool plant during the summer and fall months, the milk cannot be considered to be a part of the regular source of supply for the fluid milk market and should not share fully in the Class I utilization of the marketwide pool.

In addition to performance by an individual producer, the producer milk section of the order also sets specific limits on the total amount of producer milk which may be diverted by the operator of a pool plant or a cooperative association to nonpool plants during the month. As proposed and adopted here, diversions to nonpool plants by a pool plant operator would be limited to 33 percent during the months of July through November, and 50 percent during the months of December through June, of the producer milk that is physically received at pool plants as producer milk of such handler during the month. In the case of a cooperative association, these percentages would be based on the producer milk that the cooperative association caused to be delivered to, and physically received at, pool plants during the month.

For efficiency in the delivery of producer milk to pool plants, the proposed order provides for the diversion of producer milk from one pool plant to another pool plant. There is no limit on this type of diversion.

The proposed order also provides a procedure to be followed for determining the pool status of milk if a pool plant operator or a cooperative association diverts milk in excess of the percentage allowances specified in the order. In this case, the excess quantity of milk would not qualify as producer milk and would not be priced under the order. The diverting handler would be required to designate the dairy farmer deliveries that should not be considered producer milk. Absent such a designation, no milk diverted by the handler will be producer milk.

A parallel situation occurs when a cooperative association's diversions from a pool plant to nonpool plants would cause the pool plant to lose its pool status. In such a case, the cooperative will be responsible for identifying which dairy farmers' milk will not be producer milk. If the cooperative fails to designate the dairy farmers' deliveries that are to be excluded as producer milk, then no milk diverted by the cooperative to nonpool plants will be considered producer milk.

Milk that is diverted from a pool plant to a nonpool plant should be priced at the location of the nonpool plant where the milk is physically received. Diverted milk is presently priced under the individual orders in this manner and should continue to be so priced under the merged order.

As discussed above (with reference to pool plants), the market administrator, upon request of a handler in the market and following the submission of data, views, and arguments, should be permitted limited flexibility to adjust pooling standards and diversion limitations. With respect to diversion limitations, the market administrator should be permitted to increase or decrease diversion limitations by 10 percentage points. For example, the 33 percent limitation could be decreased to 23 percent or increased to 43 percent. In the case of the touch-base requirement, the market administrator should be permitted to increase or decrease these requirements by up to 50 percent. Accordingly, the requirement that each producer deliver 10 days' production of milk to a pool plant before being eligible for diversion to a nonpool plant may be increased to 15 days or decreased to five days. During the months of December through June, when a four day touch-base requirement applies, the touch base requirement could be increased to six days or decreased to two days. This flexibility will allow the market administrator to respond quickly to changing market conditions.

In their exceptions, Barber Pure Milk Company and Dairy Fresh Corporation (Greensboro, Alabama) reiterated the request initially made in their hearing proposal to be permitted to combine all of the milk physically received at all of their pool plants in determining their diversion limits rather than compute diversion limits based on each plant's receipts.

This modification should be adopted for handlers that unit pool their plants. Like unit pooling, unit diverting also will allow handlers to operate their plants in a more efficient manner. Rather than having to juggle milk between two pool plants to meet touch-base requirements, handlers will be able to divert milk from the plant that normally receives it. This provision, in conjunction with unit pooling, will provide handlers great flexibility in the operation of their plants.

Other Source Milk: § 1007.14. The other source milk definition has been a standard definition included in all milk orders since 1974, when a uniform classification plan was instituted for all milk orders. The definition included in the proposed Southeast order is identical to those included in the individual orders.

In addition to milk received from producers, a regulated pool plant may receive milk or milk products from sources other than producers. The other source milk definition identifies those other sources.

Specifically, ''other source milk'' means all skim milk and butterfat in a handler's receipts of fluid milk products or bulk fluid cream products from any source other than producers, cooperative association handlers, or pool plants. It also includes a handler's receipts of fluid cream products in packaged form from other plants. In addition, any milk products (other than fluid milk products, fluid cream products, and products produced at the plant in the same month) from any source which are reprocessed, converted into, or combined with another product in a handler's plant during the month would be considered a receipt of other source milk. Finally, receipts of milk products (other than fluid milk products or fluid cream products) for which a handler fails to establish a disposition would also be included under the other source milk definition.

Unlike packaged fluid cream products, which are Class II products and therefore not included in the fluid milk product definition, bulk fluid cream products are treated in the same manner as fluid milk products for the purpose of applying the other source milk definition. This facilitates the application of the other provisions of the order. Accordingly, receipts of fluid cream products in packaged form from other plants are considered other source milk.

Although no handler obligation is involved with these receipts, it is desirable for accounting purposes that such receipts be defined as other source milk. This accounting technique precludes the record-keeping difficulties that might otherwise be experienced in accounting separately for inventories and sales of Class II products processed in the handler's plant versus those received at the plant in packaged form from other plants. Such receipts are allocated directly to the handler's Class II utilization.

Manufactured products from any source that are reprocessed, converted into, or combined with another product in the plant also are considered as other source milk. Such products include dry curd cottage cheese received at a pool plant to which cream is added before distribution. Such receipts are allocated to a handler's Class II or III utilization, depending upon the use of the product. No handler obligation is applicable.

Products manufactured in a pool plant during the month and then reprocessed, converted into, or combined with another product in the same plant during the same month are not other source milk. Under this situation, producer milk is considered as having been used to produce the final product.

Disappearance of manufactured milk products for which the handler fails to establish a disposition is considered as other source milk. Each handler is required to account for all milk and milk products received or processed at the handler's plant. Otherwise, a handler may have an opportunity to gain a competitive advantage over competitors. Treating the unexplained disappearance of manufactured milk products as other source milk contributes to a uniform application of the provisions to all handlers.

Fluid Milk Product/Fluid Cream Product: §§ 1007.15 and 1007.16. The terms *fluid milk product* and *fluid cream product* are standard definitions in all milk orders and were proposed for inclusion in the merged order. There was little discussion at the hearing concerning these definitions and no opposition to their inclusion in the merged order.

The fluid milk product and fluid cream product definitions were most recently revised in a national decision involving all Federal milk orders that was issued on February 5, 1993 (58 FR 12634), and which became effective on July 1, 1993. Official notice is taken of that decision, including the reasons set forth for the standards adopted in these definitions. They are incorporated by reference in this decision.

Filled Milk: § 1007.17. The term filled milk also is identical in all milk orders and was proposed for inclusion in the merged order. There was no opposition to this provision.

Filled milk is defined as any combination of nonmilk fat (or oil) with skim milk (whether fresh, cultured, reconstituted, or modified by the addition of nonfat milk solids), with or without butterfat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product, and contains less than six (6) percent nonmilk fat (or oil). In determining the classification of filled products, the same competitive criteria should apply to these products as to fluid milk products.

The *filled milk* definition stems from the Assistant Secretary's decision for all Federal orders issued October 13, 1969 (34 FR 16881). That decision is incorporated by reference in this decision.

Commercial food processing establishment: § 1007.19. A standard definition for commercial food processing establishment was added to all orders on July 1, 1993. The definition contained in the Assistant Secretary's February 5, 1993, decision (58 FR 12675) is just as appropriate for the merged Southeast order as it is for the individual orders of which it is comprised.

Product prices: § 1007.20. A final decision amending the Class II price under all Federal orders was issued January 27, 1995, and published February 2, 1995 (60 FR 6606). The decision changed the computation of the Class II price in a manner that removed the need for a section dealing with ''product prices.'' Since the amended language of the Class II decision is applicable to the merged order proposed in this proceeding, § 1007.20 has been removed.

2(b). Classification of Milk: §§ 1007.40 through 1007.45. Under a Federal milk order, milk is priced according to the form or manner in which it is used. Section 40 of the proposed order discusses the four classes of utilization under the order. Section 41 discusses how to classify ''shrinkage,'' the disappearance of skim and butterfat that occurs through handling, transporting, and processing milk. Section 42 sets forth rules for classifying skim milk and butterfat that is transferred or diverted between plants. Section 43 contains general rules pertaining to the classification of producer milk, and Section 1007.44, ''classification of producer milk,'' describes how to classify producer milk by allocating a handler's receipts of skim milk and butterfat to the handler's utilization of such receipts. Finally, § 1007.45 describes the market administrator's reports and announcements concerning classification.

The classification scheme proposed for the Southeast order is identical to the uniform classification plan now in use in the five individual orders and in most other Federal order markets. A detailed explanation of the purpose and application of these provisions is contained in the Department's final decisions that were issued February 19, 1974 (39 FR 9012), July 17, 1975 (40 FR 30119), and February 5, 1993 (58 FR 12634). Because these provisions deal with inter-order, as well as intra-order, movements of milk, they should be essentially uniform with the surrounding orders and adopted, with only a slight modification, for the merged order.

Under the present Georgia order, the application of § 1007.42(c) has been unclear with respect to the transfer or diversion of bulk fluid milk products to an exempt governmental agency plant. At present, if bulk milk is transferred to an exempt plant, it is automatically classified as Class I, based on the presumption that the transferred milk is needed only to supplement the own-farm production of the exempt handler. However, where the exempt handler has no own-farm production, this presumption has resulted in a Class I classification for milk that, in fact, was used in a Class II product. Therefore, this paragraph should be modified to provide an automatic Class I classification for transfers or diversions of fluid milk products to a producer-handler. It should also provide for a Class I classification for a packaged fluid milk product transferred to an exempt governmental agency plant defined in § 1007.8(e). However, in the case of bulk fluid milk products or fluid cream products transferred or diverted to an exempt plant, the classification should be based on the exempt plant's utilization as determined by the market administrator.

2(c). Pricing of Milk: [8] *§§ 1007.50–1007.54.* Milk pooled under most

[8] Several changes in pricing have been made in this final decision. Changes in Class II and III prices are the result of national decisions amending all

Continued

Federal orders is now priced in four use classifications: Class I, Class II, Class III, and Class III–A. Class I milk, which is generally milk consumed as a beverage, competes for sales on a local or regional basis; Class II milk products, which include soft dairy products such as cottage cheese, ice cream, and dips, compete on a regional basis, and Class III milk products (hard cheese and butter) and Class III–A products (nonfat dry milk) are products which can be stored for extended periods of time and compete for sales on a national basis.

There are several issues to be discussed in connection with the pricing of milk: Class III and III–A prices, the Class II price, the seasonal adjustment proposed for the Class III and III–A prices, the Class I price level, and the location adjustments that are needed for the new order.

The Class III–A price: § 1007.50(d). The present Class III–A price that is applicable to each of the individual orders should be continued for the Southeast marketing area. This price is based on a product formula, specified in § 1007.50(d), that is defined as the average Central States nonfat dry milk price for the month, as reported by the Department, less 12.5 cents, times an amount computed by subtracting from 9 an amount calculated by dividing 0.4 by such nonfat dry milk price, plus the butterfat differential value per hundredweight of 3.5 percent milk and rounded to the nearest cent.

Class III–A pricing was added to the individual orders on December 1, 1993. The reasons for moving nonfat dry milk from Class III to Class III–A and for adopting the product formula described above were thoroughly explained in a final decision issued October 20, 1993, and published in the **Federal Register** on October 29, 1993 (58 FR 58112). The findings and conclusions of that decision are incorporated by reference in this decision. There was no opposition to a continuation of this price under the merged order.

The Class III price: § 1007.50(c). The Class III price for the Southeast order should be the ''basic formula price,'' as defined in § 1007.51(a) and as adopted for all Federal milk orders in a final decision issued January 27, 1995, and published on February 7, 1995 (60 FR 7290). The *basic formula price* is the preceding month's average pay price for manufacturing grade milk in Minnesota and Wisconsin using the ''base month'' series, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis using the butterfat differential for the preceding month computed pursuant to § 1007.74 and rounded to the nearest cent, plus or minus the change in gross value yield by the butter-nonfat dry milk and Cheddar cheese product price. This price will be used in each of the individual orders involved in this proceeding and in every other Federal order. It reflects the value of manufacturing grade milk used to produce hard cheese and butter and is equally appropriate for the Southeast marketing area.

Seasonal Adjustment to Class III and III–A Prices. The cooperative coalition proposal to seasonally adjust the Class III and III–A prices should not be adopted.

The proposal would reduce Class III and III–A prices by 10 cents during the months of December, January, and February and by 30 cents during the months of March, April, and May; it would increase these prices by 10 cents in June, 20 cents in July, 25 cents in August through October, and 15 cents in November.

The cooperative coalition's spokesman testified that there is considerable cost involved in balancing the seasonal excess supply of the proposed marketing area. The cooperative coalition proposal, he testified, is designed to relieve the handlers of some of the cost involved in assuming this role.

This proposal was opposed by a handler and a regional cooperative association in post-hearing briefs. Baker & Sons Dairy stated in its brief that while the simple average of the proposed seasonal adjustments would be mathematically neutral, they are far from neutral on a weighted average basis and would substantially reduce the blend price and producer income during the months of December through May. The handler also argued that this proposal undermines the principle of pricing Class III and III-A products on a national and international basis, and instead would give one area of the country an advantage over other areas.

Milk Marketing, Inc., a cooperative with dairy farmer members in eight states, also submitted a brief opposing any seasonal adjustment to the Class III and III–A prices. MMI wrote that plants utilizing milk in Class III and III–A during the months of March, April, and May would have a 30-cent per hundredweight advantage over plants regulated under other orders. It stated that this translates to a price advantage of 3 to 4 cents per pound for nonfat dry milk powder.

The proposal to seasonally adjust Class III and III–A prices cannot be justified on the basis of this hearing record. It is apparent from reviewing the market administrator's price announcements from December 1993 through March 1994 that much of the seasonally surplus milk in the proposed Southeast marketing area is manufactured into nonfat dry milk at the Mid-America Dairymen, Inc., plants in Lewisburg, Tennessee, and Franklinton, Louisiana. As a result of the institution of Class III–A pricing in December 1993, the cooperative has already obtained substantial relief in the pricing of Class III–A milk. For the four months from December 1993 through March 1994, the Class III–A price averaged $2.15 below the Class III price. This reduction in price for Class III–A milk would have reduced the blend price by approximately nine cents per hundredweight in the proposed market for these months if the merged order had been in effect.

Producers in this marketing area have already contributed to those organizations that are balancing the reserve supplies of the market, and no compelling reason exists on the basis of this record to increase this contribution by further reducing the Class III and III–A prices with the proposed seasonal adjustments. The proposal is therefore denied.

In its exception to the recommended decision, Mid-Am repeated its request for a seasonal adjustment of Class III and III–A prices. While conceding that Class III–A pricing does provide ''some relief'' to those handlers manufacturing nonfat dry milk, Mid-Am argued that ''Class III–A pricing does not provide relief from the costs associated with the seasonal variability of the supply of milk utilized to produce nonfat dry milk powder.''

Mid-Am's claims for adopting seasonal pricing of Class III and III–A milk are insufficient in view of the reasons set forth for denying seasonal pricing.

Class II price: § 1007.50(b). A final order amending Class II pricing under all Federal milk orders was issued on January 27, 1995, and published on February 2, 1995 (60 FR 6606). As amended, the Class II price is the basic formula price for the second preceding month, plus 30 cents. This price is adopted for the Southeast order for all of the reasons set forth in the final decision (i.e., See 59 FR 64524) pertaining to that issue. There was no opposition to the adoption of this price at the hearing, in briefs that were filed, or in the exceptions that were received.

Federal order Class II and III prices. In addition, plant location adjustments have been changed as a result of the comments received.

Class I Pricing. The Class I price under the proposed Southeast order should be determined by adding a Class I differential to the *basic formula price* for the second preceding month. This is the method for determining Class I prices under all Federal orders and the method proposed for the merged order. There was no opposition to this proposal.

As proposed by the cooperative coalition, the Class I differential applicable to the base zone, which includes Birmingham, Alabama, and Atlanta, Georgia, should be $3.08 per hundredweight, the differential that is now applicable to those locations under the Georgia and Alabama-West Florida orders.

In establishing the Class I price level, a primary consideration must be to attract an adequate supply of Grade A milk for fluid use, taking into consideration production within the marketing area relative to the demand for fluid milk by handlers regulated under the order and the cost of transporting bulk milk from surplus producing areas to supplement local production. However, an equally important consideration is to establish a Class I price that will provide proper alignment with Class I prices in neighboring markets. A Class I price that is too high could result in excessive milk production within the market and a retail price advantage for handlers regulated under lower-priced orders distributing packaged products in the marketing area. Therefore, the Class I price should not exceed the Class I price in the closest surplus-producing region plus the cost of transporting bulk milk from that area to this market.

Based on the current cost of transporting milk, which the cooperative coalition's spokesman indicated was in excess of 3.9 cents per hundredweight per 10 miles distance, the $3.08 Class I differential proposed for the base zone of the merged order should be high enough to ensure an adequate supply of milk but not too high so as to provide a pricing advantage for handlers in lower-priced markets to the north of the Southeast marketing area.

Plant location adjustments: § 1007.52. This final decision, like the recommended decision, provides for 12 pricing zones. However, unlike the recommended decision, which provided for a base zone, five minus zones, and six plus zones, this final decision contains a base zone, six minus zones, and five plus zones. These zones, and the Class I differential adjusted for location for each zone, are shown on the map of the marketing area included in this decision. Table 1 identifies the plants designated by the numbers on the map.

Several changes in location adjustments have been made from those set forth in the recommended decision. Zone 1 has been expanded to include 5 counties that were part of Zone 2; a new zone, designated as Zone 3 on the map, has been added; several Arkansas counties, including the Little Rock area, have been added to the zone that encompasses the Memphis area (i.e., Zone 4); the changes to Zone 4 have resulted in a slight and non-significant reconfiguration of the Arkansas counties that are contained in Zones 5 and 6; Zones 9 and 10 have been combined into one zone with a $3.40 price; some of Zone 12 has been moved to Zone 11; and the Zone 12 price has been changed to $3.65. In addition, because of the addition of the new Zone 3, the recommended Zones 3–8 are now Zones 4–9. As a result of these modifications, Class I prices were reduced from those in the recommended decision by 5 cents at Nashville; 7 cents at Little Rock; 8 cents at Hattiesburg, Mississippi, and Cowarts, Alabama; 10 cents at Hammond, Louisiana; and 3 cents at Baton Rouge, New Orleans, and Mobile.

Although there is, in reality, one Class I price that will apply to the Southeast marketing area, when this price is adjusted for location, it results in a unique Class I price for each of the 12 zones of the marketing area. The Class I price that will be shown for the market will be the price applicable to Zone 7, the base zone (Zone 6 in the recommended decision). This zone includes Atlanta, Georgia, and Birmingham, Alabama, two of the market's key population centers.

In arriving at the appropriate location adjustments for the Southeast marketing area, several factors were taken into consideration. In addition to considering the prices that are now applicable in each of the separate areas and those embodied in the proposals submitted, it was necessary to consider other factors such as the prices in marketing areas contiguous to the Southeast marketing area, whether the prices in the individual marketing areas lined up properly on an east-to-west axis in the merged marketing area, the fluid needs throughout the marketing area, the supply of milk locally available to each plant within the marketing area, the competitive relationship among handlers in the marketing area, and the exceptions received in response to the recommended decision.

The zones in this decision were carefully drawn to provide proper alignment with the Carolina order to the east, the Upper Florida order to the south, the Texas and Southwest Plains orders on the west, and the Louisville-Lexington-Evansville, Paducah, and Tennessee Valley orders on the north; they were drawn so as to minimize price changes from one zone to the next zone; as much as possible, the zones were drawn so as to include in the same zone all plants located in close proximity to one another; and they were drawn in a way that will provide an incentive for milk to move from surplus production areas to metropolitan areas where distributing plants are located.

Zone 7. The base zone, Zone 7 (Zone 6 in the recommended decision), includes a band of counties extending from South Carolina on the east to Texas on the west. The $3.08 Class I differential applicable to this zone borders a $3.08 zone in the Carolina order and a $3.16 zone in the Texas order and a $3.00 zone in the Southwest Plains order. Included within this zone are three distributing plants in Georgia, three in Alabama, and two in Mississippi. The $3.08 adopted for the Georgia and Alabama plants is the same price that is now applicable to these plants and that was proposed by the cooperative coalition and Fleming Dairy.

The Mississippi portion of Zone 7 includes the Brookshire (Dairy Fresh) Dairy Products, Inc., plant in Columbus (Lowndes County) and LuVel Dairy Products, Inc., in Kosciusko (Attala County). At the present time, the price at the Columbus plant is $3.10, while the price in Kosciusko is $3.20. Proposal number 1 would have maintained these prices, while the Fleming Dairy proposal would have included the Columbus plant in its $3.08 zone and the Kosciusko plant in its $3.18 zone.

Lowndes and Attala Counties should be added to Zone 7 of the proposed Southeast marketing area with a Class I differential of $3.08. This price ties in well with prices to the east and west and will be 10 cents below the Class I price applicable to LuVel's closest competitor, Flav-O-Rich in Canton, which is about 50 miles southeast of Kosciusko.

The $3.08 price in Zone 7 extends into 6 counties in southern Arkansas, which are currently not regulated by any order. There are presently no distributing plants in this area. Seven counties in southern Arkansas, which contain no distributing plants and are not now regulated, have been removed from the base zone and placed in Zone 6. This change, and a similar conforming change to Zone 5, was made to maintain an orderly price surface in southern Arkansas following the transfer of several counties in the Little Rock area to Zone 4.

One exception to the base zone price of $3.08 was filed on behalf of Barber (Birmingham) and Dairy Fresh (Greensboro). This exception is addressed after the discussion of Zone 9.

Zone 8. Zone 8 (Zone 7 in the recommended decision) should have a Class I differential adjusted for location of $3.18 (i.e., a plus location adjustment of 10 cents). This zone borders a $3.23 zone under the Carolina order on its easternmost edge and a $3.16 zone under the Texas order on its western border. There are five distributing plants in this zone: Foremost Dairies in Shreveport, Louisiana; the Borden Company in Monroe, Louisiana; Flav-O-Rich in Canton, Mississippi; Kinnett Dairy in Columbus, Georgia; and the Borden Company in Macon, Georgia. The Shreveport and Monroe plants are now in a $3.28 zone under Order 96, the Flav-O-Rich plant is in a $3.35 zone under Order 94, and the Columbus and Macon, Georgia, plants are in a $3.18 zone under Order 7.

Testimony at the hearing indicated that handlers in northwestern Louisiana compete with handlers in east Texas who are subject to a $3.16 price. It was also pointed out in testimony and in a brief that Dallas, Texas, which is roughly the same latitude as Shreveport, had the same price as Shreveport from 1985 through 1991, after which the Dallas price was reduced from $3.28 to $3.16.

Data and testimony in the record also indicated that there are abundant supplies of milk available to the Shreveport and Monroe handlers in nearby De Soto Parish and in Hopkins County, Texas, which produced 74 million pounds of milk in December 1992.

The $3.28 price that presently applies at Shreveport and Monroe and which was proposed for this area by the cooperative coalition is too high in relation to the $3.16 Class I differential under the Texas order. In the absence of any testimony indicating that the Shreveport/Monroe area is a deficit area needing an unusually high price to attract a supply of milk, the price in that area should be reduced to $3.18.

The price at the Flav-O-Rich plant in Canton should be reduced by 17 cents to provide proper alignment with areas to the east and west of Canton. Although the competitive relationship will be changed between Flav-O-Rich, Canton, and its nearest competitor, the Borden plant in Jackson, Mississippi (Zone 9), the 10-cent difference in price is not unreasonably wide in view of the roughly 25 miles from Canton to Jackson and is necessary to provide a proper price relationship with areas to the east and west of Canton.

Zone 9. Zone 9 (formerly Zone 8 in the recommended decision) of the proposed marketing area includes no plants in Louisiana or Georgia, but does encompass one plant in Mississippi and two plants in Alabama.

The Mississippi plant in Zone 9 is the Borden plant in Jackson, while the two Alabama plants are the Superbrand and Barber Pure Milk Company plants in Montgomery. Under Order 94, the Jackson plant now has a Class I differential adjusted for location of $3.35. As proposed by the cooperative coalition and Fleming Dairy, that would also be the price under the merged order. The two Montgomery plants also now have a Class I differential adjusted for location of $3.35, which was also the price proposed for those two areas.

The price in Jackson, Mississippi, and Montgomery, Alabama, should be reduced from $3.35 to $3.28. These plants are on nearly the same east-west plane as Dallas, Shreveport, and Monroe, which would be subject to a $3.18 price. There was no indication of a problem attracting a milk supply in this area, and there are no plants in the immediate area that would be negatively impacted by this modest reduction in price. Accordingly, the pricing in the four separate marketing areas should be integrated by the creation of this $3.28 zone.

Fleming and Purity took exception to the recommended 7-cent price reduction at Jackson, Mississippi, and Montgomery, Alabama. They argued that this change was not proposed or supported and is untested by the realities of supply and demand. Finally, they were concerned that the milk supply of handlers in Jackson and Montgomery might be jeopardized by the price reduction.

Neither the supplier of the Jackson and Montgomery plants nor the handlers themselves filed comments suggesting a problem with the proposed price of $3.28. In terms of inter and intra-order alignment, a price of $3.28 appears to line up well with prices to the north, south, east and west. It is 170 miles from Mobile to Montgomery. If the transportation cost were computed from Mobile, the price at Montgomery would be $3.23 (i.e., $3.65 − [17 × .025]). If transportation cost were added to the price at Birmingham, the price would be about $3.33 (i.e., $3.08 + [10 × .025]). Based on prices to the east and west of the marketing area, $3.28 is the correct price for this area.

Barber and Dairy Fresh also objected to the lower Class I price at LuVel Dairy Products, Inc., Kosciusko, Mississippi, from $3.20 to $3.08. They stated that there was no support in the record to make this change.

As explained in the recommended decision, the prices at Kosciusko, Canton, and Jackson were too high in relation to the prices east and west of those locations. To maintain the existing prices at those locations while reducing the prices in northern Louisiana and northern Mississippi would have put those handlers at a competitive disadvantage. Neither Flav-O-Rich nor Borden nor LuVel excepted to this price reduction on grounds that it would jeopardize their milk supply. In fact, the blend price under the merged order at those locations is likely to offset the price reduction so that the lower Class I price should have no impact on their ability to attract a supply of milk.

Zone 10. Zone 10 in this final decision is a combination of Zones 9 and 10 as contained in the recommended decision. The new Zone 10 runs from the Atlantic Ocean on the east to a $3.34 zone under the Texas order on the west. The differential price adjusted for location in Zone 10 should be $3.40. There are no distributing plants within this zone in Louisiana, but there is one nonpool plant operated by Hershey Foods in Savannah, Georgia, a pool distributing plant operated by Dairy Fresh Corporation at Cowarts, Alabama, and another Dairy Fresh plant at Hattiesburg, Mississippi. The Hershey plant in Savannah is now subject to a $3.38 price under Order 7; the Cowarts plant is subject to a $3.38 price under Order 93; and the Hattiesburg plant has a price of $3.45 under Order 94. Both the cooperative coalition and Fleming Dairy proposed a continuation of current prices for this area.

A price of $3.48 was recommended for the Cowarts and Hattiesburg plants in recommended Zone 10 and a price of $3.38 for the Savannah plant in recommended Zone 9. This price structure would have resulted in a 10-cent price increase for the Cowarts plant, a 3-cent price increase for the Hattiesburg plant, and no change in price for the Savannah plant. After reviewing the comments submitted and further analyzing the market structure in this area, Zones 9 and 10 should be combined with a price of $3.40 providing for a smoother pricing transition between Zones 9 and 11.

Barber (Birmingham) and Dairy Fresh (Greensboro) excepted to the price reduction of 17 cents at the Flav-O-Rich plant at Canton, Mississippi, and the 7-cent price reduction at the Borden plant at Jackson, Mississippi, in relation to the 3-cent increase in price at the Dairy Fresh plant at Hattiesburg. The exception noted that the price at Hattiesburg would be increased by three cents to $3.48 while the price at New Orleans would be lowered 17 cents to $3.68. This would lower the difference between the Hattiesburg and New Orleans Class I prices to 20 cents from its present 40-cent level. These handlers asked: ''What kind of equity is this when price zones are set up so that the price at the plant in Hattiesburg is 30 cents higher than for a plant located in Canton 105 miles north of Hattiesburg and only 20 cents lower for plants located in New Orleans 105 miles south of Hattiesburg?''

Finally, Dairy Fresh Corporation, on behalf of its plant in Cowarts, Alabama, excepted to the price proposed for its plant at Cowarts. It argues that there was no proposal to change this price and no record evidence to support the proposed price. The price should be returned to its present $3.38 level, it concludes.

The price change at Hattiesburg, from $3.48 in the recommended decision to $3.40 in this final decision, will reduce the Hattiesburg price by five cents from its present $3.45 level under Order 94. This plant is in a heavy production area so the lowering of its price should not affect the plant's milk supply. From the standpoint of Class I price alignment, the lower price at Hattiesburg will not disrupt price alignment with nearby competitors. Hattiesburg, for example, is 109 miles to New Orleans and 98 miles to Mobile. Based on a transportation allowance of 2.5 cents per 10 miles, the price at Hattiesburg in relation to New Orleans should be no lower than $3.37 [i.e., $3.65 $-$ (11 $\times$ .025)], while the price at Hattiesburg in relation to Mobile should be no lower than $3.40 [i.e., $3.65 $-$ (10 $\times$ .025)].

With these price changes, there will be a 12-cent difference in price between Hattiesburg and Jackson (i.e., $3.40 $-$ $3.28). This is two cents greater than the difference that now exists between these two locations and provides no Class I price advantage to the Borden plant in Jackson. The 105-mile distance between Jackson and Hattiesburg would support a price difference of 28 cents (i.e., 11 $\times$ .025) between these locations. There is no reason to expect handlers to pay any more than is necessary to obtain an adequate supply of milk for fluid use. The prices at Jackson and Canton are appropriate using this standard.

A $3.40 price in the new Zone 10 will increase the Cowarts plant's price by 2 cents in comparison to its present $3.38 level under Order 93, but it will be lowered by 8 cents in comparison to the $3.48 price for this area in the recommended decision. Southern Alabama is a deficit area and milk is transported to plants in this area from as far away as central Tennessee. A price of $3.48 for Cowarts was proposed in the recommended decision to ensure that the Dairy Fresh plant would be adequately supplied under the merged order, as well as to provide a smooth transition in price from southern Alabama and Georgia into the $3.58 price zone of the Upper Florida marketing area. Like the plants in Mobile, the Cowarts plant now enjoys the relatively high utilization of the Alabama-West Florida order. Under the merged order, the uniform price will probably be lower at Cowarts and the plant may have difficulty attracting a supply of milk. Nevertheless, in view of the strong opposition of Dairy Fresh to any price increase at Cowarts, the price should be lowered to $3.40. Cowarts is more than 190 miles from Mobile, so the 25-cent price difference between Cowarts and Mobile is far below the cost of shipping milk from Cowarts to Mobile. Therefore, the reduction in price at Cowarts will cause no disruption in Class I price alignment with Mobile.

The Hershey plant at Savannah, Georgia, will experience a two-cent higher Class I price as a result of this change. This minimal price change should have little impact on this plant, which has a relatively high Class II utilization.

Zone 11. Zone 11 of the Southeast marketing area borders the Upper Florida order on the east, where the Class I differential price is $3.58, and the Texas order on the west, where the price is $3.34. The price in Zone 11 should be $3.58.

Zone 11, which has been modified by the addition of several parishes and counties from Zone 12, now includes only one county that is split between two zones. The portion of Mobile County, Alabama, that is within 20 miles of the Mobile City Hall is in Zone 12, while the remainder of Mobile County is in Zone 11.

With these modifications, there is now one distributing plant in Zone 11 at Hammond, Louisiana, operated by Superbrand Dairy Products, Inc., and there are two Mid-Am manufacturing plants in the Louisiana parishes of Tangipahoa and Washington. In Tangipahoa Parish, Mid-Am operates a cheese plant in Kentwood. In Washington Parish, which is to the east of Tangipahoa Parish, it operates a butter-powder manufacturing plant in Franklinton.

At the present time, the Class I differential price at Hammond, Kentwood, and Franklinton is $3.65 under Order 94. The cooperative coalition proposed a continuation of this price level under the merged order, as did Fleming Dairy, Dairy Fresh, Acadia Dairy, Barber Dairy, Brown's Velvet Dairy, Guth Dairy, Kleinpeter Dairy, and Walker Resources.

In August 1993, Tangipahoa Parish produced 23 million pounds of milk, far more than any other parish in Louisiana. Washington Parish was the next highest production parish that month, producing 14.6 million pounds. Directly north of Tangipahoa and Washington Parishes are the Mississippi counties of Pike and Walthall, which are the two highest production counties in Mississippi, producing 6.9 and 7.0 million pounds, respectively, in August 1993.

Because of the substantial milk production in this area of southern Mississippi and southeastern Louisiana, this area serves as a reserve supply area for much of the Southeast. In August 1993, for example, more milk was supplied to the Alabama-West Florida market from Washington Parish than any other county or parish in the Southeast.

A $3.58 price level for Zone 11 will align properly with the Upper Florida marketing area and will provide a smooth transition to Zone 12, which based upon this decision should be priced 7 cents above Zone 11. Milk is not needed in Zone 11, but it is needed in Zone 12. Therefore, the price in Zone 11 needs to be high enough to provide proper alignment with lower prices north of this area and higher prices south of the area, but it does not have to be kept at its present level, particularly since the price in Zone 12 is being reduced.

Although Zones 11 and 10 ($3.58 and $3.40, respectively) of the Southeast order abut a $3.34 zone under the Texas order, there are no distributing plants in the Texas county of Newton, which borders these zones. Due to the extremely large zones in the Texas marketing area, it is not possible to gradually increase prices on a north to south axis in Louisiana while simultaneously matching up perfectly with the zone prices of the Texas marketing area. Because there are no plants in this area, however, this is not a serious problem at the present time.

Zone 12. Zone 12 contains several of the large population centers in this marketing area, including Baton Rouge, New Orleans, and Mobile. It extends from Mobile, Alabama, on the east to the Texas border on the west. The Class I differential adjusted for location for Zone 12 should be $3.65 or three cents below the recommended decision's price of $3.68.

At present, the prices at Baton Rouge, New Orleans, and Mobile are $3.78, $3.85, and $3.65, respectively. Under the cooperative coalition proposal, these prices would stay at their present levels. Under the Fleming Dairy proposal, and under Proposal No. 3, which was jointly submitted by Dairy Fresh, Barber Dairy, Brown's Velvet Dairy, and Kleinpeter Dairy, the price at Baton Rouge would be reduced to $3.65 and the price at New Orleans would be reduced to $3.72. Fleming Dairy also proposed a price of $3.65 for Mobile.

A spokesman representing Dairy Fresh of Louisiana (i.e., part of the Fleming Companies), which operates a distributing plant in Baker, Louisiana (about five miles north of Baton Rouge), testified that the Class I prices in southern Louisiana should be adjusted for three reasons. First, he said that the current Class I price for southern Louisiana which was established by Congressional mandate in 1985 has put this area significantly out of alignment with the price grid of other locations in the South. The Congressionally-mandated Class I pricing in southern Louisiana, he said, was not justified in the 1985 legislative history and cannot be justified now, particularly since the area north of Lake Pontchartrain and Lake Maurepas contains one of the greatest concentrations of milk cows of the deep South.

The witness testified that in the Federal order system higher Class I prices at one location compared to another suggest a need to attract milk from distant supply areas. But southern Louisiana, he pointed out, is not more deficit in milk production than Florida. In fact, he added, southern Louisiana milk supply is regularly transferred, primarily by Dairymen, Incorporated, to Florida during short production months to supplement Florida's raw milk requirements. He said that Louisiana shipments to Florida totaled 17 million pounds in 1989, 4 million pounds in 1990, 5 million pounds in 1991, 2.5 million pounds in 1992, and in August 1993 seven loads containing 330,000 pounds.

The second reason why southern Louisiana prices should be lowered, according to the witness, was that in September of 1990 a new Superbrand plant commenced operation in Hammond, Louisiana, which is about 40 miles due east of Baton Rouge and 55 miles north of New Orleans. He said the Superbrand plant was 25 miles closer to New Orleans than Baton Rouge, yet the Hammond plant enjoyed a Class I price of $3.65, which is 13 cents lower than the Baton Rouge price of $3.78.

The witness testified that the mileage allowance between Hammond and New Orleans is 3.6 cents per hundredweight per ten miles while the mileage allowance between Baton Rouge and New Orleans is 0.8 cents per hundredweight per ten miles. He stated that the Hammond allowance clearly exceeds the prevailing rate of about 2.0 cents to 2.5 cents per hundredweight per 10 miles that prevails elsewhere in the Southeast.

The Dairy Fresh witness stated that the third reason why southern Louisiana prices should be lowered is that in 1991 the Department lowered the Texas Class I differential by 12 cents per hundredweight. As a result, he said, milk processors in Texas immediately received a relative 12-cent advantage in their ability to compete with Louisiana processors. Prior to this decision, he testified, handlers in the Houston-Beaumont zone of the Texas market paid 4 cents per hundredweight more for their Class I milk than processors in the Baton Rouge area. After the change, however, these processors paid 8 cents less than the Baton Rouge processors, he added. The witness said that the Texas plants with regular distribution in Louisiana include two plants in Tyler, one in Conroe, and one plant in Fort Worth. One of the Tyler plants, he estimated, distributed 4 million pounds of Class I milk per month to retail stores in Louisiana.

The witness also testified that gross margins on Louisiana wholesale milk prices have tightened up since the Department lowered the Texas prices. He said it was time to address and correct the problem of competitive inequity and price misalignments without further delay and urged the Department to address the southern Louisiana pricing problems by partial recommended and final decisions without waiting for analysis and resolution of other merger issues.

A spokesman for the Southern Foods Group (SFG) testified that SFG agreed with Fleming Dairy that the price in southeastern Louisiana was too high relative to other areas. He also stated that the price surface that exists there today is solely the result of the 1985 Farm Bill, which established statutory minimums for Class I differentials in New Orleans and Shreveport. He added that there is no longer a reason to maintain the existing price structure in southern Louisiana because the Congressional mandate to increase prices was not binding after April 30, 1988.

The SFG witness testified that the largest population center for the Southeast order is Zone 8 of Proposal No. 1 (i.e., the Atlanta area) with a population of 3.3 million. He said the next most populous area is the Birmingham, Alabama, area with 1,717,455 people, followed by the Baton Rouge-West Louisiana and southern Georgia areas with 1.3 million each, and then New Orleans with 1.2 million.

Using data on nearby milk supplies and per capita consumption of fluid milk, the witness asserted that there is more production in relation to population in southern Louisiana than in any other population center of the marketing area. He said that nearby milk supplies in southern Louisiana for December 1992 exceeded 53.5 million pounds while all of the milk production located in Zone 8 of Proposal No. 1 was 44.2 million pounds. In contrast, he pointed out, the population of Zone 8 exceeded southern Louisiana by 2.4 million people. Therefore, he concluded, the milk price in Baton Rouge and New Orleans is higher than is warranted.

In its post-hearing brief, SFG stated that there should be no difference in price between Baton Rouge and New Orleans. The brief pointed out that prior to the 1985 Farm Bill, the Class I price at Baton Rouge and New Orleans was the same. It also emphasized that the distance from the large pool of milk in Tangipahoa Parish is roughly the same to New Orleans as to Baton Rouge because of the causeway over Lake Pontchartrain.

A witness appearing on behalf of the Louisiana Farm Bureau Federation stated that processors in Louisiana are losing fluid milk sales and producers are also losing their market. He testified that it was important that the pricing structure be aligned appropriately, not only within the consolidated area, but also with the adjacent market areas. He asked the Department to objectively evaluate the pricing structures in the proposed consolidated area. Louisiana processors cannot be competitive, he noted, if they are subject to unreasonably high prices relative to their competition.

The witness testified that current Federal order price alignment within, and adjacent to, Louisiana markets has resulted in prices that are jeopardizing the economic well-being of the State's dairy industry. Just as important, he added, it is contributing to a decline in the critical mass of services essential to a healthy dairy industry (e.g., milk hauling, veterinary services, feed milling, etc.).

The Louisiana Farm Bureau witness indicated that ''the decline of our local markets and loss of our processing industry, can be directly linked to imports from adjacent areas.'' He said that the present price structure has resulted in the importation of unneeded milk from Texas which, in turn, has caused the unnecessary movement of milk at the expense of Louisiana dairymen.

It is concluded from the testimony in this record that a reduction in price is absolutely necessary in the Baton Rouge and New Orleans areas and that there is no reason for Hammond to be priced 13 cents below Baton Rouge or for Baton Rouge to be priced seven cents below New Orleans. Baton Rouge and New Orleans should be in the same zone with the same price, and Hammond should be priced 7 cents lower.

The available supplies of milk in the New Orleans/Baton Rouge area do not justify a continuation of the present price structure. From December 1983 to December 1992, the milk supply in the two Louisiana parishes of Tangipahoa and Washington grew by more than 29 percent, from 39,492,177 pounds of milk per month to 51,125,921 pounds of milk per month. In December 1992, more than 33 million pounds of milk produced in Tangipahoa Parish were pooled on Orders 94 and 96. There is another 15.9 million pounds of milk available in Washington Parish and in excess of 4.6 million pounds for December 1992 from St. Tammany and St. Helena Parishes. In total, there were 55 million pounds of milk in parishes close to the New Orleans/Baton Rouge area.

The Class I differential adjusted for location for Zone 12 should be $3.65, which is 13 cents below the present price in Baton Rouge and 20 cents below the present price in New Orleans. It is also five cents below the adjacent Zone 8 price of Order 126.

In this southernmost part of the Southeast marketing area, there is obviously no reason to provide higher prices to preserve alignment with more southerly areas because there is nothing but water south of New Orleans. The question that must be asked then is whether or not a higher price is needed to attract a supply of milk to this area.

The testimony and data in this record indicate that there is more milk available to handlers in New Orleans and Baton Rouge than to handlers in many other parts of the marketing area. It would therefore appear that, not only are the present Class I price levels in Baton Rouge and New Orleans not needed to help handlers attract a supply of milk to this area, but, in fact, may hinder the movement of bulk milk to other areas where it is needed for fluid use.

From May 1984 to May 1993, the total packaged distribution of fluid milk products in the Greater Louisiana marketing area decreased from 46.7 million pounds to 46.4 million pounds, or by .6 percent. During this same time period, the distribution of packaged fluid milk products in this marketing area by handlers regulated under the Texas order increased from 2.5 million pounds to 9.8 million pounds, or by approximately 290 percent. The total distribution in the area from handlers regulated under all other Federal orders increased from 11.9 million pounds to 15.2 million pounds (i.e., 28 percent).

In the Order 94 marketing area, the total packaged distribution of fluid milk products declined from 64.0 million pounds to 61.5 million from May 1984 to May 1993, or by 3.9 percent. During this time period, the distribution of packaged fluid milk products from all other orders increased from 9.3 million pounds in May 1984 to 13.3 million pounds in May 1993, or by 43 percent.

These comparisons paint an unhealthy picture for handlers in Mississippi and Louisiana. While their total disposition of fluid milk products has gone down, more and more of what remains of their market is being serviced by handlers outside the marketing area. Although there may be other explanations for these statistics, one thing that definitely happened during this timeframe is that the Class I prices in Baton Rouge and New Orleans went up in relation to all of the surrounding orders.

The pricing structure adopted here for Zone 12 will restore proper price alignment to this area in relation to prices in surrounding orders.

The Mobile, Alabama, area should also be part of Zone 12; specifically, that part of Mobile County, Alabama, within 20 miles of the Mobile City Hall. The Zone 12 price of $3.65 is the same price that now applies to Mobile under Order 93 and which was proposed for this area by the cooperative coalition.

There are two plants in the Mobile area: Barber Pure Milk Company (Barber) in Mobile and Dairy Fresh Corporation (Dairy Fresh) in nearby Prichard.

At the hearing, Barber and Dairy Fresh proposed maintaining the present $3.65 Class I price at Mobile, but increasing the producer location adjustment by an additional 22 cents. Under the cooperative coalition proposal and the Fleming Company proposal, the Class I price also would have remained at the $3.65 level.

Under the Barber/Dairy Fresh proposal, handlers in their proposed Zone 17–A (i.e., that part of the cooperative's proposed Zone 17 within the States of Alabama and Florida) would pay a 57-cent location adjustment on their Class I milk (i.e., $3.65), but the producers delivering milk to these plants would be paid an additional 79 cents (over the base zone price) on all of the milk delivered to the plants.

The spokesman for Barber and Dairy Fresh testified that the demand for Class I milk in the south Alabama area and western panhandle section of Florida far exceeds the supply. He said that historically milk has been shipped considerable distances to this area.

The witness testified that in December 1992 the Barber and Dairy Fresh plants received approximately 17.9 million pounds of producer milk from non-member producers and cooperative association member producers, of which 7.3 million pounds, or 41 percent, was received from producers located in Louisiana and Mississippi. He stated that there is approximately 2.5 million pounds of milk per month located in southern Alabama and the panhandle of Florida that is not being shipped to the Barber and Dairy Fresh plants. Even if this milk were delivered to those plants, he said, there would remain a shortfall of about 4.8 million pounds of milk. To maintain this supply, based on current price relationships, he added, will cost handlers from 33 cents to 75 cents per hundredweight.

The Barber/Dairy Fresh witness indicated that the incentive for these producers to ship their milk to plants located in the Mobile area has been the Order 93 blend price, which averaged 53 cents higher than the Order 94 blend price in southeastern Louisiana/ southern Mississippi for the 12 months of September 1992 through August 1993. The problem, he stated, was that in merging these orders, this blend price incentive will be eliminated. Without an additional incentive to move milk to Mobile, according to the witness, it is likely that some handlers in the Mobile area will be forced out of business.

The witness stated that there are several handlers competing for the milk supply in Louisiana and Mississippi who have plants located in that heavy production area. Among these, he said, are Mid-America Dairymen, Inc., which operates a cheese manufacturing plant in Kentwood, Louisiana, and a butter-powder manufacturing plant in Franklinton, Louisiana; Flav-O-Rich, which operates a distributing plant located in Canton, Mississippi; Superbrand Dairy Products, Incorporated, which is located in Hammond, Louisiana; Borden, Inc., which has plants in Baton Rouge, Louisiana, and Jackson, Mississippi; and Dairy Fresh of Louisiana, which operates a distributing plant in Baker, Louisiana.

According to the witness, Gulf Dairy Association charged an additional 30 cents per hundredweight for milk delivered to Mobile on top of the 53-cent blend price difference prevailing between Orders 93 and 94 between September 1992 and August 1993. He stated that Gulf Coast Dairymen's Association of Gulfport, Mississippi, charged an additional 40 cents per hundredweight for milk delivered to Mobile.

The Barber/Dairy Fresh proposal was actively opposed by most of the other hearing participants and was supported by no one other than the proponents. The effect of this proposal would be to have producers and handlers in other parts of the marketing area subsidize the delivery of milk to the Barber and Dairy Fresh plants in the Mobile area. Those parties opposed to the proposal argued that they should not have to subsidize Barber and Dairy Fresh in attracting a milk supply. They contended that if higher prices to producers are needed in Mobile, the handlers operating plants in Mobile should pay higher Class I prices to reflect those higher costs.

The problem posed by the Mobile handlers can be addressed by providing a greater transportation allowance to move milk to the Mobile area. At the present time, the Mobile area is priced the same as the heavy production area in southern Mississippi and southeastern Louisiana. Thus, there is no incentive for a producer to incur the cost of shipping milk from this area to Mobile. By maintaining a $3.65 differential price in Mobile and decreasing the price at alternative locations—i.e., by 10 cents at Kentwood, Franklinton, and Hammond, Louisiana; by 20 cents in New Orleans; by 7 cents in Jackson, Mississippi, and Montgomery, Alabama; by 17 cents in Canton, Mississippi; and by 12 cents in Kosciusko, Mississippi—the blend price in the Mobile area will cover more of the transportation costs incurred in shipping milk to Mobile as compared to these alternative delivery locations.

If, despite these adjustments, the Mobile handlers still find it difficult to attract milk to their plants, the location adjustment in the Mobile area can be increased further to provide more transportation allowance for shipping milk to Mobile. If this proves necessary, however, it is only appropriate to increase both the Class I price and the producer blend price by the same amount. In that way, the higher Class I prices of handlers in the Mobile area will be passed on to consumers, who should, appropriately, pay higher prices reflective of the higher costs of bottling milk in the Mobile area or transporting packaged milk to the Mobile area from plants at other locations.

In its exception, Mid-Am agreed with the recommended decision in putting Baton Rouge and New Orleans in the same pricing zone. Mid-Am disagreed, however, with also including Hammond in that zone (Zone 12). It argued that the distance from Kentwood, Louisiana, which is the center of the Tangipahoa Parish supply area, to Hammond is 34 miles, but the distance to Baton Rouge is 82 miles and the distance to New Orleans is 73 miles. Mid-Am maintains that the added distance from the supply area justifies at least a 9-cent higher price at New Orleans and Baton Rouge relative to Hammond. Using the same analysis with respect to the distance from Franklinton, Louisiana, to Baton Rouge, New Orleans, and Hammond justifies a price at Hammond that is 7 cents lower than the New Orleans and Baton Rouge prices, according to the cooperative. Mid-Am concluded that to improve alignment between Hammond, Baton Rouge, and New Orleans, the Louisiana parishes of Livingston, Tangipahoa, and St. Tammany and the Mississippi counties of Hancock, Harrison, and Jackson should be added to Zone 11 and the price of Zone 12 should be reduced from $3.68 to $3.65.

Dairy Fresh of Louisiana, Inc., the operator of a distributing plant at Baker (Baton Rouge), Louisiana, suggested expanding Zone 10 to include Zone 11 and applying a price of $3.48 to this combined zone. It also suggested reducing the price in Zone 12 to $3.58. It argued that no point is served in having a separate zone which only contains Mid-Am's two manufacturing plants at Franklinton and Kentwood; reducing the price at these plants to $3.48 would enhance the blend price for the market and would encourage milk to move from this high production area to distributing plants at Hattiesburg, Mississippi; Cowarts, Alabama; and Mobile, Alabama.

Dairy Fresh also stated that revamping prices in this way will not create any alignment problems with the Upper Florida order or with the Houston/Beaumont area of the Texas order because there are no Texas plants in the immediate vicinity of southern Louisiana. It concluded that its suggested lowering of prices in the Baton Rouge/New Orleans area will restore the relationship that existed between south Louisiana and the Houston area prior to 1991, when the Texas price was reduced by 12 cents.

Barber and Dairy Fresh objected to the prices recommended for the Mobile area. These handlers stated that the Department erred in dismissing their proposal for separate Class I and producer location adjustments. They also wrote that separate location differentials for producers delivering milk to pool plants located within the marketing area are a method that could and should be used in addition to the Class I price to move milk to areas within the market where the milk supply is short.

Barber and Dairy Fresh also objected to placing Mobile, Alabama, in Zone 12 and increasing the price there by three cents. They urged the Department to reduce their price to $3.58 or at least to the present level of $3.65.

Finally, Gold Star Dairy objected to the price reduction in southern Louisiana because it ''upsets the competitive balance.'' It stated that ''it is improper to upset the economic balance without evidence of any change in marketing conditions justifying a change in prices.''

After reviewing the comments cited above and further analyzing the market structure of Zone 12 and the surrounding areas, it is concluded that the Zone 12 price should be lowered from $3.68 to $3.65. Also, as mentioned previously, the Louisiana parishes of Tangipanoa and St. Tammany, and the Mississippi counties of Hancock, Harrison, and Jackson should be moved from Zone 12 to Zone 11. This reduces the price at Hammond by 7 cents. Bulk milk delivered to Hammond is not worth as much as milk delivered to Baton Rouge or New Orleans and it is appropriate to have a lower price at Hammond, as suggested by Mid-Am.

Livingston Parish should not be shifted from Zone 12 to Zone 11, as suggested by Mid-Am. Although there presently are no plants in this parish, one could be built there in the future and have a price advantage over nearby plants in Baton Rouge. Livingston Parish should remain in Zone 12 to serve as a buffer between Baton Rouge and lower-priced Zone 11.

In Federal order markets, prices gradually increase from the Upper Midwest to the tip of Florida. The present pricing structure, which has evolved over time, reflects the fact that some southern areas occasionally need to import milk from surplus areas to the north. This is not true for every southern area. There may be pockets of heavy production, such as central Tennessee or southern Louisiana, which do not require supplemental milk from other areas, but which have higher prices nevertheless to preserve Class I price alignment with higher-priced areas to the south.

As noted above, southern Louisiana is a heavy production area. The handlers in Hammond, Baton Rouge, and New Orleans do not have to import milk from distant areas because they have an abundant supply at their doorstep. Because there are no handlers in the Gulf of Mexico, prices do not have to be increased at 2.5 cents per 10 miles through southern Louisiana to preserve price alignment with areas to the south of New Orleans.

The argument of Barber and Dairy Fresh that prices should be higher in New Orleans so that Dairy Fresh at Hattiesburg can afford to ship and sell packaged milk in New Orleans does not meet the standards of the Agricultural Marketing Agreement Act. Location adjustments reflect the cost of hauling bulk milk from production areas to processing plants. The adjustments compensate producers for the economic service they provide to handlers.

Similarly, the position of Gold Star Dairy that the reduction in price at New Orleans upsets the competitive balance between Little Rock and New Orleans provides no justification for not reducing a price that obviously is higher than it needs to be.

The goal of the Federal milk order program is to ensure an adequate supply of milk for fluid use and to establish and maintain orderly marketing conditions. Consumers in New Orleans should not have to pay higher milk prices simply to reflect the transportation cost of shipping packaged products there from Hattiesburg, Texas, Little Rock, or anywhere else because there are milk processing plants in the New Orleans area that can obtain bulk fluid milk at a cost that is less than the cost of hauling packaged milk.

Zone 6. Immediately north of the base zone, a new, transition zone (Zone 5 in the recommended decision) should be created with a Class I differential adjusted for location of $2.98. Currently, there are no distributing plants in this zone. However, at the time of the hearing there was one distributing plant—the Meadow Gold plant at Gadsden, Alabama—in this zone. Since the hearing, this plant has closed.

A slightly lower price should apply to Zone 6 to reflect its closer proximity to the heavy production area in south central Tennessee and to provide a smooth north to south price surface through this part of the marketing area. The $2.98 price in Zone 6 borders the dividing line of a $3.08 zone and $2.93 zone under the Carolina order. On the west, this zone borders a $3.00 zone under the Southwest Plains order.

Just north of Zone 6, the Class I price drops to $2.83 in Zone 5. It is necessary to create an intermediate Zone 6 to eliminate a sharp 25-cent drop that otherwise would occur between Zone 5 and the base zone.

Zone 5. Zone 5 (Zone 4 in the recommended decision) includes the northern tier of counties through Georgia, the northern two tiers of counties through Alabama and Mississippi, and a tier of counties through Arkansas. This zone should have a differential price adjusted for location of $2.83. As mentioned previously, the area of Arkansas included in Zone 5 has been modified from the recommended decision because of the changes made to Zone 4. With the modification, there are no plants in Arkansas in this zone.

There are no plants in the Georgia portion of Zone 5, which cuts through the Chattahoochee National Forest. In northwest Georgia, there are seven counties that are within the Tennessee Valley marketing area. Most of these counties also lie within the Chattahoochee National Forest. Although there are presently no plants in this area of Order 11, the location adjustment for a plant in this area that becomes regulated under the Southeast order would be minus 25 cents (i.e., a Class I price of $2.83).

There are three plants in the Alabama portion of Zone 5: Meadow Gold at Huntsville (Madison County), Dasi Products (partially regulated) at Decatur (Morgan County), and Shoals Cheese in Florence (Lauderdale County). The Class I price that now applies at these plants under Order 93 is $2.85.

In the Mississippi portion of Zone 5, there are two fully regulated distributing plants and one cheese plant. Barber Dairy operates a distributing plant in Tupelo (Lee County), and Avent's Dairy operates a distributing plant in Oxford (Lafayette County). The western border of this zone adjoins a $3.00 zone and a $2.77 zone under the Southwest Plains order.

Under the four separate orders, there are now four separate prices that apply to Zone 5: under Order 7, the price is $2.93; under Order 93, the price is $2.85; under Order 94, the price is $2.90; and under Order 108, the price is $2.77. Under the cooperative coalition proposal, the prices would remain at their present levels from northern Georgia to northern Mississippi. The Fleming Company would standardize the price at $2.85 from northern Georgia through northern Mississippi. AMPI proposed a $2.77 Class I price for the Little Rock, Memphis, and northwest Mississippi areas.

Under the merged order, a price of $2.83 should apply in this zone. This price would be 15 cents lower than Zone 6 to the south and 6 cents higher than Zone 4 on the north. The reason for selecting a price of $2.83 is that it lines up well with the prices on the east and west of the market and contributes to a smooth north to south transition within the marketing area.

Zone 4. Zone 4 (Zone 3 in the recommended decision) is comprised of the southernmost tier of counties through the State of Tennessee and has been reconfigured to include two tiers of counties in central Arkansas. It should have a Class I differential adjusted for location of $2.77.

There are six plants in this zone: Forest Hill Dairy and Harbin Mix in Memphis, Tennessee; Borden, Inc., Coleman Dairy, and Gold Star Dairy, in Little Rock, Arkansas; and Humphrey's Dairy in Hot Springs, Arkansas. At present, the Class I price at these locations under the Central Arkansas order is $2.77. The recommended decision proposed a price of $2.77 for Memphis and a price of $2.83 for the Little Rock area.

Gold Star Dairy argued in its exception that it had no notice that any price change was contemplated for Little Rock and that to change the price at Little Rock simply to tie together east-west price alignment was inappropriate. It suggested reducing the price at Little Rock to $2.77 by moving six Arkansas counties from Zone 4 to Zone 3.

Gold Star is incorrect in asserting that it had no notice. In any merger hearing, all order provisions are to be considered and are within the scope of the hearing. However, it is true that no attention was focused on the appropriate price at Little Rock at the hearing. Proponents assumed that the current pricing structure would be adopted.

A slightly higher price was recommended for the Little Rock area to better align prices east to west and to slightly enhance the uniform price at that location under the merged order. This was an increase of six cents and with the zone configuration in the recommended decision this price level seemed appropriate. However, with the reconfiguration of the zones in this final decision it is appropriate to return the price applicable at Little Rock to $2.77. Accordingly, the Arkansas counties of Polk, Montgomery, Garland, Saline, Pulaski, Lonoke, Prairie, Monroe, and Lee have been moved to the new Zone 4, thereby reducing the price at Little

Rock to $2.77, the level that now applies to that area under Order 108.

Zone 3: A new zone consisting of three counties in western Tennessee and nine counties in Arkansas should be created after reviewing the exceptions to the recommended decision.

Fleming and Purity opposed the inclusion of the Turner Dairies plant at Covington, Tennessee, in recommended Zone 2 with a price of $2.60. These handlers argued that Covington is in the Memphis Metropolitan Area and that it should retain the same $2.77 price that it had under the Memphis order. They stated that they compete with the Covington plant for route disposition in the Memphis area and would be seriously affected by the change.

Arkansas Dairy Cooperative Association, Inc. (ADCA), also commented on the proposed pricing for the Covington plant. It noted that while the plant now produces mostly Class II products, the proposed 17-cent lower price at this location could encourage the processing of Class I products there. ADCA also stated that even though Memphis is 36 miles south of Covington, the 17-cent price difference between the two locations would place suppliers of the Covington plant at a disadvantage vis-a-vis suppliers of the Memphis plant. This would create a substantial disincentive to supply that plant, they argued.

ADCA also commented on other problems which it saw with the proposed Zone 2. It stated that in October 1994 it purchased land in Damascus, Arkansas, to build a receiving station/balancing plant. When it made this commitment, it had no idea that this area would be priced 17 cents below the price that had applied to Van Buren County under the Central Arkansas order. It wrote that ''this is an inequitable result which surely would not have occurred if the plant had been in place at the time of the rulemaking and discussed at the hearing.''

A new zone should be added between recommended Zones 2 and 3 in Arkansas and western Tennessee. The price for this zone is $2.70, which is 7 cents lower than the Zone 3 price and 10 cents higher than the Zone 2 price. The new zone consists of the Arkansas counties of Johnson, Pope, Van Buren, Cliburne, Independence, Jackson, Craighead, Poinsett, and Mississippi; and the Tennessee Counties of Tipton, Lauderdale, and Haywood. This new zone, which includes the Turner Dairies plant at Covington and the plant which ADCA intends to build at Decatur, will reduce the price difference between the Turner Dairies plant at Covington and handlers in Nashville, Memphis, and Little Rock. It will also help to mitigate the price reductions cited by ADCA.

A $2.70 price for this new zone will improve alignment between Zones 2 and 3. Based on the 36-mile distance between Covington and Memphis, a 7-cent lower price for Covington is a little higher than the 10-cent difference that would be justified based on 2.5 cents per 10 miles. Similarly, based on a distance of approximately 40–50 miles from Damascus to Little Rock, a difference of at least seven cents is justified between those two points. Milk should be encouraged to move from Damascus to Little Rock, where it is needed by distributing plants for fluid use. In view of the fact that Covington and Memphis were in the same zone under the Memphis order and Van Buren County was part of the base zone under Order 108, it is appropriate to limit the difference to 7 cents between Zone 2 and new Zone 3.

The new $2.70 zone is not carried through central Tennessee. This is a departure from the pricing zones to the north and south of this zone which extend on an east-west plane through the marketing area. As noted previously, central Tennessee is a heavy supply area from which milk moves to various parts of the marketing area. This area includes Mid-Am's butter-powder plant at Lewisburg, which processes the market's surplus milk. Under the Alabama-West Florida order, the price at this plant is now $2.52, the same as the price applicable to the Purity plant at Nashville and 1.5 cents below the price at the Fleming Dairy plant, which has been regulated under the Georgia order. As proposed in the recommended decision, the price at Lewisburg was $2.60, the same as the price applicable at Murfreesboro and Nashville. This pricing was based, in part, on Fleming's testimony that the price at Lewisburg should be no higher than the price at Murfreesboro because otherwise producers would have an incentive to deliver their milk to Lewisburg for manufacturing use rather than to Murfreesboro for fluid use. The recommended decision attempted to extend this reasoning to the Nashville area as well by including Nashville in the same zone as the Murfreesboro and Lewisburg plants, but, as explained below, the Nashville handlers excepted to the higher price at Nashville and it has been changed.

With the addition of the new $2.70 zone, a question again arises concerning the proper price at Lewisburg. Based on higher prices to the east and west of Lewisburg, some might argue that Lewisburg should be in the $2.70 zone. Similarly, in terms of north-south Class I price alignment, it could be argued that Lewisburg should be priced at $2.70, seven cents lower than Giles County, immediately below Lewisburg. These considerations, however, are outweighed by the fact that there are no distributing plants in Tennessee south of Murfreesboro which would require a higher price at Lewisburg to preserve Class I price alignment. In addition, because the Lewisburg plant is a surplus processing plant, it is not necessary to increase the price at Lewisburg to $2.70 to assure that the plant receives an adequate supply of milk. Finally, the price at Lewisburg has been very close to the price applicable at the Purity and Fleming plants at Nashville and the necessity of keeping this relationship as close as possible overshadows the potential problem that could arise if a distributing plant is ever built at Lewisburg.

Zones 1 and 2. With the addition of the new Zone 3, as described above, Zone 2 now consists of 27 counties in central Tennessee and three counties in northwest Arkansas. The price for this zone should be $2.60.

There are two plants in this zone: The Heritage Farms plant in Murfreesboro (Rutherford County) and the Mid-America Dairymen, Inc., butter-powder manufacturing plant in Lewisburg (Marshall County). The Heritage plant now has a $2.605 price under Order 7 and the Lewisburg plant has a $2.52 price under Order 93.

The cooperative coalition proposed a price of $2.60 for these two plants. A $2.60 Class I differential adjusted for location also was proposed for these locations in the recommended decision. Neither Heritage nor Mid-Am excepted to this price, and it is the price adopted in this final decision.

Zone 1 of the Southeast marketing area, as modified in this final decision, includes 21 counties in northern Tennessee and 8 counties in northern Arkansas. There are three plants in this zone: Fleming Companies, Inc., and Purity Dairies, Inc., at Nashville, and Cumberland Creamery at Antioch, Tennessee. The price adopted for this zone is $2.55, which is three cents higher than the level proposed by the cooperative coalition and the Fleming Company.

This zone borders four different marketing areas with five different prices (i.e., $2.77 on its eastern border with Order 11, $2.11 and $2.26 along its northern border with Order 46, $2.39 in the Order 99 marketing area, and $2.55 on its western border with Order 106).

At present, the Fleming Dairy plant is regulated under Order 7 and has a Class I price of $2.53, while the Purity Dairy plant is regulated under Order 93 and has a Class I price of $2.52. Cumberland Creamery plant is a nonpool plant that makes condensed milk and milk powder.

The cooperative coalition and the Fleming Company both proposed a price of $2.52 for the Nashville area. However, the cooperative coalition proposed $2.605 for Lewisburg and Murfreesboro, while the Fleming Company proposed a price of $2.55 for those locations.

The assistant operations manager for Fleming Dairy, Nashville, Tennessee, testified that their Nashville plant competes with The Kroger Company plant (i.e., Heritage Farms) in Murfreesboro for sales throughout the Southeast. He also indicated that both of these plants, as well as the Purity Dairy plant in Nashville, compete for milk supplies from the same general area in central Kentucky and central Tennessee. The witness explained that because this area is a very high production area, it serves a balancing function for the Southeast. When the milk is not needed for fluid use, it is processed at Dairymen, Inc.'s (i.e, Mid-America Dairymen), butter-powder plant in Lewisburg, Tennessee, the Cumberland Creamery in Antioch, or the Meadow Gold[9] ice cream plant in Nashville.

The Fleming Dairy witness testified that the prices between Nashville and Murfreesboro should be brought into closer alignment because the existing price difference at these locations was causing unrest and discontent among neighboring producers. He suggested a price difference of no more than three cents. The witness also stated that the price at Lewisburg, Tennessee, should be no higher than the Murfreesboro price because, otherwise, producers would have an incentive to deliver their milk to Lewisburg for manufacturing use instead of to a bottling plant for fluid use.

Based on the testimony of the Fleming Dairy witness, the recommended decision put Nashville and Murfreesboro in the same zone with a Class I differential adjusted for location of $2.60. The recommended decision concluded that there was an abundant supply of milk available to handlers in central Tennessee and, for this reason, it was not necessary to increase the price at Murfreesboro relative to Nashville to insure that the Heritage Farms plant in Murfreesboro obtains an adequate supply of milk. It also stated that it would not be appropriate to reduce the Class I price at Murfreesboro to the Nashville level because that would disrupt price alignment with the higher-priced zones south of Tennessee and with the $2.77 price applicable in the adjacent Tennessee Valley marketing area. The recommended decision concluded that to provide a common pricing level between the Nashville and Murfreesboro plants, the Nashville price should be raised to $2.60.

In its exception, Mid-Am stated that the Tennessee Counties of Dickson, Cheatham, Davidson, Wilson, and Smith should be moved from Zone 2 to Zone 1, and the price for Zone 1 should be changed from $2.55 to $2.52. The cooperative argued that putting Nashville in Zone 2, as proposed in the recommended decision, results in price alignment problems with handlers fully regulated under the Louisville-Lexington-Evansville order (Order 46). In support of this position, Mid-Am noted that Louisville, which has a price of $2.11 under Order 46, is 175 miles from Nashville and that, based on a transportation cost of 2.5 cents per 10 miles, the price at Nashville should be no more than 44 cents higher than the Louisville price. It concluded, therefore, that the price at Nashville should stay at $2.52.

Fleming Companies, Inc., and Purity Dairies, Inc., which operate distributing plants in Nashville, also opposed the $2.60 price proposed for Nashville. They contend that a higher price is not needed for Nashville because there is an abundant supply of milk in north central Tennessee. They further stated in their exception that there was no evidence in the record to support a higher price at Nashville; the arguments made by Fleming Dairy at the hearing were in support of a lower price at Murfreesboro, not a higher price at Nashville. They also commented that the recommended decision ''creates a Class I price disadvantage for Nashville handlers in competition with Southern Belle and Flav-O-Rich in the southeast Kentucky portion of the Tennessee Valley market, and with Louisville-Lexington-Evansville handlers.'' They repeated their call for a $2.52 price at Nashville and a $2.55 price at Murfreesboro.

The recommended $2.60 for Nashville was based upon the testimony of the Fleming Dairy witness, who indicated that Fleming Dairy was at a competitive disadvantage in procuring milk with the nearby Heritage Farms Dairy plant at Murfreesboro. In its post-hearing brief, Fleming stated that: ''The supply of milk to the three Nashville-area plants comes from counties in central Kentucky and central Tennessee. Most of the supply comes from Kentucky, and is centered around Barren County which supplies over 10 million pounds per month to these plants * * *. The Kroger Murfreesboro plant, like the two Nashville plants, receives milk supplies from southern Kentucky, centered around Glasgow, in Barren County * * *. By reference to Glasgow, the center of the common production area, transportation to Murfreesboro is only six miles greater than transportation to Nashville * * *. The difference in blend prices payable to Central Kentucky producers for milk delivered at comparable distances to the plants in Nashville and Murfreesboro has caused unrest and discontent between neighboring producers.'' (Brief at 19–20.)

Placing aside any consideration of a procurement problem faced by either Purity or Fleming which would justify a higher Class I price, a $2.60 Class I price at Nashville is too high in relation to the Class I price at Louisville. Based upon the 169-mile distance from Louisville to Nashville, the cost of transporting bulk milk from Louisville to Nashville is approximately 43 cents (i.e., $17 \times .025$). Adding the 43 cents to the $2.11 price at Louisville would result in a price of $2.54.

The recommended decision did not consider the Class I price alignment between Somerset, Kentucky, and Nashville, Tennessee, and between London, Kentucky, and Nashville, Tennessee, because they did not appear to be germane. Somerset and London are northeast of Nashville. Southern Belle operates a distributing plant at Somerset, and Flav-O-Rich operates a distributing plant at London. Both plants are regulated under the Tennessee Valley order. It is 161 miles from Somerset to Nashville and 198 miles from London to Nashville. The Class I price at Somerset and London under the Tennessee Valley order is $2.45. Based on a hauling cost of 2.5 cents per 10 miles, the transportation allowance between Somerset and Nashville should be 43 cents (i.e., $17 \times .025$) and the transportation allowance between London and Nashville should be 48 cents (i.e., $19 \times .025$). Adding these allowances to the $2.45 Class I price at Somerset or London would justify a Class I price at Nashville of between $2.88 and $2.93. This computation would not appear to support the Fleming/Purity argument that a price of $2.60 at Nashville is too high.

The Class I differential adjusted for location at Nashville should be changed from $2.60 to $2.55 by moving the Tennessee counties of Dickson, Cheatham, Davidson, Wilson, and Smith

[9] This plant recently ceased operations.

from Zone 2 to Zone 1. This change will narrow the difference in price between Nashville and Murfreesboro from the present 8 cents to 5 cents. Based on the 43-cent transportation cost between Louisville and Nashville, and the 43-cent transportation cost between Somerset and Nashville, this modest 3-cent price increase at Nashville should pose no Class I price alignment problem for Nashville-area plants. It will have the beneficial effect of increasing slightly the uniform price at Nashville in relation to Louisville, Somerset, London, and Murfreesboro, which may help Nashville-area handlers retain their milk supplies from central Kentucky.

No change should be made in the Class I price at Murfreesboro. It should remain in Zone 2 with a Class I differential adjusted for location of $2.60.

Location adjustments for plants outside of the marketing area. Location adjustments also must be specified for plants that are located outside of the Southeast marketing area.

There are seven counties in northern Georgia that are within the Tennessee Valley marketing area. There are no known dairy plants in these counties. Under the Tennessee Valley order, which has no location adjustments within the marketing area, the Class I price in those counties is $2.77. Had those counties been incorporated in the proposed Southeast order, they would have been included in Zone 5, which has an adjusted Class I differential price of $2.83. Therefore, the location adjustment in those counties under this order, as provided in § 1007.52(a)(2), should be minus 25 cents.

The Missouri county of Dunklin is now unregulated, and Pemiscot County, Missouri, is within the Paducah, Kentucky, marketing area. Had these two counties been included within the Southeast marketing area, they would have been included in Zone 1. Therefore, the appropriate location adjustment for any plant that may be located in these two counties is minus 53 cents, as provided in § 1007.52(a)(3).

Had the Texas counties of Bowie and Cass been incorporated within the Southeast marketing area, they would have fallen within Zone 7, the base zone. Although there are no plants in these two counties at the present time, the applicable location adjustment in those two counties should be zero, as provided in § 1007.52(a)(4).

Should a plant located within another Federal order marketing area become regulated under the proposed Southeast order, or should producer milk be diverted to a plant located in another Federal order marketing area, the appropriate location adjustment at that plant location should be based on the Class I differential adjusted at the location under the Federal order regulating that area, except for the seven Georgia counties within the Tennessee Valley marketing area and the Missouri county of Pemiscot. Thus, for example, if a plant located in Louisville, Kentucky, were to become regulated under the Southeast order, the location adjustment at that plant would be determined by subtracting the Class I price under the Louisville-Lexington-Evansville order at the Louisville location (i.e., $2.11) from the base zone Class I differential price under the Southeast order (i.e., $3.08), which would result in a location adjustment of minus 97 cents. This treatment is provided in § 1007.52(a)(5) of the Southeast order.

The final situation that must be dealt with concerns a plant that is not located within any other Federal order marketing area. Section 1007.52(a)(6) of the proposed order provides six basing points (i.e., Shreveport, Louisiana; Little Rock, Arkansas; Memphis, Tennessee; Jackson, Tennessee; Nashville, Tennessee; and Atlanta, Georgia) in the Southeast marketing area from which to determine the shortest hard-surfaced highway distance to the plant location as determined by the market administrator. The location adjustment would be determined by multiplying each 10-mile increment or fraction thereof by 2.5 cents and subtracting this number from the Class I differential price adjusted for location at the closest of the six basing points. To illustrate, should a plant in Richmond, Virginia, which is 511 miles from Atlanta, become regulated under the Southeast order, the location adjustment would be 52 x $.025 or minus $1.30. In the case of a plant located in Chillicothe, Missouri, the location adjustment would be computed by determining the mileage (i.e., 424 miles) from the closest basing point (i.e., Little Rock), multiplying 43 times $.025, and subtracting that number ($1.08) from the location adjustment at Little Rock (i.e., minus 25 cents) to arrive at a location adjustment at Chillicothe of minus $1.33. This method will provide a reasonable transportation allowance to ship bulk milk from a distant location to the Southeast marketing area, while simultaneously providing a price that is reasonably aligned with other Federal order prices closer to the plant location.

2(d). Payments to Producers. On or before the 26th day of each month, each handler under the proposed order should pay for milk received from producers during the first 15 days of the month. The rate of payment for this milk should be the higher of the Class III price for the preceding month or 90 percent of the preceding month's weighted average price.

On or before the 15th day of each month, a handler would make a final payment to producers for milk received during the preceding month. The rate of payment would be based on the uniform price(s) that will have been announced by the market administrator on or before the 11th day of the month. The final payment would be net of the partial payment made on the 26th day of the prior month, and will also be adjusted for marketing services deductions pursuant to § 1007.86, errors, and other deductions authorized in writing by the producer.

If a handler has received milk from a producer who is marketing his or her milk through a cooperative association, the handler would pay the cooperative association for this milk, not the individual producer. The partial payment would be made to the cooperative on or before the 25th day of the month, and the final payment would be made on or before the 14th day of the month. In this way, the cooperative would, in turn, be able to pay its producers on the same day that handlers pay their nonmember producers.

These provisions and the remaining paragraphs in § 1007.73, are identical to the provisions proposed by the cooperative coalition.

The proposed partial payment date is somewhat earlier than the date that is provided in the individual orders—i.e., the last day of the month—but there was no testimony to indicate why an earlier date would not be possible or any apparent reason why the earlier payment date would not work.

These payment provisions are common to all of the individual orders and should be familiar to all handlers regulated under the merged order.

A second partial payment to producers. A proposal that would establish two partial payments and a final payment to producers should not be adopted.

Georgia Milk Producers, Inc. (GMP), an organization which represents approximately 195 dairy farmers located in the State of Georgia, proposed a provision that would require handlers to pay producers two partial payments and a final payment. The proposal specifies that on or before the 20th day of each month, producers would be paid for milk received during the first 15 days of the month at the rate of 85 percent of the weighted average price per hundredweight for the preceding month; on or before the 5th day of the following month, producers would receive another payment, based on this rate, for milk received from the 16th through the last day of the month; and, finally, on or before the 15th day of each month, the producer would receive final payment for milk received during the preceding month based on the uniform price(s) for the month.

An agricultural economist at the University of Georgia testified on behalf of GMP, Georgia Farm Bureau Federation (GFBF), Alabama Farmers Federation (AFF), Louisiana Farm Bureau (LFB), and the Mississippi Farm Bureau Federation (MFBF) in support of the three-payment proposal.

According to the witness, milk is one of the few agricultural commodities produced in which the producer supports or actually finances the marketing of the product. He stated that most agricultural commodities are paid for at or soon after delivery to the first buyer. He claimed that the dairy farmer finances not only the production of his or her milk, but also the marketing of the milk produced through each of the marketing channels including the retail store.

The witness argued that the financial risk to producers has increased in recent years. He noted, for example, that from 1982 to 1992, the number of producers delivering milk to regulated handlers under Orders 7, 93, 94, 96, and 98, decreased from 5,765 to 4,600 but that the average monthly volume of milk produced increased by 10,000 pounds. He also pointed out that the number of pool distributing plants decreased from 75 to 41 from 1982 to 1992. Thus, he reasoned, there is now a greater financial obligation per plant and a greater financial risk per producer.

The witness testified that the three-payment plan would decrease the financial burden on producers and reduce the risk of nonpayment. By reducing by one-third the time between milk delivery by the producer and the payment for the milk by the handler, he claimed, the financial exposure to producers resulting from a late handler payment or handler bankruptcy would also be reduced by about one-third.

The witness emphasized that dairy farmers do not have the debt protection and the type of provisions included in both the Packers and Stockyard Act and the Perishable Agricultural Commodities Act. He noted that the Agricultural Marketing Act of 1937 authorizes the Secretary of Agriculture to administer milk marketing orders so as to provide for ''assurance and security for, the payment by handlers for milk purchased.'' However, he stated, there are no Federal milk orders that include payment security provisions.

A dairy farmer testifying on behalf of the Alabama Farmers Federation Dairy Committee in support of the three-payment plan stated that the plan is an opportunity to begin correcting a problem that exists between the time a farmer delivers milk to a handler and the time he is paid. He testified that this problem needs to be addressed nationwide but stated that this regional hearing is an excellent place to begin.

A dairy farmer located in Loudon, Tennessee, who is also in the milk hauling business, also testified in support of the three-payment plan. He stated that over the years changes in the dairy industry have limited the selling and marketing options of dairy farmers. He said that there are agreements in place to control producer movement between processors and cooperatives. He also stated that the times of year when producers can change markets economically are limited because of base-excess plans, pooling requirements, and cooperative procurement needs. Additionally, he claimed that producers have limited access to accurate financial information of handlers.

According to this witness, bankruptcy is no longer an act of last resort; it is considered a standard business procedure that is often a pre-meditated planned event. He stated that dairy farmers should not carry the risk after the milk leaves the farm when they do not reap the benefits or losses from that product. He also stated that producers should be paid three times per month because the technology is now available to do it.

A dairy farmer who is the president of Georgia Milk Producers, Inc., testified that the three-payment plan would provide much needed protection against the risk of dairymen losing money when handlers go bankrupt and it would improve producers' cash flow. Finally, a dairy farmer located in Barnesville, Georgia, testified that the three-payment plan was needed because the credit situation for producers has changed over the past 10 years. He claimed that producers have limited selling options.

The vice president of the International Dairy Foods Association (IDFA) testified in opposition to the three-payment plan. IDFA is comprised of Milk Industry Foundation (MIF), the national trade association for processors of fluid milk and milk products, the National Cheese Institute (NCI), the national trade association for manufacturers, processors and marketers of all varieties of cheese, and the International Ice Cream Association (IICA), the national trade association for manufacturers of frozen dessert products. According to the witness, the member companies of the three associations in total utilize over 80 percent of all the raw milk produced in the United States to process milk and manufacture cheese and frozen dessert products which they market.

The IDFA witness pointed out that provisions for three times a month payments to producers are not in effect in any of the milk marketing orders involved in the hearing or in any other milk marketing orders, with the exception of three Florida orders. He said the three-payment plan in the Florida markets pre-dated the establishment of the orders and was based on prevailing market conditions that were mutually agreed upon by producers and handlers in those areas at that time.

The witness cited several decisions in which the Department denied proposals to establish thrice-monthly payments to producers. He said the proposal would lead to unstable marketing conditions throughout the southern region and would create a competitive disadvantage for both producers and handlers in the merged order because of the increased cost of raw milk. He also argued that thrice-monthly payments would clearly increase costs to handlers and severely impact their cash flow and cash reserve positions. He claimed that handlers, and ultimately consumers, would have to pay an additional 2.6 cents per hundredweight due to the accelerated payment.

The witness stated that there is no evidence which indicates producers in this region have suffered financial hardships as a result of the prevailing payment schedules in these orders. In fact, he stated, the financial situation for producers in this area, as well as most areas of the country, has improved over the past few years, indicating no need to change the payment schedule. He noted that from 1987 through 1990 the ratio of current farm business assets to current farm business liabilities for milk producers in the southeastern region has more than tripled from 1.37 to 4.78.

The IDFA witness indicated that dairy processors also must wait to be paid for their products. Information from IDFA member companies, he said, indicates that handlers' outstanding accounts receivable generally run from 25 to 40 days on most commercial accounts, and accounts receivable on sales to schools and state institutions run longer, generally from 60 to 90 days from billing to collection.

Southern Foods Group and Kraft General Foods (Kraft) supported the opposition testimony of IDFA. The procurement manager for Kraft testified that Kraft's accounts receivables averaged 17.3 days in 1993, which does not include the inventory age of the product. He also said that, based on Kraft's own receivables and payable schedules and other information, it is customary for those in the industry to extend 20 to 25 days credit on their accounts receivables.

Representatives of Kinnett Dairies, Inc. (Kinnett), and The Kroger Company (Kroger), proprietary handlers regulated under Order 7, also testified in opposition to the thrice-monthly payment plan proposal. The Kinnett witness stated that the plan would give handlers regulated under other orders a competitive advantage, and the Kroger representative claimed that the proposal would significantly reduce the cash flow of dairy processors, adversely affecting the dairy industry. According to the Kroger witness, reducing the cash flow for processors would reduce the amount of money available for research and development of new products which helps to maintain and expand the market for dairy farmers' milk.

The University of Georgia agricultural economist and the other proponent witnesses testified that the thrice-monthly payment plan would reduce the financial risk that dairy farmers face from handler bankruptcy. Although the record evidence reveals that bankruptcy is a problem in the marketing area involved, the proposal is not one that guarantees producers protection against financial loss from handlers who declare bankruptcy.

One of the advantages that members of a cooperative association have in bankruptcy situations is that the financial loss is shared equally among all producers and not borne by one producer alone. Perhaps for this reason, there was little concern expressed about this issue at the hearing by cooperative association representatives or their member producers.

While proponents of the thrice-monthly payment plan argued that the plan would enhance their cash flow, the record does not reveal that producers are experiencing financial problems as a result of receiving one partial and a final payment each month. Although the record does indicate that at least one dairy farmer pays for feed on a cash-on-delivery basis and is assessed a penalty for late payment, there is no indication that a large number of producers are buying production items on this basis.

Adoption of this proposal would place handlers regulated under the merged order at a competitive disadvantage with unregulated handlers and handlers regulated under other orders. It must be concluded that the extra costs associated with the implementation of this plan exceed the benefits to producers.

The Agricultural Marketing Agreement Act of 1937 authorizes the setting of payment dates under an order but it does not specify how frequently handlers must pay producers. Customarily, this is established on the basis of prevailing marketing conditions, including payment practices already existing in an area or new payment practices that handlers and producers may find mutually desirable. Producers and handlers should continue to have the option of negotiating payment schedules, including an additional partial payment if mutually desired. However, this practice should not be institutionalized by being incorporated in the merged order.

Producer Assurance Fund. A proposal to establish a producer security fund under the merged order should not be adopted.

A second professor and agricultural economist at the University of Georgia, presented a proposal on behalf of some Georgia dairy farmers, the Alabama Farmers Federation, and the Louisiana Farm Bureau which provides for the establishment of a producer assurance fund (PAF). He claimed that the PAF would reduce the financial risk of producers in bankruptcy cases.

The witness testified that paragraph 5(E) of Section 8c(2) of the Agricultural Marketing Act of 1937, as amended, provides for the inclusion of provisions for the ''assurance of, and security for, payment by handlers for milk purchased.'' He stated that the market administrator could administer the PAF at no additional charge, explaining that processors regulated under the merged order would be assessed two cents per hundredweight until the fund was fully endowed. He said that the market administrator would review the fund annually to determine if adjustments should be made.

The witness stated that operating cooperatives and chain stores would be exempt from the fund and that, if the order is terminated, processors who contributed to the fund would be reimbursed a pro rata amount. While noting that the best approach would be to implement this fund on a national level, he said that the next best alternative is to initiate it on a regional basis.

The chairman of the Alabama Farmers Federation Committee (AFFC) and a Barnesville, Georgia, dairy farmer also testified in support of the producer assurance fund. While observing that the fund would not protect producers from all loss, the AFFC representative said that it was a step in the right direction. The Georgia dairy farmer related his experience in a bankruptcy two years ago which resulted in a financial loss of about 21 days' of production.

The witness for the IDFA testified that the members of the IDFA were opposed to the establishment of a producer assurance fund. He said that such a provision has never existed under Federal milk orders and questioned whether the Federal order program was the appropriate vehicle to implement this type of fund.

The IDFA witness stated that processors and manufacturers assume a significant risk in receiving a steady supply of raw milk, even as demand fluctuates throughout the year and does not always keep up with supply. He claimed that most of the businesses within the United States, including dairy processors, do not have any protective regulations and/or funds which guarantee payment on products sold. He argued that establishment of a PAF would limit processors in conducting business and will negatively impact producers in the long run.

In its post-hearing brief, IDFA claimed that establishment of the fund would result in a costly duplication of regulations that have already been promulgated by some States in the Southeast. In addition, IDFA claimed that the expense of the fund would place handlers at a competitive disadvantage vis-a-vis unregulated handlers or handlers regulated under other orders.

Representatives of Kraft General Foods, Kinnett Dairy, and The Kroger Company also testified in opposition to implementing a PAF. In their post-hearing briefs, Southern Foods Group, Barber Pure Milk Company, Dairy Fresh Corporation, and Baker & Sons Dairy, Inc., also indicated their opposition to this proposal.

The PAF proposed for the merged order would place handlers regulated under the order at a competitive disadvantage compared to handlers regulated elsewhere. Those handlers who operate cost efficient businesses should not be required to pay the debts of insolvent handlers whose businesses were poorly managed.

The record evidence does not reveal why a fund which protects producers against bankruptcy should be financed solely by handlers. In fact, the record shows that the proposal lacked support from a substantial number of producers, many of whom are protected from loss by belonging to a cooperative association, which obviously is better equipped to withstand a handler bankruptcy than a single producer.

While a producer assurance fund may have some merit, the concept should be more fully researched and explored. One question that should be answered is whether such a fund should be implemented on a local, regional, or national basis. Another question that should be addressed is whether handlers should bear the sole responsibility of supporting the fund, or whether producers also should be required to contribute to it.

Due to the lack of information on the effects of a PAF on producers and handlers under the proposed order, the overwhelming opposition to it by handlers in this market, and the lack of producer support exhibited at both the hearing and in briefs, the proposal should not be adopted.

Base-excess plan: §§ 1007.90–1007.94. A base-excess plan should be adopted for the merged order. The plan adopted in this final decision is significantly different than the one proposed in the recommended decision.

Need For a Base-Excess Plan. The cooperative coalition's spokesman testified that a base-excess plan would provide an incentive to producers to balance their milk production throughout the year. He noted that a base-excess plan is provided in the Georgia (Order 7), Alabama-West Florida (Order 93), and the former Nashville (Order 98) orders.

There was widespread support at the hearing and in post-hearing briefs for a base-excess plan. Representatives of the Southern Foods Group, Inc., Fleming Dairy, the Louisiana Farm Bureau Federation, Georgia Milk Producers, Inc., and Arkansas Dairy Cooperative Association testified in support of the plan. Several individual dairy farmers also spoke in support of the plan.

A dairy farmer who testified on behalf of some of the producers supplying Fleming Dairy in Nashville stated that a base-excess plan will encourage more milk production during seasonally low production months and discourage milk production during the flush production months. In the past, he said, dairy cooperatives have unsuccessfully built manufacturing plants to help balance raw milk production to the demand of the Class I market. He claimed that dairy producers are the only ones able to solve the raw milk balancing problem by leveling out their milk production.

The witness and other dairy farmers who testified on this issue indicated that much could be done by dairy farmers to balance their seasonal swings in production. Some of the plans have not been effective in the past, they said, because they were not implemented on a regional basis and because some cooperatives did not pay their producers a base and excess price.

Opposition to a base-excess plan was expressed by Gold Star Dairy, which indicated that the plan would limit Gold Star's flexibility in obtaining supplemental supplies during the operative months of the plan. The spokesman for AMPI also indicated opposition to a base-excess plan for AMPI's proposed Mid-South order but supported the cooperative coalition's proposal to include a base-excess plan in their proposed Gulf States order. He stated that the plan would build a fence around the marketing area and impede the efficient movement of supplemental milk to the market during periods of increased demand or reduced production.

In their exceptions to the recommended decision, Gold Star Dairy and AMPI maintain that Mid-Am, the dominant cooperative in the Southeast marketing area, will not pay its producers base and excess prices. They stated that, historically, base-excess plans have been used to impede the movement of producers from one market to another and are not necessary to advance the provisions of the Act. AMPI emphasized that the plan will be ''especially onerous—and act as an exclusionary barrier—to the flexible and efficient marketing capability of cooperatives whose producers are located to the southwest, west and north of the proposed Southeast marketing area.''

The Agricultural Marketing Agreement Act states that milk orders may contain provisions ''to encourage seasonal adjustments in the production of milk * * * on the basis of their [producers] marketings of milk during a representative period of time * * *.'' While the performance of the base-excess plans in Orders 7, 93, 98, and 108 in leveling out production is subject to some debate, particularly because several of the cooperatives in these markets have not been paying their producers base and excess prices, there is no doubt that the overwhelming sentiment of producers, as expressed in the record of this hearing, is that a base-excess plan be incorporated in the merged order. Absent any sound reason for denying this request, the proposal should be adopted. However, it is time-consuming and costly for the market administrator to administer a base-excess plan. If the plan is not used under the merged order to pay producers, it cannot be effective for the intended purpose of leveling out production. Absent a demonstration of use of the plan in paying producers, further consideration should be given to whether the plan is necessary. This decision is written, however, on the basis of the testimony, evidence, and comments on the record of this hearing which demonstrate that the plan is desired, needed, and will be used to pay producers.

Under the base plan adopted in this final decision, a producer can earn a base by shipping as little as one day's production to the Southeast market during the months of July through December. Of course, such a base will be very small, but the point to be emphasized is that those who argued that the base plan would inhibit the movement of milk on and off the market will have the flexibility to shift milk between plants as conditions may require. The base plan, as modified, should serve its purpose of encouraging producers to level their seasonal production pattern but, at the same time, not be a barrier to the movement of milk on and off the market.

Base-Forming and Base-Paying Months: There was considerable disagreement concerning the months to be used for the base-forming and base-paying periods. As contained in the cooperative coalition's proposal, bases would be computed based upon production during the months of September through December (i.e., the ''base-forming period''), and base and excess prices would be paid during the following months of February through May.

The witness for Fleming Dairy stated that the base-forming period should consist of the months of July through November and that producers should be paid base and excess prices during the months of January through May. He noted that statistics for the five-market region indicate that the Class I utilization exceeded 80% only during the months of July through November from 1990 through 1993. For the same three-year period, he pointed out, the percentage of milk utilized in Class III manufactured products for the five-market region was the lowest during July through October. He also indicated that Fleming had experienced problems in trying to encourage producers to increase milk production during the months of July and August and that these two months should, therefore, be part of the base-forming period.

Two dairy farmers supplying Fleming Dairy agreed that the base-forming period should be the months of July through November and that the base-paying months should be January through May. Their testimony indicated that cows and heifers that calve in late

August or September will peak in milk production in November, December, and January, which are not the months in which additional milk production is needed.

One of the dairy farmer witnesses explained that ‘‘cull’’ cows or ‘‘turn’’ cows dry early in the spring. He stated that this option is available to each dairy producer whose milk production gets out of cycle. Thus, he proposed that the merged order be structured to discourage milk production during those months when milk is typically in over-supply by paying producers a base and excess price during the months of January through May.

The other dairy farmer witness noted that over the past several years many county school systems in the South have moved their fall start-up date from September until about the third week of August, which caused the demand created by school start-ups to be moved up two weeks. He claimed that including the month of July in the base-forming period will send the correct signal to producers as to when more milk is needed.

The chairman of the Dairy Advisory Committee of the Louisiana Farm Bureau Federation (LFBF) testified that the months of March through June should be the base-paying period. He stated that these are the months of highest production in relation to Class I needs.

The witness also stated that producers currently regulated under Orders 94 and 96, which do not now have a base-excess plan, would be placed at a greater disadvantage if the base-forming period began with the month of July or August instead of September because production was down in those months due to the midsummer heat in Louisiana.

In its post-hearing brief, Georgia Milk Producers, Inc. (GMP), recommended that the base-forming period be the months of September through January. According to GMP's brief, adding the month of January as a base-forming month would provide a period where weather conditions are more indicative of the norm. Additionally, GMP suggested extending the base-paying period to include the month of July, claiming that the extension would allow producers who have met the needs of the market by equalizing their production in the fall and summer to receive payment for base milk for an additional month.

Summarizing the hearing proposals and testimony, the base-forming period would be September–December (cooperative coalition, LFBF), July–November (Fleming Dairy and two dairy farmers), or September–January (GMP), while the base-paying period would be February–May (cooperative coalition), January–May (Fleming Dairy and two dairy farmers), March–June (LFBF), or February–July (GMP).

The appropriate base-paying period for this market is February through May. These are clearly the months when additional milk is not, in fact, needed. July, August, and December should clearly not be base-paying months because supplemental milk supplies may very well be needed during those months. June and January are borderline months. During the past three years, the average Class I utilization was 72.3 percent in January and 73.3 percent in June, both of which are above the comparable percentages for the months of February through May: i.e., 69.5, 68.4, 67.5, and 70.8 percent, respectively. Based on this data and analysis, the testimony and the comments received, the cooperative coalition's proposed February–May base-paying period was proposed in the recommended decision and is adopted in this final decision.

With respect to the base-forming period, the recommended decision concluded that the needs of the market's producers would be met by using the months of September, October, and November. However, many comments were received opposing these months because they were too restrictive. Accordingly, this final decision is modified to meet the needs of all producers by expanding the base-forming months to July through December. However, only each producer's highest four production months will be used to determine each producer's base.

In their exceptions to the recommended decision, Mid-America, Southern Milk Sales, the Louisiana Farm Bureau Federation, the Mississippi Farm Bureau Federation, and many dairy farmers again stated their support for the months of September through December. Mid-America and Southern Milk Sales argued that the merged order should include a four-month base-forming period of September through December because a shorter period would be unfair to all producers whose milk will be pooled under the order. They maintain that the four months of September through December would balance the desires of producers in both the northern and southern areas of the proposed marketing area.

The Georgia Milk Producers Association (GMP), Alabama Dairy Producers, and several dairy farmers reiterated their support for the months of September through January as the base-forming period. These commentors argued that the recommended September through November base-forming period would place producers located in the southern part of the marketing area at a disadvantage compared to producers located in the northern area due to the summer heat. GMP contends that the lingering effects of the hot summer weather on cows as well as the warm temperatures of late summer and early fall prevent cows from reaching their peak production until the late fall.

Fleming Dairies reiterated its support for the inclusion of the months of July and August in the base-forming period. Fleming argued that while the average producer will find it easier to establish a ‘‘production benchmark’’ during the fall months, establishing a base-forming period to provide ease to producers in building a base is not a goal of a base-excess plan. It emphasized that the objective of a base-excess plan is to ‘‘encourage more even production of milk throughout the year.’’ By excluding the shortest milk production months of July and August from the base-forming period, Fleming contends that a major objective of the statutory seasonal incentive authority would be abandoned. It urged that this error be corrected in the final decision.

As a result of the comments received, the recommended base-forming period of September through November should be expanded to the months of July through December. However, instead of using every month of this six-month period to determine a producer's base, only the highest four production months should be used. This four-month period will better accomplish the goal of establishing the production benchmark, and it will allow all of the market's producers to compete on equally favorable conditions.

As noted above, Fleming claims that July and August should be base-forming months because these months are low production months when milk is often in short supply. On the other hand, many of the market's producers would also like to see the months of December and January included in the base-forming period because they are accustomed to these months under their present base plans and the inclusion of these months would boost their daily average production.

The primary reason for initially excluding the months of July, August, December, and January from the base-forming period was because these months would be difficult months for some dairy farmers. However, the modified base-forming period provides producers with much more flexibility.

While the inclusion of December may help producers in the southern-most part of the market, the inclusion of July and August, in conjunction with the use of the four highest daily average production months, should result in a balanced plan that is fair to all of the market's producers.

The month of January was not included in the base-forming period because its inclusion would make it impossible for the market administrator to determine a producer's base in time for the producer to transfer that base with certain knowledge of what the base actually is. Under § 1007.93(a) of the base rules, in order for a transferred base to be effective at the beginning of the February 1 base-paying period it must be transferred by February 15. However, if January had been included in the base-forming period, the market administrator would not have had the information to compute a base until near the end of February. With the July-December base-forming period adopted in this decision, the market administrator will have the time to compute and announce bases by January 31 so that orderly transfers may take place prior to, or close to, the outset of the base-paying period. As a result, producers will not be placed in the position of having to ship their milk for an entire month without knowing with certainty what their base was. By having the information available at the outset of the base-paying period, producers will be in a better position to make informed and timely management decisions.

Under the plan adopted in this final decision, to qualify for a base, a dairy farmer must be a ''producer'' under the Southeast order during one or more of the months of July through December. To determine each producer's average daily production during the base-forming months, the market administrator will divide the producer's total pounds of producer milk delivered to pool plants or diverted to nonpool plants by the number of days in the month. The sum of the four highest daily averages so computed will then be added together and divided by four to determine the producer's daily average base. If a producer was on the market for less than four months, a zero will be substituted for each month in which no producer deliveries were made. Unless the producer qualifies under the hardship provisions described below, the divisor in this base computation will always be four.

Under the present base plan provisions and those proposed by the cooperative coalition, accommodation is made for a producer who experienced a substantial reduction in production as a result of a catastrophe, certain diseases, or a quarantine. Since only the four highest months of production out of a total of six months will be used to determine base under the base-excess plan adopted in this decision, it is less likely that this provision will be needed. Nevertheless, such a provision is provided in § 1007.92(c) to accommodate those situations when a producer's production is severely disrupted by fire, storm, or other natural disaster, by brucellosis, bovine tuberculosis, or other infectious diseases, or by a Federal or State quarantine of a producer's farm. In the unlikely event that a disruption in production caused by one or more of these conditions leaves a dairy farmer without four complete months of production from which to compute a base, the dairy farmer may request a base computation based on a lessor number of months by submitting to the market administrator in writing on or before February 1 a statement that establishes to the satisfaction of the market administrator that during four or more of the months in the immediately preceding July through December base-forming period the amount of milk produced on such producer's farm was substantially reduced because of one or more of the conditions described in § 1007.92(c).

In addition to discussing the conditions specifically included in § 1007.92(c), the recommended decision's findings and conclusions referred to a ''temporary loss of market when cut off by a buying handler.'' The implication of this language, which emanated from the testimony of the cooperative coalition's spokesman but which was not in the proposed rules of the coalition, was not explored.

Under the base plan provisions adopted in this decision, order language of this nature is unnecessary because a producer can have a ''temporary'' loss of market for as long as two months and still be eligible for a full base by at least qualifying as a producer for the remaining four months of the base-building period. Accordingly, no specific accommodation has to be made for a producer who is temporarily off the market for this reason.

Producers who do not qualify for a base because they delivered milk to a nonpool plant that became a pool plant after the beginning of the base-forming period should be assigned bases under the order. Such bases should be calculated as if the nonpool plant had been a pool plant during the entire base-forming period. A base assigned in this manner also would not be transferable.

Transfer Rules: A base earned by a producer may be transferred. Transferability is an appropriate provision to include in the plan because a base is something of value that has been earned, and the base-holder or his/her heirs should be compensated for that value when the base-holder dies or when the farm of a base holder is sold. For ease in administering this provision, the amount of base transferable should either be its entirety or in amounts not less than 300-pounds.

A base transfer will be effective on the first day of the month following the date on which an application signed by the base holder or his/her heirs is received by the market administrator. However, base transfers to be effective on February 1 must be received by the market administrator no later than February 15. Although the cooperative coalition also specified that the person receiving the base should be required to sign the transfer application, this requirement has not been adopted. There is no apparent reason why the recipient of a base should be required to sign the application, and this particular requirement merely adds unnecessary expense to the administration of the base plan provisions. If a base is held jointly, the application for transfer should be signed by all joint holders or their heirs to insure that there is no misunderstanding between the parties involved in the transfer.

A base established by a partnership may be divided between partners on any basis agreed on in writing by them as long as written notification of the agreed-upon division, signed by each partner, is received by the market administrator prior to the first day of the month in which the division is to be effective.

To insure that the exchange of bases between producers are bona fide transfers, a producer who transferred all or part of his/her base on or after February 1 should not be permitted to receive other base by transfer that would be applicable within the February–May period of the same year. In addition, a producer who received base by transfer on or after February 1 should not be permitted to transfer a portion of that base to be applicable within the February–May period of the same year, but should be permitted to transfer the entire base.

Inclusion of a base-excess plan under the merged order will require the computation of a uniform price during the non-base-paying months of June through January and uniform prices for base and excess milk during the other months of the year. The steps to be followed in computing these prices are contained in § 1007.61.

One change should be made in the computation of the uniform price for excess milk. As now in Orders 7 and 93 and as proposed by the cooperative coalition in § 1007.61(b)(1), the uniform price for excess milk would be computed by multiplying the pounds of excess milk that do not exceed the pounds of milk assigned to Class III by the Class III price, any remaining excess pounds by the Class II price, and, if there are excess pounds remaining, by the Class I price. The total value so computed then would be divided by the total pounds of excess milk to arrive at the uniform price for excess milk.

This procedure should be modified slightly to reflect the incorporation of Class III–A pricing in the order. Specifically, a new step should be added—i.e., § 1007.61(b)(1)(i)—that would first multiply the pounds of excess milk that do not exceed the pounds of milk assigned to Class III–A by the Class III–A price. The remaining excess pounds would then be multiplied by the Class III price, the Class II price, and finally, if there are any excess pounds left, by the Class I price.

Without this modification, any milk that was assigned to Class III–A would reduce the uniform price for base milk, instead of the uniform price for excess milk. This would narrow the difference between the two prices, thereby reducing the incentive for producers to level out their production, which is the primary purpose of the base-excess plan.

Sections 1007.92, 1007.93, and 1007.94 have been modified to reflect the changes in the base-forming months, in the computation of a producer's base, and the base rules.

2(e). Administrative Provisions. The administrative duties of the market administrator are detailed under § 1000.3 of the General Provisions, which pertain to all milk orders. In § 1000.5 of the General Provisions, a handler's responsibility for records and facilities are also detailed.

Handler Reports. The responsibility of handlers to establish and maintain certain records of their operations and to make such records and facilities available to the market administrator are set forth in § 1000.5 of the General Provisions. That section relates to the adequacy of the records of the handler and the period of time for which they should be maintained.

The requirements of handlers to maintain such records, and to make reports of receipts and utilization to the market administrator under §§ 1007.30, 1007.31, and 1007.32 of the proposed order, are similar to the requirements that are now contained in the five orders to be merged.

To compute the uniform price and the prices for base and excess milk, the market administrator must first receive a report of receipts and utilization from each of the handlers in the pool. Section 30 of the order describes who should file a report of receipts and utilization, what the report should contain, and when it should be filed. As proposed and adopted here, this report would have to be filed on or before the 5th day after the end of the month, or not later than the 7th day if the report is delivered in person to the office of the market administrator. This filing deadline will provide the market administrator with sufficient time to receive the reports, review and correct them for obvious errors, compute each handler's value of milk at classified prices, compute the uniform price or prices, and announce such price or prices by the 11th day of each month.

Section 31 of the proposed order discusses the submission of handler payroll reports. This report shows the name and address of each producer, the total pounds of milk received from the producer, the butterfat content of the milk, and the price per hundredweight paid. This report is due on or before the 20th day after the end of the month.

Section 32 deals with the reporting of base milk for the months of February through May and any other reports which the market administrator may request. The aggregate quantity of base milk received from producers must be reported on or before the 7th day after the end of the month, while the pounds of base and excess milk received from each producer must be reported on or before the 20th day after the end of each month of February through May.

The dates proposed for the filing of reports, price announcements, and payments were patterned after those in the Alabama-West Florida order. They are similar, however, to those provided in other Federal orders in the Southeast. Therefore, handlers under the proposed Southeast order will be accustomed to meeting these deadlines. Likewise, producers covered by this order will receive their payments at about the same time as they have received payments under the current Federal orders.

Charge for Overdue Accounts. It is essential to the effective operation of the proposed order that handlers make their payments on time.

Under a marketwide pooling arrangement, handlers with Class I utilizations higher than the market average pay part of their total use value of milk to the producer-settlement fund. This money is, in turn, paid out to handlers with lower than average Class I utilization so that all handlers in the market, irrespective of the way they use their milk, can pay their producers the same uniform price. The success of this arrangement depends upon the solvency of the producer-settlement fund.

The prompt payment of funds due the administrative and marketing service funds is also essential for the market administrator to perform the various administrative functions prescribed by the order. Delinquent payments to these funds could impair the ability of the market administrator to carry out these duties in a timely and efficient manner.

Payment delinquency also results in an inequity among handlers. Handlers who pay late are, in effect, borrowing money from producers. In the absence of any late-payment charge equal to at least the cost of borrowing money from commercial sources, handlers who are delinquent in their payments would have a financial advantage relative to those handlers making timely payments.

The late-payment charges included in the proposed order are not a substitute for prompt payments by handlers; those handlers delinquent in their obligations would still be subject to legal enforcement action as authorized under the Act.

Under the late payment provisions, overdue handler obligations would be increased by 1.5 percent on the day after the due date. Any remaining unpaid portion of the original obligation would be increased by 1.5 percent on the same date of each succeeding month until the obligation is paid.

The late payment charge should apply not only to the original obligation but also to any unpaid charges previously assessed. They would apply whether the obligation is paid one day late or ten days late, and would be applicable to both fully regulated and partially regulated handlers alike.

The disposition of the late payment charge would be determined by the account to which it is due. A charge resulting from an unpaid obligation to the producer-settlement fund would go into that fund. By the same token, a charge resulting from an unpaid obligation for order administration or marketing services would go into those respective funds.

The proposed rate of 1.5 percent per month is reasonable and is not less than the current annual rate for short-term loans.

Expenses of Administration. The expenses for the administration of the proposed order should be borne by regulated handlers under the order.

Section 1007.85 provides that each handler shall pay to the market administrator his/her pro rata share of the expenses of administration of the order. Accordingly, on or before the 15th day after the end of the month, each handler will be required to pay the market administrator five cents per hundredweight, or such lesser amount as the Secretary may determine is necessary, with respect to receipts of producer milk, including such handler's own production, but excluding receipts from a cooperative association acting as a handler for milk delivered to pool plants of other handlers. The payment shall also apply to other source milk allocated to Class I and to route disposition in the marketing area by partially regulated distributing plants.

To administer the order properly, the market administrator must have sufficient funds to cover his costs. The Act specifically states that such cost of administration shall be borne by handlers through an assessment on such handlers.

A principal function of the market administrator's office is to verify the receipts and disposition of milk from all sources. Equity in sharing the cost of administration of the order among handlers will be achieved by applying the administrative assessment on the basis of milk received from dairy farmers as well as on other source milk allocated to Class I.

The proposed order provides that a cooperative shall be the handler for its member milk which it delivers in tank trucks from the farm to pool plants of other handlers. The cooperative is the handler for such milk basically for the purpose of accounting to its individual member producers.

The milk is producer milk at the plant of the receiving handler and is treated the same as any other direct receipt from producers. Therefore, the pool plant operator who receives the milk should pay the administrative assessment on such milk. The cooperative, however, would be liable for the administrative assessment for any amount by which the farm weights of the producer milk exceeds the weights at the plant on which the plant operator purchased the milk from the cooperative.

The market administrator must verify, by audit, the receipts and utilization of pool plants whether the plant operator buys milk directly from producers or through a cooperative association as a handler. It is appropriate, therefore, that the pool plant operator receiving such milk should pay the administrative assessment on the milk on the same basis as all other producer milk received at the plant.

In the case of unregulated milk entering the market through a regulated plant for Class I use, the regulated handler who utilizes the unregulated milk must report to the market administrator the receipts and use of such milk. It is appropriate, therefore, that the regulated handler should be responsible for payment for the administrative assessment on such unregulated milk.

While the proposed order is designed so that the cost of administration is shared equitably among handlers distributing milk in the proposed marketing area, an assessment should not be made on other source milk on which an assessment was made under another Federal milk marketing order.

Marketing Service Deduction. Proper payment to producers is assured by the verification of producer weights and producer butterfat tests and by keeping producers well informed about marketing conditions.

If a producer is a member of a cooperative association, these services are performed by the cooperative association and are paid for by the members of the cooperative association. In the case of nonmember producers, however, the Act authorizes a handler to deduct a fee from the payment to nonmember producers for marketing services, which are provided by the market administrator or an agent selected by the market administrator.

There is no need for the market administrator to duplicate the services which a cooperative association normally provides for its membership. However, since the market administrator must rely on the cooperative's results to insure a proper accounting of milk and butterfat, it is essential that the cooperative association's performance of these marketing services be reviewed by the Secretary. A cooperative association will not be entitled to perform marketing services until it files an application to do so with the market administrator and demonstrates that it is fully qualified and capable of performing these services.

Section 1007.86 of the proposed order provides the procedure by which producers pay the cost of marketing services provided by the market administrator.

Nonmember producers who will be pooled under the proposed order will be dispersed over a wide geographic area. It is likely that the cost to the market administrator of performing marketing services for nonmembers will be as high as that now incurred under the separate orders. Therefore, the cooperative coalition proposal for a seven-cent maximum fee should be adopted. This is the maximum fee now permitted under Orders 93 and 108, but slightly higher than the level currently permitted under Orders 7, 94, and 96. It should be stressed, however, that this is a maximum fee that may be charged for these services; it may be that the market administrator can perform these services at a lower rate. Nevertheless, to err on the side of caution, a seven-cent maximum fee should be provided.

The separate funds that have been accumulated under each of the orders to defray the costs of administration and providing marketing services to producers, as well as the producer-settlement fund reserves, should be consolidated under the merged order. Consolidation of these funds provides an effective and equitable way of avoiding an interruption of services and regulation in the area. Any liabilities of such funds under the current orders should be paid from the appropriate new fund under the merged order. Similarly, any obligations that are due to the several funds under the individual orders should be paid to the appropriate combined fund under the merged order.

Motions To Reopen the Hearing

Several parties motioned to reopen the hearing. Fleming and Purity argued that there was no proposal to increase the price at Nashville, decrease the price at Covington, decrease the price at Montgomery, or decrease the price at Huntsville. In addition, they state that since the hearing there has been a major restructuring and reorganization of plant ownership and milk supplies in the Southeast and that the dominant cooperative association, Mid-America Dairymen, Inc., has entered into full supply agreements with Meadow Gold, Borden, and Barber Pure Milk Company plants, effectively requiring independent producers supplying those plants to join the cooperative association or lose the market for their milk. Fleming and Purity maintain that Mid-Am knew of these changes but concealed them from the hearing participants, who should have an opportunity to address them.

Gold Star Dairy requested that the hearing be reopened to receive additional testimony and evidence on the Class I price zones and the size of the marketing area. Gold Star excepted to the increase in Class I price at Little Rock, the 17-cent reduction in price at Covington, Tennessee, and the price reductions in Louisiana, an area that is priced well above Gold Star's location in Little Rock. As far as marketing area is concerned, Gold Star states in its exception that ''in large part Gold Star does not care which order it is pooled on so long as its pricing and competitive price structure does not change.''

Dairy Fresh Corporation of Greensboro, Alabama, asked for a reopened hearing because the price at its plant in Hattiesburg was increased by 3 cents, while the prices at Canton, Jackson, and Kosciusko, Mississippi, were reduced by 17 cents, 7 cents, and 12 cents, respectively, the price at New Orleans was reduced by 17 cents, and the price at Baton Rouge was reduced by 10 cents. In addition, Dairy Fresh did not agree that a 10-cent increase in price was necessary for its Cowarts, Alabama, plant.

Admittedly, there have been many changes in the Southeast marketing area since the November 1993 hearing. Many of these changes were noted in the recommended decision. Others have been pointed out in this decision. Since these changes are well known to the handlers and producers in this market and to the Department, there is nothing to be gained by reopening the hearing.

With respect to the arguments of Fleming, Purity, Gold Star, Barber, and Dairy Fresh that they had no notice of the price changes and no opportunity to address the issues, it is determined that, on the contrary, they did have notice and an opportunity to present evidence regarding all provisions of the merged order. Furthermore, they addressed these issues in their exceptions and the Department carefully reviewed their arguments, and, for the most part, made changes as a result of them. In particular, the price at Nashville was reduced from $2.60 to $2.55, the price at Covington was increased from $2.60 to $2.70, the price at Little Rock was reduced from $2.77 to $2.70, the price at Cowarts, Alabama, was reduced from $3.48 to $3.40, the price at Hattiesburg was reduced from $3.48 to $3.40, and the price at Mobile was reduced from $3.68 to $3.65. With respect to price reductions that were made in higher-priced areas to improve alignment or to revise price increases that were made in 1985, it is concluded that Fleming, Purity, Gold Star, and Dairy Fresh have no right to expect prices to be maintained that are higher than necessary simply so that these handlers can sell their milk in higher-priced markets in Alabama, Mississippi, Georgia, and Louisiana.

The administrative rulemaking procedure has worked as it is supposed to work in this proceeding. Many different proposals were evaluated. They were combined and modified as deemed to be appropriate and interested parties were given an opportunity to comment on the recommended decision. In this final decision, the exceptions to the recommended decision were considered and justified changes were adopted. There is no reason to delay this proceeding for at least another year by reopening the hearing to hear facts that are generally known to everyone involved with this matter. The requests to reopen the hearing, accordingly, are denied.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the Southeast order, which merges and amends the Georgia, Alabama-West Florida, Greater Louisiana, New Orleans-Mississippi, and Central Arkansas orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(c) The Southeast order will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held;

(d) All milk and milk products handled by handlers, as defined in the Southeast order, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(e) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require each handler to pay, as its pro rata share of such expense, 5 cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1007.85 of the aforesaid tentative marketing agreement and the Southeast order.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk in the Southeast marketing area and an Order amending the order regulating the handling of milk in the Southeast marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions. It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register**.

Referendum Order to Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referenda be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300–311), to determine whether the issuance of the order as amended and as hereby proposed to be amended, regulating the handling of milk in the Southeast marketing area is approved or favored by producers, as defined under the terms of the individual orders (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

The representative period for the conduct of such referenda is hereby determined to be March 1995.

The agents of the Secretary to conduct such referenda are hereby designated to be the market administrators of the aforesaid orders.

Determination of Producer Approval and Representative Period

March 1995 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the merged order regulating the handling of milk in the Southeast marketing area is approved or favored by producers as defined under the terms of the individual orders (as amended and as hereby proposed to be amended) who during the representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

List of Subjects in 7 CFR Part 1007

Milk marketing orders.

Dated: May 3, 1995.

Patricia A. Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

Order Amending the Order Regulating the Handling of Milk in the Southeast Marketing Area

This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulate the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held;

(4) All milk and milk products handled by handlers, as defined in the order as hereby amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require each handler to pay, as its pro rata share of such expense, 5 cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1007.85.

Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in the Southeast marketing area shall be in conformity to and in compliance with the terms and conditions of the following attached order.

It is proposed to revise 7 CFR part 1007 to read as follows:

PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

Subpart—Order Regulating Handling

Authority: 7 U.S.C. 601–674.

Subpart—Order Regulating Handling

General Provisions

§ 1007.1 General provisions.

The terms, definitions, and provisions in Part 1000 of this chapter are hereby incorporated by reference and made a part of this order.

Definitions

§ 1007.2 Southeast marketing area.

The *Southeast marketing area,* hereinafter called the *marketing area,* means all territory within the bounds of the following Alabama, Florida, Georgia, Mississippi, Tennessee, and Arkansas counties and Louisiana parishes, including all piers, docks, and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State, or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed counties or parishes:

Zone 1

Arkansas counties: Baxter, Clay, Fulton, Greene, Izard, Lawrence, Randolph, and Sharp.

Tennessee counties: Cheatham, Clay, Davidson, Dickson, Fentress, Henry, Houston, Jackson, Lake, Macon, Montgomery, Obion, Overton, Pickett, Robertson, Smith, Stewart, Sumner, Trousdale, Weakley, and Wilson.

Zone 2

Arkansas counties: Newton, Searcy, and Stone.

Tennessee counties: Bedford, Benton, Bledsoe, Cannon, Carroll, Chester, Coffee, Crockett, DeKalb, Decatur, Dyer, Gibson, Grundy, Henderson, Hickman, Humphreys, Lewis, Madison, Marshall, Maury, Perry, Putnam, Rutherford, Van Buren, Warren, White, and Williamson.

Zone 3

Arkansas counties: Cleburne, Craighead, Independence, Jackson, Johnson, Mississippi, Poinsett, Pope, and Van Buren.

Tennessee counties: Lauderdale, Tipton, and Haywood.

Zone 4

Arkansas counties: Conway, Crittenden, Cross, Faulkner, Garland, Lee, Lonoke, Monroe, Montgomery, Perry, Polk, Prairie, Pulaski, Saline, St. Francis, White, Woodruff, and Yell.

Tennessee counties: Fayette, Franklin, Giles, Hardeman, Hardin, Lawrence, Lincoln, McNairy, Moore, Shelby, and Wayne.

Zone 5

Alabama counties: Colbert, De Kalb, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marshall, and Morgan.

Arkansas counties: Arkansas, Clark, Grant, Hot Spring, Howard, Jefferson, Phillips, Pike, and Sevier.

Georgia counties: Gilmer, Towns, and Union.

Mississippi counties: Alcorn, Benton, Coahoma, DeSoto, Itawamba, Lafayette, Lee, Marshall, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo, Tunica, and Union.

Zone 6

Alabama counties: Blount, Cherokee, Cullman, Etowah, Fayette, Lamar, Marion, Walker, and Winston.

Arkansas counties: Bradley, Calhoun, Cleveland, Dallas, Desha, Drew, Hempstead, Lincoln, Little River, Nevada, and Ouachita.

Georgia counties: Bartow, Cherokee, Dawson, Floyd, Gordon, Habersham, Lumpkin, Pickens, Rabun, and White.

Mississippi counties: Bolivar, Calhoun, Chickasaw, Grenada, Monroe, Sunflower, Tallahatchie, and Yalobusha.

Zone 7

Alabama counties: Bibb, Calhoun, Clay, Cleburne, Jefferson, Pickens, Randolph, Shelby, St. Clair, Talladega, and Tuscaloosa.

Arkansas counties: Ashley, Chicot, Columbia, Lafayette, Miller, and Union.

Georgia counties: Banks, Barrow, Butts, Carroll, Clarke, Clayton, Cobb, Coweta, De Kalb, Douglas, Elbert, Fayette, Forsyth, Franklin, Fulton, Greene, Gwinnett, Hall, Haralson, Hart, Heard, Henry, Jackson, Jasper, Lincoln, Madison, Morgan, Newton, Oconee, Oglethorpe, Paulding, Polk, Putnam, Rockdale, Spalding, Stephens, Taliaferro, Walton, and Wilkes.

Mississippi counties: Attala, Carroll, Choctaw, Clay, Holmes, Humphreys, Leflore, Lowndes, Montgomery, Noxubee, Oktibbeha, Washington, Webster, and Winston.

Zone 8

Alabama counties: Chambers, Chilton, Coosa, Greene, Hale, Lee, Perry, Sumter (north of U.S. 80), and Tallapoosa.

Georgia counties: Baldwin, Bibb, Burke, Columbia, Crawford, Glascock, Hancock, Harris, Jefferson, Jones, Lamar, McDuffie, Meriwether, Monroe, Muscogee, Pike, Richmond, Talbot, Taylor, Troup, Twiggs, Upson, Warren, Washington, and Wilkinson.

Louisiana parishes: Bienville, Bossier, Caddo, Claiborne, East Carroll, Jackson, Lincoln, Morehouse, Ouachita, Richland, Union, Webster, and West Carroll.

Mississippi counties: Issaquena, Kemper, Leake, Madison, Neshoba, Sharkey, and Yazoo.

Zone 9

Alabama counties: Autauga, Bullock, Dallas, Elmore, Lowndes, Macon, Marengo, Monroe, Montgomery, Russell, Sumter (south of U.S. 80), and Wilcox.

Georgia counties: Bleckley, Bulloch, Candler, Chattahoochee, Crisp, Dodge, Dooly, Effingham, Emanuel, Evans, Houston, Jenkins, Johnson, Laurens, Macon, Marion, Montgomery, Peach, Pulaski, Schley, Screven, Stewart, Sumter, Tattnall, Telfair, Toombs, Treutlen, Webster, Wheeler, and Wilcox.

Louisiana parishes: Caldwell, De Soto, Franklin, Madison, Natchitoches (north of State Highway 6 and U.S. 84), Red River, Tensas, and Winn.

Mississippi counties: Claiborne, Clarke, Copiah, Hinds, Jasper, Lauderdale, Newton, Rankin, Scott, Simpson, Smith, and Warren.

Zone 10

Alabama counties: Barbour, Butler, Choctaw, Clarke, Coffee, Conecuh, Covington, Crenshaw, Dale, Escambia, Geneva, Henry, Houston, Monroe, Pike, and Washington.

Georgia counties: Appling, Atkinson, Bacon, Baker, Ben Hill, Berrien, Brantley, Brooks, Bryan, Calhoun, Camden, Charlton, Chatham, Clay, Clinch, Coffee, Colquitt, Cook, Decatur, Dougherty, Early, Echols, Glynn, Grady, Irwin, Jeff Davis, Lanier, Lee, Liberty, Long, Lowndes, McIntosh, Miller, Mitchell, Pierce, Quitman, Randolph, Seminole, Terrell, Thomas, Tift, Turner, Ware, Wayne, and Worth.

Louisiana parishes: Avoyelles, Catahoula, Concordia, Grant, La Salle, Natchitoches (south of State Highway 6 and U.S. 84), Rapides, Sabine, and Vernon.

Mississippi counties: Adams, Amite, Covington, Forrest, Franklin, Greene, Jefferson, Jefferson Davis, Jones, Lamar, Lawrence, Lincoln, Marion, Perry, Pike, Walthall, Wayne, and Wilkinson.

Zone 11

Alabama counties: Baldwin and Mobile (more than 20 miles from the Mobile city hall).

Florida counties: Escambia, Okaloosa, Santa Rosa, and Walton.

Louisiana parishes: Allen, Beauregard, East Feliciana, Evangeline, Pointe Coupee, St. Helena, St. Landry, St. Tammany, Tangipahoa, Washington, and West Feliciana.

Mississippi counties: George, Hancock, Harrison, Jackson, Pearl River, and Stone.

Zone 12

Alabama counties: Mobile (within 20 miles of the Mobile city hall).

Louisiana parishes: Acadia, Ascension, Assumption, Calcasieu, Cameron, East Baton Rouge, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Martin, St. Mary, Terrebonne, Vermilion, and West Baton Rouge.

§ 1007.3 Route disposition.

Route disposition means a delivery to a retail or wholesale outlet (except a plant), either directly or through any distribution facility (including disposition from a plant store, vendor or vending machine) of a fluid milk product classified as Class I milk. Packaged fluid milk products that are transferred to a distributing plant from a plant with route disposition in the marketing area and which are classified as Class I under § 1007.40(a) shall be considered as route disposition from the transferor plant, rather than the transferee plant, for the single purpose of qualifying it as a pool plant under § 1007.7(a).

§ 1007.4 Plant.

Plant means the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products, including filled milk, are received, processed, or packaged. Separate facilities without stationary storage tanks that are used only as a reload point for transferring bulk milk from one tank truck to another or separate facilities used only as a distribution point for storing packaged fluid milk products in transit for route disposition shall not be a plant under this definition.

§ 1007.5 Distributing plant.

Distributing plant means a plant that is approved by a duly constituted regulatory agency for the handling of Grade A milk and at which fluid milk products are processed or packaged and from which there is route disposition in the marketing area during the month.

§ 1007.6 Supply plant.

Supply plant means a plant that is approved by a duly constituted regulatory agency for the handling of Grade A milk and from which fluid milk products are transferred during the month to a pool distributing plant.

§ 1007.7 Pool plant.

Pool plant means a plant specified in paragraphs (a), (b), (c) or (d) of this section, or a unit of plants as specified in paragraph (e) of this section, but excluding a plant specified in paragraph (g) of this section. The pooling standards described in paragraphs (a) through (c) of this section are subject to modification pursuant to paragraph (f) of this section:

(a) A distributing plant from which during the month:

(1) Total route disposition, except filled milk, is equal to 50 percent or more of the total quantity of Grade A fluid milk products, except filled milk, physically received at such plant or diverted therefrom pursuant to § 1007.13; and

(2) Route disposition, except filled milk, in the marketing area is at least the lesser of a daily average of 1,500 pounds or 10 percent of the total quantity of fluid milk products, except filled milk, physically received or diverted therefrom pursuant to § 1007.13.

(b) A supply plant from which during each of the months of July through November 60 percent (40 percent during each of the months of December through June) of the total quantity of Grade A milk that is received during the month from dairy farmers (including producer milk diverted from the plant pursuant to § 1007.13 but excluding milk diverted to such plant) and handlers described in § 1007.9(c) is transferred to pool distributing plants.

(c) A plant located within the Southeast marketing area that is operated by a cooperative association if pool plant status under this paragraph is requested for such plant by the cooperative association and during the month producer milk of members of such cooperative association is delivered directly from farms to pool distributing plants or is transferred to such plants as a fluid milk product from the cooperative's plant. Such deliveries, in excess of receipts by transfer from pool distributing plants, must equal not less than 60 percent of the total producer milk of such cooperative association in each of the months of July through November, and 40 percent of such milk in each of the months of December through June. The plant's pool plant status shall be subject to the following conditions:

(1) The plant does not qualify as a pool plant under paragraphs (a) or (b) of this section or under the provisions of another Federal order applicable to a distributing plant or a supply plant; and

(2) The plant is approved by a duly constituted regulatory agency to handle Grade A milk.

(d) A plant located within the marketing area (other than a producer-handler plant or a governmental agency plant) that meets the qualifications described in paragraph (a) of this section regardless of its quantity of route disposition in any other Federal order marketing area.

(e) Two or more plants operated by the same handler and that are located within the Southeast marketing area may qualify for pool status as a unit by meeting the total and in-area route disposition requirements specified in paragraph (a) of this section and the following additional requirements:

(1) At least one of the plants in the unit must qualify as a pool plant pursuant to paragraph (a) of this section;

(2) Other plants in the unit must process only Class I or Class II products and must be located in a pricing zone providing the same or a lower Class I price than the price applicable at the distributing plant included in the unit pursuant to paragraph (e)(1) of this section; and

(3) A written request to form a unit, or to add or remove plants from a unit, must be filed with the market administrator prior to the first day of the month for which it is to be effective.

(f) The applicable percentages in paragraphs (a) through (c) of this section may be increased or decreased up to 10 percentage points by the market administrator if, following a written request for such a revision, the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the market administrator shall investigate the need for the revision by conducting an investigation and conferring with the Director of the Dairy Division. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing seven days before the effective date.

(g) The term *pool plant* shall not apply to the following plants:

(1) A *producer-handler* plant;

(2) An *exempt plant* as defined in § 1007.8(e);

(3) A plant qualified pursuant to paragraph (a) of this section which is not located within the Southeast marketing area, meets the pooling requirements of another Federal order, and has had greater sales in such other Federal order marketing area for three consecutive months, including the current month;

(4) A plant qualified pursuant to paragraph (a) of this section which is located in another order's marketing area and which is required to be regulated under such other order because of its location within the other order's marketing area; and

(5) A plant qualified pursuant to paragraph (b) of this section which also meets the pooling requirements of another Federal order and from which greater qualifying shipments are made to plants regulated under such other order than are made to plants regulated under this part, or such plant has automatic pooling status under such other order.

§ 1007.8 Nonpool plant.

Nonpool plant means any milk or filled milk receiving, manufacturing, or processing plant other than a pool plant. The following categories of nonpool plants are further defined as follows:

(a) *Other order plant* means a plant that is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act.

(b) *Producer-handler* plant means a plant operated by a producer-handler as defined in any order (including this part) issued pursuant to the Act.

(c) *Partially regulated distributing plant* means a nonpool plant that is not an other order plant, a producer-handler plant, or an exempt plant, from which there is route disposition in consumer-type packages or dispenser units in the marketing area during the month.

(d) *Unregulated supply plant* means a supply plant that does not qualify as a pool supply plant and is not an other order plant, a producer-handler plant, or an exempt plant.

(e) *Exempt plant* means a plant:

(1) Operated by a governmental agency from which fluid milk products are distributed in the marketing area. Such plant shall be exempt from all provisions of this part; or

(2) Which has monthly route disposition of 100,000 pounds or less during the month. Such plant will be exempt from the pricing and pooling provisions of this order, but the handler will be required to file periodic reports as prescribed by the market administrator to enable determination of the exempt status of such handler.

§ 1007.9 Handler.

Handler means:

(a) Any person who operates one or more pool plants;

(b) Any cooperative with respect to producer milk which it causes to be diverted pursuant to § 1007.13 for the account of such cooperative association;

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer for delivery to a pool plant of another handler in a tank truck owned and operated by, or under the control of, such cooperative association, unless both the cooperative association and the operator of the pool plant notify the market administrator prior to the time that such milk is delivered to the pool plant that the plant operator will be the handler of such milk and will purchase such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples. Milk for which the cooperative association is the handler pursuant to this paragraph shall be deemed to have been received by the cooperative association at the location of the pool plant to which such milk is delivered;

(d) Any person who operates a partially regulated distributing plant;

(e) A producer-handler;

(f) Any person who operates an other order plant described in § 1007.8(a);

(g) Any person who operates an unregulated supply plant; and

(h) Any person who operates an exempt plant.

§ 1007.10 Producer-handler.

Producer-handler means a person who:

(a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in excess of 100,000 pounds per month;

(b) Receives no Class I milk from sources other than his/her own farm production and pool plants;

(c) Disposes of no other source milk as Class I milk; and

(d) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts from pool plants) and the operation of the processing and packaging business are his/her personal enterprise and personal risk.

§ 1007.11 [Reserved]

§ 1007.12 Producer.

(a) Except as provided in paragraph (b) of this section, *producer* means any person who produces milk approved by a duly constituted regulatory agency for fluid consumption as Grade A milk and whose milk is:

(1) Received at a pool plant directly from such producer;

(2) Received by a handler described in § 1007.9(c); or

(3) Diverted from a pool plant in accordance with § 1007.13.

(b) *Producer* shall not include:

(1) A producer-handler as defined in any order (including this part) issued pursuant to the Act;

(2) Any person with respect to milk produced by such person whose milk is delivered to an exempt plant, excluding producer milk diverted to such exempt plant pursuant to § 1007.13;

(3) Any person with respect to milk produced by such person which is diverted to a pool plant from an other order plant if the other order plant designates such person as a producer under that order and such milk is allocated to Class II or Class III utilization pursuant to § 1007.44(a)(8)(iii) and the corresponding step of § 1007.44(b); or

(4) Any person with respect to milk produced by such person which is reported as diverted to an other order plant if any portion of such person's milk so moved is assigned to Class I under the provisions of such other order.

§ 1007.13 Producer milk.

Producer milk means the skim milk and butterfat contained in milk of a producer that is:

(a) Received at a pool plant directly from such producer by the operator of the plant;

(b) Received by a handler described in § 1007.9(c);

(c) Diverted from a pool plant to the pool plant of another handler. Milk so diverted shall be deemed to have been received at the location of the plant to which diverted; or

(d) Diverted by the operator of a pool plant or cooperative association to a nonpool plant that is not a producer-handler plant, subject to the following conditions:

(1) In any month of December through June, not less than four days' production of the producer whose milk is diverted is physically received at a pool plant during the month;

(2) In any month of July through November, not less than ten days' production of the producer whose milk is diverted is physically received at a pool plant during the month;

(3) The total quantity of milk so diverted during the month by a cooperative association shall not exceed 33 percent during the months of July through November, or 50 percent during the months of December through June, of the producer milk that the cooperative association caused to be delivered to, and physically received at, pool plants during the month;

(4) The operator of a pool plant that is not a cooperative association may divert any milk that is not under the control of a cooperative association that diverts milk during the month pursuant to paragraph (d) of this section. The total quantity of milk so diverted during the month shall not exceed 33 percent during the months of July through November, or 50 percent during the months of December through June, of the producer milk physically received at such plant (or such unit of plants in the case of plants that pool as a unit pursuant to § 1007.7(d)) during the month;

(5) Any milk diverted in excess of the limits prescribed in paragraphs (d)(3) and (4) of this section shall not be producer milk. The diverting handler shall designate the dairy farmer deliveries that will not be producer milk pursuant to paragraphs (d)(3) and (4) of this section. If the handler fails to make such designation, no milk diverted by such handler shall be producer milk;

(6) To the extent that it would result in nonpool status for the plant from which diverted, milk diverted for the account of a cooperative association from the pool plant of another handler shall not be producer milk;

(7) The cooperative association shall designate the dairy farm deliveries that are not producer milk pursuant to paragraph (d)(6) of this section. If the cooperative association fails to make such designation, no milk diverted by it to a nonpool plant shall be producer milk;

(8) Diverted milk shall be priced at the location of the plant to which diverted; and

(9) The market administrator may increase or decrease the applicable percentages in paragraphs (d)(3) and (4) of this section by up to 10 percentage points, and may increase or decrease the 10-day and 4-day delivery requirements in paragraphs (d)(1) and (2) of this section by 50 percent if, following a written request for such a revision, the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the market administrator shall investigate the need for the revision by conducting an investigation and conferring with the Director of the Dairy Division. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing seven days before the effective date.

§ 1007.14 Other source milk.

Other source milk means all skim milk and butterfat contained in or represented by:

(a) Receipts of fluid milk products and bulk products specified in § 1007.40(b)(1) from any source other than producers, a handler described in § 1007.9(c), or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1007.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1007.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1007.40(b)(1)) for which the handler fails to establish a disposition.

§ 1007.15 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 9 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, lowfat milk, milk drinks, buttermilk, and filled milk, including any such beverage products that are flavored, cultured, 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.

§ 1007.16 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 9 percent or more butterfat, with or without the addition of other ingredients.

§ 1007.17 Filled milk.

Filled milk means any combination of nonmilk fat (or oil) with skim milk (whether fresh, cultured, reconstituted, or modified by the addition of nonfat milk solids), with or without milkfat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product, and contains less than 6 percent nonmilk fat (or oil).

§ 1007.18 Cooperative association.

Cooperative association means any cooperative marketing association of producers which the Secretary determines after application by the association:

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

(b) To have full authority in the sale of milk of its members and be engaged in making collective sales of, or marketing, milk or milk products for its members.

§ 1007.19 Commercial food processing establishment.

Commercial food processing establishment means any facility, other than a milk or filled milk plant, to which bulk fluid milk products and bulk fluid cream products are disposed of, or producer milk is diverted, that uses such receipts as ingredients in food products, and has no disposition of fluid milk products or fluid cream products other than those that it received in consumer type packages. Producer milk diverted to commercial food processing establishments shall be subject to the same provisions relating to diversions to plants, including, but not limited to, provisions in §§ 1007.13, 1007.41, and 1007.52.

Handler Reports

§ 1007.30 Reports of receipts and utilization.

On or before the 5th day after the end of the month (if postmarked), or not later than the 7th day if the report is delivered in person to the office of the market administrator, each handler shall report for such month to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(a) Each handler, with respect to each of its pool plants, shall report the quantities of skim milk and butterfat contained in or represented by:

(1) Receipts of producer milk, including producer milk diverted by the handler from the pool plant to other plants;

(2) Receipts of milk from handlers described in § 1007.9(c);

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

(4) Receipts of other source milk;

(5) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1007.40(b)(1); and

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

(b) Each handler operating a partially regulated distributing 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. Such report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1007.9 (b) and (c) shall report:

(1) The quantities of skim milk and butterfat contained in receipts from producers; and

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

(d) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to its receipts and utilization of milk, filled milk, and milk products in such manner as the market administrator may prescribe.

§ 1007.31 Payroll reports.

(a) On or before the 20th day after the end of each month, each handler described in § 1007.9 (a), (b), and (c) shall report to the market administrator its producer payroll for such month, in detail prescribed by the market administrator, showing for each producer:

(1) Such producer's name and address;

(2) The total pounds of milk received from such producer, showing separately the pounds of milk received from the producer on each delivery day;

(3) The average butterfat content of such milk; and

(4) The price per hundredweight, the gross amount due, the amount and nature of any deduction, and the net amount paid.

(b) Each handler operating a partially regulated distributing plant who elects to make payment pursuant to § 1007.76(b) shall report for each dairy farmer who would have been a producer if the plant had been fully regulated in the same manner as prescribed for reports required by paragraph (a) of this section.

§ 1007.32 Other reports.

(a) Each handler described in § 1007.9 (a), (b), and (c) shall report to the market administrator on or before the 7th day after the end of each month of February through May the aggregate quantity of base milk received from producers during the month, and on or before the 20th day after the end of each month of February through May the pounds of base milk received from each producer during the month. In the case of milk diverted to another plant, the handler shall also report the pounds of base milk of each producer assigned to the divertee plant.

(b) In addition to the reports required pursuant to paragraph (a) of this section and §§ 1007.30 and 1007.31, each handler shall report such information as the market administrator deems necessary to verify or establish each handler's obligation under the order.

Classification of Milk

§ 1007.40 Classes of utilization.

Except as provided in § 1007.42, all skim milk and butterfat required to be reported pursuant to § 1007.30 shall be classified as follows:

(a) *Class I milk* shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk* shall be all skim milk and butterfat:

(1) Disposed in the form of a fluid cream product or any product containing artificial fat, fat substitutes, or 6 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 processing establishment if the market administrator 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, sour half-and-half, sour cream mixtures containing nonmilk items, yogurt, and any other semi-solid product resembling a Class II 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) *Class III milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheese 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 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) through (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 (b)(4) (i) through (iv) of this section, that are dumped by a handler. The market administrator 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 market administrator so requires, the handler must notify the market administrator 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 market administrator;

(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 § 1007.15 and the fluid cream product definition pursuant to § 1007.16; and

(7) In shrinkage assigned pursuant to § 1007.41(a) to the receipts specified in § 1007.41(a)(2) and in shrinkage specified in § 1007.41 (b) and (c).

(d) *Class III–A* milk shall be all skim milk and butterfat used to produce nonfat dry milk.

§ 1007.41 Shrinkage.

For the purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1007.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraphs (b) (1) through (6) of this section which was received in the form of a bulk fluid milk product or a bulk fluid cream product;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant);

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1007.9(c), except that if the operator of the plant to which the milk is delivered purchased such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchased such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amount of skim milk and butterfat to which percentages are applied in paragraphs (b)(1), (2), (4), (5), and (6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1007.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1007.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or transferred in the form of a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification shall be subject to the following conditions:

(1) The skim milk or butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant after the computations pursuant to § 1007.44(a)(12) and the corresponding step of § 1007.44(b). The amount of skim milk or butterfat classified in each class shall include the assigned utilization of skim milk or butterfat in transfers of concentrated fluid milk products.

(2) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1007.44(a)(7) or the corresponding step of § 1007.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-plant received during the month other source milk to be allocated pursuant to § 1007.44(a) (11) or (12) or the corresponding steps of § 1007.44(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or transferred in the form of a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b)(1), (2), or (3) of this section.

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be Class I subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to the class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification shall be in accordance with the provisions of § 1007.40.

(c) *Transfers and diversions to producer-handlers and to exempt plants.* Skim milk or butterfat that is transferred or diverted from a pool plant to a producer-handler under another Federal order or to an exempt plant shall be classified:

(1) As Class I milk if transferred or diverted to a producer-handler;

(2) As Class I milk if transferred to an exempt plant in the form of a packaged fluid milk product;

(3) In accordance with the utilization assigned to it by the market administrator if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product to an exempt plant. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant, a producer-handler plant, or an exempt plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or transferred in the form of a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i) (A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2) (ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in such handler's report of receipts and utilization filed pursuant § 1007.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plants from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plants from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be classified to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class II utilization, and then to Class III utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class II utilization, then to any remaining Class III utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in this paragraph.

(e) *Transfers by a handler described in § 1007.9(c) to pool plants.* Skim milk and butterfat transferred in the form of bulk milk by a handler described in § 1007.9(c) to another handler's pool plant shall be classified pursuant to § 1007.44 pro rata with producer milk received at the transferee-handler's plant.

§ 1007.43 General classification rules.

In determining the classification of producer milk pursuant to § 1007.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1007.30 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 § 1007.9 (b) or (c) that was not received at a pool plant, the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1007.40, 1007.41, and 1007.42. The combined pounds of skim milk and butterfat so determined in each class for a handler described in § 1007.9 (b) or (c) shall be such handler's classification of producer milk;

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by the handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1007.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association;

(d) Skim milk and butterfat contained in receipts of bulk concentrated fluid milk and nonfluid milk products that are reconstituted for fluid use shall be assigned to Class I use, up to the reconstituted portion of labeled reconstituted fluid milk products, on a pro rata basis (except for any Class I use of specific concentrated receipts that is established by the handler) prior to any assignment under § 1007.44. Any remaining skim milk and butterfat in concentrated receipts shall be assigned to uses under § 1007.44 on a pro rata basis, unless a specific use of such receipts is established by the handler; and

(e) Class III–A milk shall be allocated in combination with Class III milk and the quantity of producer milk eligible to be priced in Class III–A shall be determined by prorating receipts from pool sources to Class III–A use on the basis of the quantity of total receipts of bulk fluid milk products allocated to Class III use at the plant.

§ 1007.44 Classification of producer milk.

For each month the market administrator shall determine for each handler described in § 1007.9(a) for each pool plant of the handler separately the classification of producer milk and milk received from a handler described in § 1007.9(c), by allocating the handler's receipts of skim milk and butterfat to the utilization of such receipts by such handler as follows:

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

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1007.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(ii) Packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1007.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1007.40(b)(1) in packaged form and in bulk concentrated fluid milk products that were in inventory at the beginning of the month, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in bulk concentrated fluid milk products and in other source milk (except other source milk received in the form of an unconcentrated fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1007.40(b) (excluding the quantity of such skim milk that was classified as Class III milk pursuant to § 1007.40(c)(6)), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Bulk concentrated fluid milk products and other source milk (except other source milk received in the form of an unconcentrated fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1007.40(b)(1) that were not subtracted pursuant to paragraphs (a)(4), (a)(5), and (a)(6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under any Federal milk order and from an exempt distributing plant;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2)(i) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is fully regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant;

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (7)(v), and (8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount;

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, milk from a handler described in § 1007.9(c), fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from another order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1007.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(ii), (a)(5), and (a)(7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (a)(7)(v), (a)(8)(i), and (a)(8)(ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant that were not subtracted pursuant to paragraphs (a)(7)(vi) and (8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii) and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1007.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1007.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk and milk received from a handler described in § 1007.9(c), subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as ''overage'';

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk and milk received from a handler described in § 1007.9(c) in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

§ 1007.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1007.44(a)(12) and the corresponding step of § 1007.44(b), estimate and publicly announce the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose.

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to §§ 1007.43(d) and 1007.44 on the basis of such report (including any reclassification of inventories of bulk concentrated fluid milk products), and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

(c) Furnish each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to another order plant the class to which such shipments were allocated by the market administrator of the other order on the basis of the report by the receiving handler, and, as necessary, any changes in such allocation arising from the verification of such report.

(d) On or before the 12th day after the end of each month, report to each cooperative association which so requests, the percentage of producer milk delivered by members of such association that was used in each class by each handler receiving such milk. For the purpose of this report the milk so received shall be prorated to each class in accordance with the total utilization of producer milk by such handler.

Class Prices

§ 1007.50 Class prices.

Subject to the provisions of § 1007.52, the class prices for the month per hundredweight of milk containing 3.5% butterfat shall be as follows:

(a) The *Class I price* shall be the basic formula price for the second preceding month plus $3.08.

(b) The *Class II price* shall be the basic formula price for the second preceding month plus $.30.

(c) The *Class III price* shall be the basic formula price for the month.

(d) The *Class III-A price* for the month shall be the average Central States nonfat dry milk price for the month, as reported by the Department, less 12.5 cents, times an amount computed by subtracting from 9 an amount calculated by dividing 0.4 by such nonfat dry milk price, plus the butterfat differential value per hundredweight of 3.5 percent milk and rounded to the nearest cent, and subject to the adjustments set forth in paragraph (c) of this section for the applicable month.

§ 1007.51 Basic formula price.

The *basic formula price* shall be the preceding month's average pay price for manufacturing grade milk in Minnesota and Wisconsin using the ''base month'' series, as reported by the Department, adjusted to a 3.5 percent butterfat basis using the butterfat differential for the preceding month computed pursuant to § 1007.74 and rounded to the nearest cent, plus or minus the change in gross value yielded by the butter-nonfat dry milk and Cheddar cheese product price formula computed pursuant to paragraphs (a) through (e) of this section.

(a) The gross values of per hundredweight of milk used to manufacture butter-nonfat dry milk and Cheddar cheese shall be computed, using price data determined pursuant to paragraph (b) of this section and annual yield factors, for the preceding month and separately for the current month as follows:

(1) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(i) Multiply the Grade AA butter price by 4.27;

(ii) Multiply the nonfat dry milk price by 8.07; and

(iii) Multiply the dry buttermilk price by 0.42.

(2) The gross value of milk used to manufacture Cheddar cheese shall be the sum of the following computations:

(i) Multiply the Cheddar cheese price by 9.87; and

(ii) Multiply the Grade A butter price by 0.238.

(b) The following product prices shall be used pursuant to paragraph (a) of this section:

(1) *Grade AA butter price.* Grade AA butter price means the simple average for the month of the Chicago Mercantile Exchange, Grade AA butter price, as reported by the Department.

(2) *Nonfat dry milk price.* Nonfat dry milk price means the simple average for the month of the Western Nonfat Dry Milk Low/Medium Heat price, as reported by the Department.

(3) *Dry buttermilk price.* Dry buttermilk price means the simple average for the month of the Western Dry Buttermilk price, as reported by the Department.

(4) *Cheddar cheese price.* Cheddar cheese price means the simple average for the month of the National Cheese Exchange 40-pound block Cheddar cheese price, as reported by the Department.

(5) *Grade A butter price.* Grade A butter price means the simple average for the month of the Chicago Mercantile Exchange Grade A butter price, as reported by the Department.

(c) Determine the amounts by which the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk and the gross value per hundredweight of milk used to manufacture Cheddar cheese for the current month exceed or are less than the respective gross values for the preceding month.

(d) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (c) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (d)(1) and (d)(2) of this section:

(1) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the Department, for the most recent preceding period, and divide by the annual yield factor for nonfat dry milk, 8.07, to determine the quantity (in hundredweights) of milk used in the production of butter-nonfat dry milk; and

(2) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the Department, for the most recent preceding period, and divide by the annual yield factor for Cheddar cheese, 9.87, to determine the quantity (in hundredweights) of milk used in the production of American cheese.

(e) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (c) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (d) of this section.

§ 1007.52 Plant location adjustments for handlers.

(a) For milk received at a plant from producers or a handler described in § 1007.9(c) and which is classified as Class I milk without movement in bulk form to a pool distributing plant at which a higher Class I price applies, the price specified in § 1007.50(a) shall be adjusted by the amount stated in paragraphs (a)(1) through (6) of this section for the location of such plant:

(1) For a plant located within one of the zones set forth in § 1007.2, the adjustment (cents per hundredweight) shall be as follows:

Zone 1	Minus 53
Zone 2	Minus 48
Zone 3	Minus 38
Zone 4	Minus 31
Zone 5	Minus 25
Zone 6	Minus 10
Zone 7	No adjustment
Zone 8	Plus 10
Zone 9	Plus 20
Zone 10	Plus 32
Zone 11	Plus 50
Zone 12	Plus 57

(2) For a plant located in that portion of the Tennessee Valley marketing area that is within the State of Georgia, the adjustment shall be minus 25 cents.

(3) For a plant located in the Missouri counties of Dunklin or Pemiscot, the adjustment shall be minus 53 cents.

(4) For a plant located in the Texas counties of Bowie or Cass, the adjustment shall be zero.

(5) For a plant located within another Federal order marketing area, other than in those counties specified in paragraphs (2), (3), and (4) of this section, the adjustment shall be determined by subtracting the Class I differential price in Zone 7 of this order from the Class I differential price, adjusted for the plant's location, under such other Federal order.

(6) For a plant located outside the areas described in paragraphs (a)(1) through (5) of this section, the adjustment shall be computed by multiplying 2.5 cents per 10 miles, or fraction thereof (by the shortest hard-surfaced highway distance as determined by the market administrator), from the nearer of Shreveport, Louisiana; Little Rock, Arkansas; Memphis, Tennessee; Jackson, Tennessee; Nashville, Tennessee; or Atlanta, Georgia, and subtracting that figure from the location adjustment applicable at Shreveport, Little Rock, Memphis, Jackson, Nashville, or Atlanta, as the case may be.

(b) For fluid milk products transferred in bulk form from a pool plant to a pool distributing plant at which a higher Class I price applies and which are classified as Class I milk, the Class I price shall be the Class I price at the transferee-plant subject to a location adjustment credit for the transferor-plant which shall be determined by the market administrator for skim milk and butterfat, respectively, as follows:

(1) Subtract from the pounds of skim milk remaining in Class I at the transferee-plant after the computations pursuant to § 1007.44(a)(12) plus the pounds of skim milk in receipts of concentrated fluid milk products from other pool plants that are assigned to Class I use, an amount equal to:

(i) The pounds of skim milk in receipts of milk at the transferee-plant from producers and handlers described in § 1007.9(c); and

(ii) The pounds of skim milk in receipts of packaged fluid milk products from other pool plants;

(2) Assign any remaining pounds of skim milk in Class I at the transferee-plant to the skim milk in receipts of fluid milk products from other pool plants, first to the transferor-plants at which the highest Class I price applies and then to other plants in sequence beginning with the plant at which the next highest Class I price applies;

(3) Compute the total amount of location adjustment credits to be assigned to transferor-plants by multiplying the hundredweight of skim milk assigned pursuant to paragraph (b)(2) of this section to each transferor-plant at which the Class I price is lower than the Class I price applicable at the transferor-plant and the transferee-plant, and add the resulting amounts;

(4) Assign the total amount of location adjustment credits computed pursuant to paragraph (b)(3) of this section to those transferor-plants that transferred fluid milk products containing skim milk classified as Class I milk pursuant to § 1007.42(a) and at which the applicable Class I price is less than the Class I price at the transferee-plant, in sequence beginning with the plant at which the highest Class I price applies. Subject to the availability of such credits, the credit assigned to each plant shall be equal to the hundredweight of such Class I skim milk multiplied by the adjustment rate determined pursuant to paragraph (b)(3) of this section for such plant. If the aggregate of this computation for all plants having the same adjustment as determined pursuant to paragraph (b)(3) of this section exceeds the credits that are available to those plants, such credits shall be prorated to the volume of skim milk in Class I in transfers from such plants; and

(5) Location adjustment credit for butterfat shall be determined in accordance with the procedure outlined for skim milk in paragraphs (b)(1) through (4) of this section.

(c) The market administrator shall determine and publicly announce the zone location of each plant of each handler. The market administrator shall notify the handler on or before the first day of any month in which a change in a plant location zone will apply.

(d) The Class I price applicable to other source milk shall be adjusted at the rates set forth in paragraph (a) of this section, except that the adjusted Class I price shall not be less than the Class III price.

§ 1007.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and Class II prices for the following month, and the Class III and Class III–A prices for the preceding month.

§ 1007.54 Equivalent price.

If for any reason a price or pricing constituent required by this part for computing class prices or for other purposes is not available as prescribed in this part, the market administrator shall use a price or pricing constituent determined by the Secretary to be equivalent to the price or pricing constituent that is required.

Uniform Prices

§ 1007.60 Handler's value of milk for computing the uniform price.

For the purpose of computing the uniform price, the market administrator 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 § 1007.9 (b) and (c) with respect to milk that was not received at a pool plant as follows:

(a) Multiply the pounds of producer milk and milk received from a handler described in § 1007.9(c) that were classified in each class pursuant to §§ 1007.43(a) and 1007.44(c) by the applicable class prices, and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1007.44(a)(14) and the corresponding step of § 1007.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1007.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1007.44(a)(9) and the corresponding step of § 1007.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat assigned to Class I pursuant to § 1007.43(d) and the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1007.44(a)(7) (i) through (iv) and the corresponding step of § 1007.44(b), excluding receipts of bulk fluid cream products from an other order plant and bulk concentrated fluid milk products from pool plants, other order plants, and unregulated supply plants;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1007.44(a)(7) (v) and (vi) and the corresponding step of § 1007.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1007.43(d) and § 1007.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1007.44(a)(11) and the corresponding step of § 1007.44(b), excluding such skim milk and butterfat in receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) Subtract, for reconstituted milk made from receipts of nonfluid milk products, an amount computed by multiplying $1.00 (but not more than the difference between the Class I price applicable at the location of the pool plant and the Class III price) by the hundredweight of skim milk and butterfat contained in receipts of nonfluid milk products that are allocated to Class I use pursuant to § 1007.43(d);

(h) Exclude, for pricing purposes under this section, receipts of nonfluid milk products that are distributed as labeled reconstituted milk for which payments are made to the producer-settlement fund of another order under § 1007.76(a)(5) or (c); and

(i) For pool plants that transfer bulk concentrated fluid milk products to other pool plants and other order plants, add or subtract the amount per hundredweight of any class price change from the previous month that results from any inventory reclassification of bulk concentrated fluid milk products that occurs at the transferee plant. Any such applicable class price change shall be applied to the plant that used the concentrated milk in the event that the concentrated fluid milk products were made from bulk unconcentrated fluid milk products received at the plant during the prior month.

§ 1007.61 Computation of uniform price (including weighted average price and uniform prices for base and excess milk).

(a) The market administrator shall compute the weighted average price for each month and the uniform price for each month of June through January per hundredweight of milk of 3.5 percent butterfat content as follows:

(1) Combine into one total the values computed pursuant to § 1007.60 for all handlers who filed the reports prescribed in § 1007.30 for the month and who made payments pursuant to § 1007.71 for the preceding month;

(2) Add not less than one-half the unobligated balance in the producer-settlement fund;

(3) Add an amount equal to the total value of the minus adjustments and subtract an amount equal to the total value of the plus adjustments computed pursuant to § 1007.75;

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

(i) The total hundredweight of producer milk; and

(ii) The total hundredweight for which a value is computed pursuant to § 1007.60(f); and

(5) Subtract not less than 4 cents nor more than 5 cents per hundredweight. The resulting figure, rounded to the nearest cent, shall be the weighted average price for each month and the uniform price for the months of June through January.

(b) For each month of February through May, the market administrator shall compute the uniform prices per hundredweight for base milk and for excess milk, each of 3.5 percent butterfat content, as follows:

(1) Compute the total value of excess milk for all handlers included in the computations pursuant to paragraph (a)(1) of this section as follows:

(i) Multiply the hundredweight quantity of excess milk that does not exceed the total quantity of such handlers' producer milk assigned to Class III–A by the Class III–A price:

(ii) Multiply the remaining hundredweight quantity of excess milk that does not exceed the total quantity of such handlers' producer milk assigned to Class III by the Class III price:

(iii) Multiply the remaining hundredweight quantity of excess milk that does not exceed the total quantity of such handlers' producer milk assigned to Class II by the Class II price:

(iv) Multiply the remaining hundredweight quantity of excess milk by the Class I price; and

(v) Add together the resulting amounts;

(2) Divide the total value of excess milk obtained in paragraph (b)(1) of this section by the total hundredweight of such milk and adjust to the nearest cent. The resulting figure shall be the uniform price for excess milk;

(3) From the amount resulting from the computations pursuant to paragraphs (a)(1) through (a)(3) of this section subtract an amount computed by multiplying the hundredweight of milk specified in paragraph (a)(4)(ii) of this section by the weighted average price;

(4) Subtract the total value of excess milk determined by multiplying the uniform price obtained in paragraph (b)(2) of this section times the hundredweight of excess milk from the amount computed pursuant to paragraph (b)(3) of this section;

(5) Divide the amount calculated pursuant to paragraph (b)(4) of this section by the total hundredweight of base milk included in these computations; and

(6) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (b)(5) of this section. The resulting figure, rounded to the nearest cent, shall be the uniform price for base milk.

§ 1007.62 Announcement of uniform price and butterfat differential.

The market administrator shall announce publicly on or before:

(a) The fifth day after the end of each month the butterfat differential for such month; and

(b) The 11th day after the end of the month the applicable uniform price(s) pursuant to § 1007.61 for such month.

Payments for Milk

§ 1007.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the *producer-settlement fund* into which the market administrator shall deposit all payments made by handlers pursuant to §§ 1007.71, 1007.76, and 1007.77, and out of which the market administrator shall make all payments pursuant to §§ 1007.72 and 1007.77. Payments due any handler shall be offset by any payments due from such handler.

§ 1007.71 Payments to the producer-settlement fund.

(a) On or before the 12th day after the end of the month, each handler shall pay to the market administrator the amount, if any, by which the amount specified in paragraph (a)(1) of this section exceeds the amount specified in paragraph (a)(2) of this section:

(1) The total value of milk of the handler for such month as determined pursuant to § 1007.60.

(2) The sum of:

(i) The value at the uniform price(s) as adjusted pursuant to § 1007.75, of such handler's receipts of producer milk and milk received from handlers pursuant to § 1007.9(c); and

(ii) The value at the weighted average price applicable at the location of the plant from which received of other source milk for which a value is computed pursuant to § 1007.60(f).

(b) On or before the 25th day after the end of the month each person who operated an other order plant that was regulated during such month under an order providing for individual-handler pooling shall pay to the market administrator an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk in route disposition from such plant in the marketing area which was allocated to Class I at such plant. If there is route disposition from such plant in marketing areas regulated by two or more marketwide pool orders, the reconstituted skim milk allocated to Class I shall be prorated to each order according to such route disposition in each marketing area; and

(2) Compute the value of the reconstituted skim milk assigned in paragraph (b)(1) of this section to route disposition in this marketing area by the difference between the Class I price under this part applicable at the location of the other order plant (but not to be less than the Class III price) and the Class III price.

§ 1007.72 Payments from the producer-settlement fund.

On or before the 13th day after the end of each month, the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1007.71(a)(2) exceeds the amount computed pursuant to § 1007.71(a)(1). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the funds are available.

§ 1007.73 Payments to producers and to cooperative associations.

(a) Each handler shall pay each producer for producer milk for which payment is not made to a cooperative association pursuant to paragraph (b) of this section, as follows:

(1) On or before the 26th day of each month, for milk received during the first 15 days of the month from such producer who has not discontinued delivery of milk to such handler before the 23rd day of the month at not less than the Class III price for the preceding month or 90 percent of the weighted average price for the preceding month, whichever is higher, less proper deductions authorized in writing by the producer. If the producer had discontinued shipping milk to such handler before the 25th day of any month, or if the producer had no established base upon which to receive payments during the base paying months of February through May, the applicable rate for making payments to such producer shall be the Class III price for the preceding month; and

(2) On or before the 15th day of the following month, an amount equal to not less than the uniform price(s), as adjusted pursuant to §§ 1007.74 and 1007.75, multiplied by the hundredweight of milk or base milk and excess milk received from such producer during the month, subject to the following adjustments:

(i) Less payments made to such producer pursuant to paragraph (a)(1) of this section;

(ii) Less deductions for marketing services made pursuant to § 1007.86;

(iii) Plus or minus adjustments for errors made in previous payments made to such producers; and

(iv) Less proper deductions authorized in writing by such producer.

(3) If a handler has not received full payment from the market administrator pursuant to § 1007.72 by the 15th day of such month, such handler may reduce payments pursuant to this paragraph to producers on a pro rata basis but not by more than the amount of the underpayment. Such payments shall be completed thereafter not later than the date for making payments pursuant to this paragraph next following after receipt of the balance due from the market administrator.

(b) On or before the day prior to the dates specified in paragraph (a) (1) and (2) of this section, each handler shall make payment to the cooperative association for milk from producers who market their milk through the cooperative association and who have authorized the cooperative to collect such payments on their behalf an amount equal to the sum of the individual payments otherwise payable for such producer milk pursuant to paragraph (a) (1) and (2) of this section.

(c) If a handler has not received full payment from the market administrator pursuant to § 1007.72 by the 15th day of such month, such handler may reduce payments pursuant to paragraph (b) of this section to such cooperative association on a pro rata basis, prorating such underpayment to the volume of milk received from such cooperative association in proportion to the total milk received from producers by the handler, but not by more than the amount of the underpayment. Such payments shall be completed in the following manner:

(1) If the handler receives full payment from the market administrator by the 15th day of the month, the handler shall make payment to the cooperative association of the full value of the underpayment on the 15th day of the month;

(2) If the handler has not received full payment from the market administrator by the 15th day of the month, the handler shall make payment to the cooperative association of the full value of the underpayment on or before the date for making such payments pursuant to this paragraph next following after receipt of the balance due from the market administrator.

(d) Each handler pursuant to § 1007.9(a) who receives milk from a cooperative association as a handler pursuant to § 1007.9(c), including the milk of producers who are not members of such association, and who the market administrator determines have authorized such cooperative association to collect payment for their milk, shall pay such cooperative for such milk as follows:

(1) On or before the 25th day of the month for milk received during the first 15 days of the month, not less than the Class III price for the preceding month or 90 percent of the weighted average

price for the preceding month, whichever is higher; and

(2) On or before the 14th day of the following month, not less than the appropriate uniform price(s) as adjusted pursuant to §§ 1007.74 and 1007.75, and less any payments made pursuant to paragraph (d)(1) of this section.

(e) If a handler has not received full payment from the market administrator pursuant to § 1007.72 by the 14th day of such month, such handler may reduce payments pursuant to paragraph (d) of this section to such cooperative association and complete such payments for milk received from such cooperative association in its capacity as a handler pursuant to § 1007.9(c), in the manner prescribed in paragraph (c) (1) and (2) of this section.

(f) In making payments to producers pursuant to this section, each handler shall furnish each producer, except a producer whose milk was received from a handler described in § 1007.9(c), a supporting statement in such form that it may be retained by the recipient which shall show:

(1) The month and identity of the producer;

(2) The daily and total pounds and the average butterfat content of producer milk;

(3) For the months of February through May the total pounds of base milk received from such producer;

(4) The minimum rate(s) at which payment to the producer is required pursuant to this order;

(5) The rate(s) used in making the payment if such rate(s) is (are) other than the applicable minimum rate(s);

(6) The amount, or rate per hundredweight, and nature of each deduction claimed by the handler; and

(7) The net amount of payment to such producer or cooperative association.

§ 1007.74 Butterfat differential.

For milk containing more or less than 3.5 percent butterfat, the uniform prices for base and excess milk shall be increased or decreased, respectively, for each one-tenth percent butterfat variation from 3.5 percent by a butterfat differential, rounded to the nearest one-tenth cent, which shall be 0.138 times the current month's butter price less 0.0028 times the preceding month's average pay price per hundredweight, at test, for manufacturing grade milk, in Minnesota and Wisconsin, using the ''base month'' series, adjusted pursuant to § 1007.51(a) through (e), as reported by the Department. The butter price means the simple average for the month of the Chicago Mercantile Exchange, Grade A butter price as reported by the Department.

§ 1007.75 Plant location adjustments for producers and on nonpool milk.

(a) The uniform price and the uniform price for base milk shall be adjusted according to the location of the plant at which the milk was physically received at the rates set forth in § 1007.52(a); and

(b) The weighted average price applicable to other source milk shall be adjusted at the rates set forth in section § 1007.52(a) applicable at the location of the nonpool plant from which the milk was received, except that the adjusted weighted average price shall not be less than the Class III price.

§ 1007.76 Payments by a handler operating a partially regulated distributing plant.

Each handler who operates a partially regulated distributing plant shall pay on or before the 25th day after the end of the month to the market administrator for the producer-settlement fund the amount computed pursuant to paragraph (a) of this section. If the handler submits pursuant to §§ 1007.30(b) and 1007.31(b) the information necessary for making the computations, such handler may elect to pay in lieu of such payment the amount computed pursuant to paragraph (b) of this section:

(a) The payment under this paragraph shall be an amount resulting from the following computations:

(1) Determine the pounds of route disposition in the marketing area from the partially regulated distributing plant;

(2) Subtract the pounds of fluid milk products received at the partially regulated distributing plant:

(i) As Class I milk from pool plants and other order plants, except that subtracted under a similar provision of another Federal milk order; and

(ii) From another nonpool plant that is not an other order plant to the extent that an equivalent amount of fluid milk products disposed of to such nonpool plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any payment obligation under any order;

(3) Subtract the pounds of reconstituted milk that are made from nonfluid milk products and which are then disposed of as route disposition in the marketing area from the partially regulated distributing plant;

(4) Multiply the remaining pounds by the difference between the Class I price and the weighted average price, both prices to be applicable at the location of the partially regulated distributing plant (except that the Class I price and weighted average price shall not be less than the Class III price); and

(5) Add the amount obtained from multiplying the pounds of labeled reconstituted milk included in paragraph (a)(3) of this section by the difference between the Class I price applicable at the location of the partially regulated distributing plant less $1.00 (but not to be less than the Class III price) and the Class III price. For any reconstituted milk that is not so labeled, the Class I price shall not be reduced by $1.00. Alternatively, for such disposition, payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not to be less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

(b) The payment under this paragraph shall be the amount resulting from the following computations:

(1) Determine the value that would have been computed pursuant to § 1007.60 for the partially regulated distributing plant if the plant had been a pool plant, subject to the following modifications:

(i) Fluid milk products and bulk fluid cream products received at the partially regulated distributing plant from a pool plant or another order plant shall be allocated at the partially regulated distributing plant to the same class in which such products were classified at the fully regulated plant;

(ii) Fluid milk products and bulk fluid cream products transferred from the partially regulated distributing plant to a pool plant or another order plant shall be classified at the partially regulated distributing plant in the class to which allocated at the fully regulated plant. Such transfers shall be computed to the extent possible to those receipts at the partially regulated distributing plant from pool plants and other order plants that are classified in the corresponding class pursuant to paragraph (b)(1)(i) of this section. Any such transfers remaining after the above allocation which are in Class I and for which a value is computed for the handler operating the partially regulated distributing plant pursuant to § 1007.60 shall be priced at the uniform price (or at the weighted average price if such is provided) of the respective order regulating the handling of milk at the transferee plant, with such uniform price adjusted to the location of the nonpool plant (but not to be less than the lowest class price of the respective order), except that transfers of reconstituted skim milk in filled milk shall be priced at the lowest price class of the respective order; and

(iii) If the operator of the partially regulated distributing plant so requests, the value of milk determined pursuant to § 1007.60 for such handler shall include, in lieu of the value of other source milk specified in § 1007.60(f) less the value of such other source milk specified in § 1007.71(a)(2)(ii), a value of milk determined pursuant to § 1007.60 for each nonpool plant that is not another order plant which serves as a supply plant for such partially regulated distributing plant by making shipments to the partially regulated distributed plant during the month equivalent to the requirements of § 1007.7(b), subject to the following conditions:

(A) The operator of the partially regulated distributing plant submits with its reports filed pursuant to §§ 1007.30(b) and 1007.31(b) similar reports for each such nonpool supply plant;

(B) The operator of such nonpool plant maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available if requested by the market administrator for verification purposes; and

(C) The value of milk determined pursuant to § 1007.60 for such nonpool supply plant shall be determined in the same manner prescribed for computing the obligation of such partially regulated distributing plant; and

(2) From the partially regulated distributing plant's value of milk computed pursuant to paragraph (b)(1) of this section, subtract:

(i) The gross payments by the operator of the partially regulated distributing plant, adjusted to a 3.5 percent butterfat basis by the butterfat differential specified in § 1007.74, for milk received at the plant during the month that would have been producer milk had the plant been fully regulated;

(ii) If paragraph (b)(1)(iii) of this section applies, the gross payments by the operator of such nonpool supply plant, adjusted to a 3.5 percent butterfat basis by the butterfat differential specified in § 1007.74, for milk received at the plant during the month that would have been producer milk if the plant had been fully regulated; and

(iii) The payments by the operator of the partially regulated distributing plant to the producer-settlement fund of another order under which such plant is also a partially regulated distributing plant and like payments by the operator of the nonpool supply plant if paragraph (b)(1)(iii) of this section applies.

(c) Any handler may elect partially regulated distributing plant status for any plant with respect to receipts of nonfluid milk ingredients assigned to Class I use under § 1007.43(d). Payments may be made to the producer-settlement fund of the order regulating the producer milk used to produce the nonfluid milk ingredients at the difference between the Class I price applicable under the other order at the location of the plant where the nonfluid milk ingredients were processed (but not less than the Class III price) and the Class III price. This payment option shall apply only if a majority of the total milk received at the plant that processed the nonfluid milk ingredients is regulated under one or more Federal orders and payment may only be made to the producer-settlement fund of the order pricing a plurality of the milk used to produce the nonfluid milk ingredients. This payment option shall not apply if the source of the nonfluid ingredients used in reconstituted fluid milk products cannot be determined by the market administrator.

§ 1007.77 Adjustment of accounts.

Whenever audit by the market administrator of any handler's reports, books, records, or accounts, or other verification discloses errors resulting in money due the market administrator from a handler, or due a handler from the market administrator, or due a producer or cooperative association from a handler, the market administrator shall promptly notify such handler of any amount so due and payment thereof shall be made on or before the next date for making payments as set forth in the provisions under which the error(s) occurred.

§ 1007.78 Charges on overdue accounts.

Any unpaid obligation due the market administrator from a handler pursuant to §§ 1007.71, 1007.76, 1007.77, 1007.78, 1007.85, and 1007.86 shall be increased 1.5 percent each month beginning with the day following the date such obligation was due under the order. Any remaining amount due shall be increased at the same rate on the corresponding day of each month until paid. The amounts payable pursuant to this section shall be computed monthly on each unpaid obligation and shall include any unpaid charges previously made pursuant to this section. The late charges shall be added to the respective accounts to which due. For the purpose of this section, any obligation that was determined at a date later than prescribed by the order because of a handler's failure to submit a report to the market administrator when due shall be considered to have been payable by the date it would have been due if the report had been filed when due.

Administrative Assessment and Marketing Service Deduction

§ 1007.85 Assessment for order administration.

As each handler's pro rata share of the expense of administration of the order, each handler shall pay to the market administrator on or before the 15th day after the end of the month 5 cents per hundredweight or such lesser amount as the Secretary may prescribe with respect to:

(a) Receipts of producer milk (including such handler's own production) other than such receipts by a handler described in § 1007.9(c) that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1007.9(c);

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1007.43(d) and other source milk allocated to Class I pursuant to § 1007.44(a) (7) and (11) and the corresponding steps of § 1007.44(b), except such other source milk that is excluded from the computations pursuant to § 1007.60 (d) and (f); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1007.76(a)(2).

§ 1007.86 Deduction for marketing services.

(a) Except as provided in paragraph (b) of this section each handler, in making payments to producers for milk (other than milk of such handler's own production) pursuant to § 1007.73, shall deduct 7 cents per hundredweight or such lesser amount as the Secretary may prescribe and shall pay such deductions to the market administrator not later than the 15th day after the month. Such money shall be used by the market administrator to verify or establish weights, samples and tests of producer milk and provide market information for producers who are not receiving such services from a cooperative association. Such services shall be performed in whole or in part by the market administrator or an agent engaged by and responsible to the market administrator;

(b) In the case of producers for whom a cooperative association that the Secretary has determined is actually performing the services set forth in paragraph (a) of this section, each handler shall make, in lieu of the deduction specified in paragraph (a) of this section, such deductions from the payments to be made to such producers as may be authorized by the membership agreement or marketing contract between such cooperative association and such producers, and on or before the 15th day after the end of the month, pay such deductions to the cooperative association rendering such services accompanied by a statement showing the amount of any such deductions and the amount of milk for which such deduction was computed for each producer.

Base-Excess Plan

§ 1007.90 Base milk.

Base milk means the producer milk of a producer in each month of February through May that is not in excess of the producer's base multiplied by the number of days in the month.

§ 1007.91 Excess milk.

Excess milk means the producer milk of a producer in each month of February through May in excess of the producer's base milk for the month, and shall include all the producer milk in such months of a producer who has no base.

§ 1007.92 Computation of base for each producer.

(a) Subject to paragraph (c) of this section, a base for each dairy farmer who was a producer pursuant to § 1007.12 during one or more of the immediately preceding months of July through December shall be determined by dividing the total pounds of producer milk delivered by such producer during each of those months by the number of calendar days in the month, adding together the four highest monthly averages so computed, and dividing by four. If a producer operated more than one farm at the same time, a separate computation of base shall be made for each such farm.

(b) Any producer who delivered milk to a nonpool plant that became a pool plant after the beginning of the July–December base-forming period shall be assigned a base calculated as if the plant were a pool plant during such entire base-forming period. A base thus assigned shall not be transferable.

(c) A person who was unable to qualify as a producer during four or more of the immediately preceding months of July through December or who did not have at least four complete months of production, in either case for one or more of the reasons specified in this paragraph, may request a base computation based upon a lesser number of months by submitting to the market administrator in writing on or before February 1 a statement that establishes to the satisfaction of the market administrator that during four or more of the months in the immediately preceding July through December base-forming period the amount of milk produced on such producer's farm was substantially reduced because of conditions beyond the control of such person as a result of:

(1) The loss by fire, windstorm, or other natural disaster of a farm building used in the production of milk on the producer's farm;

(2) Brucellosis, bovine tuberculosis or other infectious diseases in the producer's milking herd as certified by a licensed veterinarian; or

(3) A quarantine by a Federal or State authority that prevented the dairy farmer from supplying milk from the farm of such producer to a plant.

§ 1007.93 Base rules.

(a) Except as provided in § 1007.92 (b) and (c) and paragraph (b) of this section, a base may be transferred in its entirety or in amounts of not less than 300 pounds effective on the first day of the month following the date on which such application is received by the market administrator. Base may be transferred only to a person who is or will be a producer by the end of the month that the transfer is to be effective. A base transfer to be effective on February 1 for the month of February must be received on or before February 15. Such application shall be on a form approved by the market administrator and signed by the baseholder or the legal representative of the baseholder's estate. If a base is held jointly, the application shall be signed by all joint holders or the legal representative of the estate of any deceased baseholder.

(b) A producer who transferred base on or after February 1 may not receive by transfer additional base that would be applicable during February through May of the same year. A producer who received base by transfer on or after February 1 may not transfer a portion of the base to be applicable during February through May of the same year, but may transfer the entire base.

(c) The base established by a partnership may be divided between the partners on any basis agreed to in writing by them if written notification of the agreed upon division of base by each partner is received by the market administrator prior to the first day of the month in which such division is to be effective.

(d) Two or more producers in a partnership may combine their separately established bases by giving notice to the market administrator prior to the first day of the month in which such combination of bases is to be effective.

§ 1007.94 Announcement of established bases.

On or before January 31 of each year, the market administrator shall calculate a base for each person who was a producer during one or more of the preceding months of July through December and shall notify each producer and the handler receiving milk from such dairy farmer of the base established by the producer. If requested by a cooperative association, the market administrator shall notify the cooperative association of each producer-member's base.

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