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Milk in the Northeast Marketing Area; Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

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[Docket No. AO–14–A70; DA–02–01]

Milk in the Northeast Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; recommended decision.

SUMMARY: This decision recommends changes to the Northeast Federal milk marketing order based on the record of a public hearing held September 10–13, 2002, in Alexandria, Virginia, to consider proposals to amend certain pooling and related provisions. Specifically, this decision recommends amendments that would establish year-round supply plant performance standards, exclude milk received by supply plants from producers not eligible to be pooled on the Northeast order from supply plant performance standards, remove the split-plant provision, establish a one-day touch base standard, establish explicit diversion limits for pool plants, prohibit the ability to pool the same milk on the milk order and a marketwide pool administered by another government entity, and grant authority to the market administrator to adjust the touch-base and diversion limit standards as market conditions warrant. Additional amendments that would amend reporting and payment date provisions are also recommended for adoption.

DATES: Comments must be submitted on or before May 24, 2004.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1083, 1400 Independence Avenue, SW., Washington, DC 20250–9200, and you may also send your comments by the electronic process available at the Federal eRulemaking portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–1366, e-mail *gino.tosi@usda.gov.*

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 amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would 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 request modification or exemption from such order by filing 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. 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 date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

In September, 2002, there were 16,715 producers pooled on and 143 handlers regulated by the Northeast order. Based on these criteria, 97 percent of the producers and 71 percent of the handlers would be considered small businesses. The adoption of the amended pooling standards serve to revise and establish criteria that ensure the pooling of producers, producer milk, and plants that have a reasonable association with—and are consistently serving—the fluid milk needs of the Northeast milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The amendments to the reporting and payment date provisions serve to streamline and simplify handler payments to the market administrator. The criteria established in the amended pooling standards and reporting and payment date provisions are applied in an equal fashion to both large and small businesses. Therefore, the Department has determined that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly

disadvantage any handler that is smaller than the industry average.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior documents in this proceeding:

Notice of Hearing: Issued July 26, 2002; published August 1, 2002 (67 FR 49887).

Supplemental Notice of Hearing: Issued August 14, 2002; published August 16, 2002 (67 FR 53522).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Northeast marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, STOP 9200—Room 1081, 1400 Independence Avenue, SW., Washington DC 20250–9200, by May 24, 2004. Six copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendments set forth below are based on the record of a public hearing held at Alexandria, Virginia, on September 10–13, 2002, pursuant to a Notice of Hearing issued July 26, 2002, and published on August 1, 2002, (67 FR 49887), and a Supplemental Notice of Hearing issued August 14, 2002, and published on August 16, 2002, (67 FR 53522).

The material issues on the record of hearing relate to:

1. Reporting and Payment Dates.
2. Pooling standards of the marketing order:
   a. Performance standards for Supply Plants.
   b. Unit Pooling Standards for Distributing Plants.
   c. Standards for Producer Milk.
3. Marketwide Service Payments.
4. Conforming changes to the order.

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. Reporting and Payment Dates

Several changes to the reporting and payment date provisions of the Northeast marketing order should be adopted. Specific recommended changes include: (1) Changing the submission date of monthly handler reports to on or before the 10th day of the month; (2) Announcing the producer price differential (PPD) and statistical uniform price on or before the 14th day of the month, but allowing the market administrator additional days if the 14th falls on a Saturday, Sunday, or national holiday; (3) Making payments to the producer settlement fund (PSF) no later than two days after the announcement of the PPD; (4) Modifying the date which payments from the PSF are to be disbursed to handlers to the day after the due date required for payment into the PSF; (5) Requiring partial payments to producers be made no later than the last day of the month; and (6) Requiring final payments to producers be made no later than the day after the required date of payment to handlers from the PSF. The following table summarizes the recommended changes:

	Current provision	Recommended for adoption	Reason for change
Proposal 1:			
Submission of monthly handler reports to Market Administrator.	Due on or before the 9th day of the month.	Due on or before the 10th day of the month.	Allows handlers one more day to submit reports to Market Administrator.
Date of PPD and statistical uniform price announcement.	Announced on or before the 13th day of the month.	Announced on or before the 14th day of the month, and up to two additional public business days thereafter if the 14th falls on a weekend or national holiday.	Maintains the time the Market Administrator has to announce the PPD and statistical uniform price and if the 14th falls on a weekend or national holiday allows additional days.
Handler payments to the PSF	Payment must be made no later than the 15th of the month, unless the 15th falls on a weekend or holiday, where the payment can be delayed until the next business day.	Payment must be made no later than two days after the announcement of the PPD and statistical uniform price, unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day.	A conforming change made necessary by the proposed extension in the date for filing Market Administrator reports and the computation of the PPD and statistical uniform price.
Date when partial payments are to be disbursed to producers.	Payment must be received by each producer on or before the 26th of the month.	Payment must be received by each producer on or before the last day of the month unless the day falls on a weekend or holiday, then the payment can be delayed.	A conforming change reducing the number of days between partial and final payments to producers.
Date when final payments are to be disbursed to producers.	Payment must be received by each producer no later than the day after the 16th day of the following month.	Payment must be received the following month by each producer no later than the day after the required payment date from the PSF unless the day falls on a weekend or holiday, then the payment can be delayed.	A conforming change that adds flexibility to the relationship between the date of payment to handlers from the PSF and final payment to producers.

	Current provision	Recommended for adoption	Reason for change
Proposal 4: Date on which payments from the PSF are disbursed to handlers.	Market Administrator must pay each handler the amount owed, if any, from the PSF no later than the 16th after the end of each month.	Market Administrator must pay each handler the the amount owed, if any, no later then the day after handler payments to the PSF are received unless the day falls on a weekend or holiday, then the payment can be delayed.	Helps to assure that producers receive full payment in event of late payments to the PSF.

Currently, a handler's report on milk receipts and utilization is due to the Market Administrator on or before the 9th day of the month. Submission of this report triggers a sequence of other reporting and payment dates. These include: announcement of the PPD and statistical uniform price on or before the 13th day of the month; handler obligations to the PSF, due no later than the 15th day of the month but subject to a delay to the next business day if the day falls on a weekend or holiday; disbursement of funds from the PSF to handlers, due no later than the 16th day after the end of each month but also delayed subject to a weekend or holiday; partial payments from handlers to producers and cooperative associations, due on or before the 26th day of the month and again delayed due to a weekend or holiday; and final payments to producers and cooperative associations, made no later than the day after payment to handlers from the PSF.

Proposal 1, submitted by New York State Dairy Foods, Inc. (NYSDF), Proposal 4, submitted by the Northeast Market Administrator, the Association of Dairy Cooperatives in the Northeast (ADCNE) and NYSDF, and Proposal 12, submitted by the Northeast Market Administrator, are recommended for adoption. All three proposals seek to modify various reporting and payment provisions of the order. NYSDF is a trade association representing milk handlers and processors in the Northeast marketing area. ADCNE represents a number of dairy farmer cooperatives whose milk is pooled on the Northeast order. Their members include Agri-Mark, Inc. (Agri-Mark), Dairy Farmers of America, Inc. (DFA), Dairylea Cooperative Inc. (Dairylea), Land O' Lakes, Inc. (LOL), Maryland and Virginia Milk Producers Cooperative, Inc. (MVMP), O–AT–KA Cooperative, Inc. (O–AT–KA), St. Albans Cooperative Creamery, Inc. (St. Albans), and Upstate Farms Cooperative, Inc. (Upstate). Worcester Creameries, Elmhurst Dairy, Mountainside Farms, and Steuben Foods also testified in support of Proposal 1.

Proposal 1 would require monthly handler reports to be received by the Market Administrator on or before the 10th day of the month. This, in turn, triggers a sequence of other reporting deadline and payment date provisions that would be similarly changed. These include: (1) Announcement of the PPD and statistical uniform price a day later—from the 13th to the 14th day of the month. If the 14th day of the month falls on a Saturday, Sunday, or national holiday, the Market Administrator would have up to two additional public business days to announce the PPD and the statistical uniform price; (2) Handler payments to the PSF be made no later than two days after the announcement of the PPD unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day; (3) Partial payments to producers be made on or before the last day of the month unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day; and (4) Final payments to producers be received no later than the day after the required date of payment from the PSF unless the due date falls on a weekend or holiday, then the payment can be delayed until the next business day. Proposal 4 would modify the day which payments from the PSF are to be disbursed to handlers from the 16th of the month to the day after the due date required for payment into the PSF. Proposal 12 seeks to make a technical correction to the order provision relating to payments to producers and cooperatives which will make the provisions identical to other Federal orders by changing ''pool plant operator'' to ''handler'' throughout the provisions of the order.

A witness appearing on behalf of NYSDF testified in support of Proposal 1, stating that its adoption is necessary to correct unnecessarily burdensome regulations that have resulted from the reporting and payment date provisions adopted as part of Federal order reform. According to the witness, the amendments incorporated in Proposal 1 would essentially restore the reporting and payment dates specified in the former New York-New Jersey milk marketing order. The witness indicated that giving an additional day for submitting handler reports to the Market Administrator would lessen the difficulties milk handlers are currently experiencing in meeting the current reporting deadline. The witness explained that milk suppliers have experienced considerable difficulties in furnishing milk component and billing data in time for meeting the currently established reporting deadline. This situation is compounded, the witness explained, when handlers must account for the co-mingling of tanker loads of milk between cooperative and independent milk producers. Often, the witness stated, reports to the Market Administrator contain erroneous and estimated data because the reporting handler did not receive the correct data in time.

The NYSDF witness also cited testimony from the Northeast Market Administrator that one third of handler reports are often filed late. Moving the reporting date from the 9th to the 10th of the month would give milk suppliers and buyers an additional day to complete their work, thereby greatly reducing the number of late reports to the Market Administrator, the witness concluded.

The second proposed change in reporting dates contained in Proposal 1 would maintain the time the Market Administrator has to announce the PPD and statistical uniform price, and up to two additional public business days thereafter if the 14th falls on a weekend or national holiday. According to the NYSDF witness, this portion of the proposal is consistent with the proposed one-day extension for submission of handler reports to the Market Administrator, and would extend to the Market Administrator sufficient time to make the necessary price computations without undue pressure brought about by weekends or holidays. The witness also noted that while this proposal could give the Market Administrator up to two additional public business days for making the price computations, it would not require that the additional time be used. If the Market Administrator finds it feasible, a price

announcement could come earlier, the witness stated.

The third change in reporting dates offered by the NYSDF witness would require handler payments to the PSF be made no later than two days after the announcement of the PPD. According to the witness, this portion of the proposal is intended primarily as a conforming change made necessary by the one-day proposed extension in the date for filing Market Administrator reports, and the computation of the PPD and statistical uniform price. Currently, handler payments to the PSF must be made no later than the 15th of the month, unless the 15th falls on a weekend or national holiday, where the payment can be delayed until the following business day, the witness noted. The witness expressed concern that compliance with the current handler payment deadline was difficult, and the proposed change would better accomodate the flow of money from handlers to the PSF. The witness was of the opinion that this portion of the proposal would provide a more consistent time interval to gather the Market Administrator classifications on milk transfers at pool reporting time, giving handlers a more consistent time frame in which to make necessary money transfers, for example, and improve concurrent billings for milk that was transferred or diverted.

The NYSDF witness testified that Proposal 1 would also require final payments to dairy farmers be disbursed no later than the day after the required payment date to handlers from the PSF. The primary purpose of this portion of the proposal, the witness explained, is to have the date of final payment to dairy farmers conform with other proposed date changes for the computation of the statistical uniform price and when payments are made into and out of the PSF. The witness stressed that no change in the requirement for ''day-earlier'' payment to cooperatives was proposed, as currently set forth in the provisions of the order, and the final payment to producers would still be due the day after payments from the PSF are made by the Market Administrator. Accordingly, the witness noted, dates of final payment could move a day or two later, but only if the date of payment from the PSF were extended by the same number of days. This sequence in the relationship of ''date of final payment'' to the ''date of payment from the producer settlement fund'' should be continued, the witness said.

The NYSDF witness testified that the last feature of Proposal 1 modifies the date that partial payments are received by producers to ''on or before the last day of the month'', instead of the current ''26th day of the month''. The witness presented evidence which demonstrated that a longer spread in days between partial and final payment exists now than prior to Federal order reform. The witness testified that making partial payments due ''on or before the last day of the month'' would conform more closely with the dates previously set in the respective pre-reform orders and create better ''spacing'' between required pay dates.

The NYSDF witness was of the opinion that adoption of Proposal 1 also would accommodate ''tolled'' bulk milk purchased by milk distributors for processing and packaging into Class I products at pool distributing plants. The witness described ''tolling'' as a situation where a plant is paid to process raw milk, but the processing plant does not take ownership of the milk or incur a payment obligation to producers. The witness noted that the Northeast order requires that tolled milk be purchased on the basis of the PPD and component prices rather than on the basis of Class I skim value and butterfat prices, therefore, the Market Administrator must ''credit'' the handler who processes cooperative receipts, together with a Market Administrator assessment on the tolled milk. The tolling processor must then prepare a billing to the distributor of the tolled milk at the difference between the Class I cost of the skim and butterfat, and also a cooperative credit from the Market Administrator, including the associated Market Administrator fee, the witness stated. The NYSDF witness noted that doing this requires having detailed component values as well as knowing the final PPD. The billing involved is made after the PPD announcement and the billing by the Market Administrator of the handler's pool obligation, the witness said.

In their post-hearing brief, NYSDF emphasized that Proposal 1 takes the existing payment structure and applies it to the date that the Market Administrator announces the PPD and statistical uniform price. NYSDF asserted that Proposal 1 does not set the payment date to the PSF as the 16th of the month. Rather, they noted, handlers could be making payment earlier than the 16th of the month if the PPD is announced before the 14th day of the month. NYSDF was of the opinion that as a whole, Proposal 1 would allow the Market Administrator to receive more timely and accurate handler reports and permit earlier price announcements and earlier payments to and from the PSF. NYSDF concluded that both dairy farmers and handlers would benefit from more accurate information that would flow naturally from adoption of Proposal 1.

NYSDF's post-hearing brief concluded that adoption of Proposal 1 would still have producers in the Northeast marketing area receiving a partial payment for milk 5 days earlier than was the case prior to Federal order reform.

A witness appearing on behalf of Marcus Dairy (Marcus) testified in support of Proposal 1. Marcus is a distributing plant which receives approximately 60 percent of its milk supply from independent dairy farmers, with the remainder supplied by cooperatives. The witness indicated support for moving the handler reporting date from the 9th to the 10th day of the month, noting that an extra day would help in receiving more accurate information from cooperatives and eliminate the need to estimate data so that reports can be submitted on time. The witness also testified that the proposal should be accompanied by the proposed change to the Market Administrator PPD announcement date from the 13th to the 14th of the month, while providing the flexibility for the Market Administrator to make announcements later in the event that the 14th falls on a holiday or weekend. These modifications would also require a similar change in the date when payment to the PSF is due, the witness noted. In light of this, the Marcus witness expressed support for requiring payments to the PSF be made not more than two days after the PPD announcement and that final payments to dairy farmers be received no later than the day after the required date of payment by the Market Administrator. Marcus also supported moving the date of partial payment from the ''26th of the month'' to ''on or before the 30th of the month.'' The witness was of the opinion that adjusting these payment date provisions would improve the cash flow of dairy farmers.

A witness appearing on behalf of ADCNE testified in opposition to Proposal 1. The witness said that dairy farmers, and those persons who provide services to dairy farmers, are faced with meeting deadlines that are sometimes difficult or inconvenient. The witness expressed the opinion that businesses which rely on information from other businesses do not necessarily have any ability to force those other businesses to change just because they provide needed information. Accordingly, the witness said, ADCNE does not view the current reporting dates as unreasonable or in need of change. Instead, the ADCNE witness suggested that those involved work together to resolve

producer payment issues instead of seeking a regulatory change that would result in delay of payments to dairy farmers. Delaying producer payment dates will unnecessarily impose financial costs to dairy farmers in the Northeast, the ADCNE witness concluded.

In their post-hearing brief, NYSDF responded to ADCNE's views by indicating that no amount of overtime worked by employees of NYSDF can create reports when other entities fail to get needed report information to handlers in a timely manner. NYSDF's brief also noted that many of their members are small businesses subject to Regulatory Flexibility Act analysis and relief as necessary, and that undertaking expensive overtime in order to fill out reports when they do not have all the necessary information needed from various entities negates the intent of the Regulatory Flexibility Act.

The Northeast Market Administrator testified in support of Proposal 4, which seeks to move the date on which payments from the PSF are dispersed to handlers from the 16th day after the end of the month, to no later than the day after handler payments to the PSF are received. The Market Administrator explained that a problem arises when late payments to the PSF result in insufficient funds to make payments out of the PSF when both payments to and from the PSF fall on the same day. When this happens, order provisions provide for a pro-rata reduction in payments to handlers who can, in turn, reduce payments to dairy farmers, the Market Administrator noted. According to the Market Administrator, Proposal 4 would allow one extra day for payments from the PSF, and cause dairy farmers to receive their payments one day later three or four times a year. However, dairy farmers would always be assured of receiving the full amount owed, the Market Administrator added.

A witness representing ADCNE also testified in support of Proposal 4. Under current provisions, the ADCNE witness said, the date for payments to the PSF, the 16th of the month, can sometimes fall on the same day that payments from the PSF are to be made. In their post-hearing brief, ADCNE asserted the adoption of Proposal 4 was necessary for the proper administration of the PSF.

The Northeast Market Administrator also testified in support of Proposal 12. This proposal seeks to make a technical correction to the order provisions relating to payments to producers and cooperative associations and would make the Northeast order's *Payments to producers and to cooperative associations* provision identical to other Federal orders. The Market Administrator explained that the Proposal would simply amend references to ''pool plant operator'' as ''handler.''

Reporting and payment date provisions of the pre-reform New England, New York-New Jersey, and Mid-Atlantic orders served the different needs and marketing conditions of their respective marketing areas. Provisions adopted under Federal order reform established reporting and payment dates that were reflective of the three consolidated orders, while recognizing the need to establish dates that would be conducive to the marketing conditions of the larger consolidated Northeast order. The reporting and payment date requirements adopted for the consolidated Northeast order were intended to reasonably accommodate historical patterns and practices while recognizing that fixed dates also needed to be specified. For example, handler reports to the Market Administrator were due as soon as the 8th of the month, or as late as the 10th of the month. When the three pre-reform orders were consolidated to form the Northeast order, the new handler reporting date was set for the 9th of the month. This was also the case for the date for the Market Administrator's announcement of the PPD and statistical uniform price. In the pre-reform New England and Mid-Atlantic orders the announcement was on the 13th of the month, while in the pre-reform New York/New Jersey order the announcement was on the 14th of the month. Current provisions in the consolidated Northeast order require the announcement by the 13th of the month.

Changing all reporting and payment dates by first delaying the deadline for handler reports to the Market Administrator from the 9th of the month to the 10th of the month is supported by the hearing record and is recommended for adoption. Allowing handlers one additional day to submit their report of milk receipts and utilization to the Market Administrator should reduce the number of late reports and lessen the number of inaccuracies and estimations contained therein.

Changing the handler reporting date deadline by one day should also be accompanied by changing the date the Market Administrator is to announce the PPD and statistical uniform price and adjusting all other payment dates. Also recommended for adoption is the feature of Proposal 1 which specifies that the Market Administrator can make the PPD and statistical uniform price announcement up to two public business days later if the 14th falls on a weekend or national holiday.

The portion of Proposal 1 which would specify handler payments to the PSF be made no later than two days after the PPD and statistical uniform price announcement is also recommended for adoption with a specification of two business days. This portion of Proposal 1 is a change made necessary by the proposed one-day extension in the date for filing handler reports and the computation and announcement of the PPD and statistical uniform price. The recommended adoption of this portion of Proposal 1 also adds a measure of flexibility to the payment date provisions by making the date of handler payments to the PSF dependant on the date the Market Administrator announces the PPD and statistical uniform price. It also will provide the opportunity for handlers to make payments to the PSF earlier than the 16th of the month if the Market Administrator announcement of the PPD comes before the 14th of the month.

Payments to handlers from the PSF also require a conforming change as a result of the recommended changes for announcement of the PPD and statistical uniform price and dates for payment to the PSF. Evidence presented at the hearing demonstrated that sometimes payment to and from the PSF can fall on the same day and can lead to reduced payments to dairy farmers because payments are pro-rated. Amending the date that payments are made from the PSF to handlers from ''the day after the 16th day of the month'', to the day after handler payments to the PSF are received will better assure handlers of receiving their full payment each month from the PSF.

Prompt and complete payments to dairy farmers are dependant on timely and full payments from the PSF to milk handlers. However, final payments to dairy farmers should be made no later than the day after the required payment date from the PSF by the Market Administrator.

On the basis of the rationale presented above, the date partial payments are made to dairy farmers should be amended to ''on or before the last day of the month'', instead of the ''26th of the month'', as currently provided.

2. Pooling Standards

Summaries of testimony regarding the pooling standards of the Northeast order are provided individually. The discussion of all pooling standards and the decision's findings and conclusions regarding pooling standards is presented

immediately after testimony summary for ''c''. below.

a. Performance Standards for Supply Plants

Certain amendments to the *Pool plant* provision of the Northeast order should be adopted. Specifically, the recommendations include: (1) Establishing a supply plant performance standard of 10 percent of total milk receipts for each of the months of January through August and December, and 20 percent of total milk receipts for each of the months of September through November; (2) Removing the ''split plant'' feature; and (3) excluding milk received from producers not eligible to be pooled on the Northeast order from the total volume of milk used to determine the amount of milk that a supply plant needs to deliver to a distributing plant to become pooled. These recommended changes are represented in certain features of Proposals 2, 5, and 8.

Proposal 10, which advocates lowering performance standards, is not recommended for adoption. Furthermore, Proposal 9, which would credit route distribution from the plant and transfers in the form of packaged fluid milk products against the supply plant performance standards, is not recommended for adoption.

Currently, supply plants in the Northeast order need to ship at least 10 percent of their total milk receipts in the months of August and December and 20 percent of their total milk receipts in each of the months of September through November to pool distributing plants in order to qualify the supply plant and all of its milk receipts for pooling. A supply plant which meets the performance standard in each of the months of August through December is automatically considered a pool plant for each of the months of January through July. Supply plants which do not qualify as a pool plant in each of the months of August through December need to ship at least 10 percent of their total milk receipts to distributing plants during each of the months of January through July in order to qualify the supply plant and all of its milk receipts for pooling in each of those months.

The order also currently provides a ''split-plant'' feature to accommodate a supply plant that has both pool and nonpool facilities. This feature was adopted during Federal order reform to provide for more uniform supply plant provisions within the Federal milk order system. It was not a feature contained in any of the three pre-reform orders consolidated to form the Northeast order.

Proposal 2, submitted by NYSDF, seeks to amend the *Pool plant* provision of the order by: (1) Increasing the supply plant performance standards by 5 percentage points, to 15 percent for the months of August and December, and by 5 percentage points to 25 percent for each of the months of September through November; and (2) Removing the split-plant provision. In their post-hearing brief NYSDF slightly modified the months applicable for the proposed increased standards to specify a performance standard of 15 percent in the month of August and 25 percent for each of the months of September through December.

A witness representing NYSDF testified that after implementation of Federal milk order reform, milk supplies pooled on the Northeast order during the fall months have decreased. During these months, the NYSDF witness said, milk was shipped to areas outside of the order and it was difficult for Northeast order fluid milk handlers to acquire an adequate supply of milk to meet the needs of their customers. Although there was not as significant a shortage in the first half of 2002 as there was in 2000 and 2001, the witness predicted that the situation would change substantially beginning in late 2002 and during 2003.

The NYSDF witness characterized milk shortages in the fall months for the Northeast marketing area as a long-term problem which requires long-term action. In this regard, the witness stressed, Proposal 2 is designed to increase the amount of milk available to fluid milk handlers during the fall months. The witness said the proposed increase is similar to provisions previously contained in the pre-reform Middle Atlantic and New England milk orders and is identical to the adjustments made to supply plant performance standards by the Market Administrator in 2000 and 2001 for the months of August through November.

The NYSDF witness testified that supply plant performance standards applicable in the pre-reform orders consolidated to form the current Northeast milk order enabled cooperatives to pool the milk of their members separately from the milk of independent producers and small cooperatives who also supplied fluid milk plants. After implementation of Federal order reform, the witness said, the new pooling provisions have allowed cooperatives to pool not only the milk of their members, but also the milk of other smaller cooperatives and independent producers. The current pooling provisions, the witness emphasized, are being used in a way that allow large cooperatives to guarantee themselves a higher volume of milk pooled as Class I. In their post-hearing brief, NYSDF added that this arrangement has resulted in an increased market share of total Class I sales by larger cooperatives while the total volume of milk available to Class I handlers has remained unchanged.

Data presented by the NYSDF witness showed that cooperatives now account for over 80 percent of all milk pooled on the Northeast order. The witness noted that cooperatives have guaranteed non-members an outlet to pool their milk, and on average, pool in excess of 100 million pounds of non-member milk each month. The witness concluded that because cooperatives pool such a large amount of milk, cooperatives should not have difficulty meeting the proposed five percentage point performance standard increase for supply plants.

The NYSDF witness emphasized that their greatest concern regarding supply plant performance standards is the issue of ''guaranteed'' pooling of non-member milk supplies and the lack of diversion limit standards. The witness was of the opinion that this has enabled milk to be pooled on the order without bearing any responsibility for serving the Class I market or being made available as a reserve supply to the market. The witness was of the opinion that inappropriate pooling has resulted in the erosion of blend prices paid to producers who do regularly supply the Class I needs of the market.

The NYSDF witness further testified that the split-plant feature for supply plants should be removed because the feature does not serve the purpose for which it is intended. The witness maintained that the split-plant provision was created to allow a supply plant to have separate facilities to receive and process Grade B milk. Currently, the witness said, no handlers located in the Northeast order are using the split-plant feature. However, if a supply plant chooses to rely on the feature, it would be able to pool a substantial amount of additional milk simply by diverting milk to the non-pool side of the plant during those months when no performance standards or diversion limits are provided by the order, the witness cautioned.

In conclusion, the NYSDF witness said, it is the Class I market that generates additional revenues which accrue to all producers whose milk is pooled on the Northeast marketing area. Accordingly, the witness maintained, entities that seek to have their milk pooled on the order should bear some responsibility in actually supplying the Class I needs of the market. The witness

said that Proposal 2 is intended to end what NYSDF characterized as ''abusive'' pool-riding methods and to ensure that entities benefitting from revenue generated by Class I sales have demonstrated service in supplying the Class I market.

A witness appearing on behalf of Marcus also testified in support of Proposal 2. According to the witness, Marcus Dairy experienced milk supply shortages during some months since implementation of the consolidated Northeast milk order. The witness stated that adoption of Proposal 2 would help alleviate supply shortfalls for the Class I market during the fall months when the milk is most needed.

A witness representing the ADCNE testified in opposition to that portion of Proposal 2 which would raise the supply plant performance standards for the months of August through December. However, the witness supported the proposal on the need to remove the split-plant feature. The witness was of the opinion that increasing supply plant performance standards was unwarranted and could cause disorderly marketing conditions in the region because some handlers would be forced to depool a portion of the milk of their producers. The witness stressed that the Market Administrator already has the authority to adjust these standards and that this should continue as the way to make future changes as marketing conditions warrant.

Furthermore, the ADCNE witness emphasized, Proposal 2 does not specify some level of performance by supply plants during the ''free-ride'' months of January through July.[1] According to the witness, Proposal 2 also does not limit the ability of producers located far from the Northeast marketing area to be pooled on the order without maintaining a reasonable association to the market, nor does it ensure that Class I distributors will receive additional milk when needed.

In their post-hearing brief, ADCNE stressed that no evidence was presented at the hearing that would warrant a permanent change in performance standards. ADCNE reiterated their opinion that the current authority provided to the Market Administrator to make adjustments to the performance standards was the most appropriate method for the orderly marketing of milk in the Northeast.

Proposal 5, submitted by ADCNE, also seeks to amend the *Pool plant* provision of the order. Specifically the proposal would: (1) Require supply plants to deliver at least 10 percent of their total milk receipts to a distributing plant during each of the months of January through August and December; (2) Grant authority to the Market Administrator to impose additional shipping requirements on handlers receiving marketwide service payments; and (3) Eliminate the split-plant provision.

The ADCNE witness testified that current order provisions have unintentionally provided the opportunity for milk to be pooled and priced under the terms of the Northeast order without demonstrating a reasonable level of service in supplying the Class I needs of the market. Pooling such milk could result in a lower blend price for all producers who do regularly supply the fluid needs of the market, the witness specified. The witness stressed that Proposal 5 is not meant to eliminate the ability to pool the milk of producers located far from the Northeast marketing area. Instead, the witness explained, Proposal 5 would assure that all milk pooled on the Northeast order demonstrates a consistent service to supplying distributing plants and consequently bears some of the burden of incurring the additional costs of supplying the Class I needs of the market. According to the witness, there are two aspects of the *Pool plant* provision of the Northeast marketing order that have enabled what the witness described as ''opportunistic pooling'': the split-plant feature and the current level of supply plant performance standards.

The ADCNE witness explained that supply plants qualified as split-plants can engage in opportunistic pooling by receiving milk on the pool side of the plant and then diverting the milk to the nonpool side of the plant. Under current provisions, during the months of August and December a supply plant could divert nine loads of milk to its nonpool side for every one load of milk it receives on its pool side, the witness explained. In addition, the witness continued, during the months of September through November, the supply plant could divert eight loads of milk for every two loads it receives at the pool side of the plant. According to the witness, once the plant meets the performance standards in each of the months of August through December, the plant is automatically qualified as a pool plant in the months of January through July and can divert an unlimited amount of milk.

Under current supply plant performance standards, the ADCNE witness said, a pool plant located far from the marketing area could potentially pool all of the milk located near it during the spring months by shipping a small amount of its milk supply to a Northeast order pool plant during the fall months. The lack of a monthly touch-base standard, the witness also asserted, has facilitated the pooling of milk located far from the marketing area by allowing producers to qualify all of their milk for pooling by delivering a minimal amount of milk to a Northeast order pool plant. During January through July when no performance standards for supply plants are stipulated, the witness noted, a plant has the ability to pool all the milk of every producer who had delivered to the plant throughout the year. According to the witness, theoretically 100 percent of the pool plant's milk receipts could be pooled on the Northeast order.

The ADCNE witness presented data estimating the impact of pooling distant milk on the Northeast order blend price. The witness estimated that for the period of January 2001 through July 2002, the blend price was reduced by an average of 16 cents per hundredweight. The witness was of the opinion that if Proposal 5 is adopted, most of the lost blend price value would be restored.

The ADCNE witness testified that the free-ride feature is no longer being used for its intended purpose of allowing producers that had been historically pooled on the Northeast Order to remain pooled. Instead, the witness stated, the free-ride feature has created the ability to pool milk on the order that was never intended to be pooled. The witness maintained that supply plants that currently meet the performance standards in September through November would not be disadvantaged with the new year-round monthly performance standards because the proposed standards for the months of January through July are lower than those specified for the fall months.

A witness testifying on behalf of NYSDF testified in opposition to Proposal 5. While NYSDF agreed that the order's lack of performance standards for all months has created opportunities for distant milk to be pooled on the order, a free-ride feature is important for maintaining orderly marketing conditions. The NYSDF witness said that providing for months without performance standards ensures that the market's reserves have the ability to be pooled on the order during months of abundant supply.

At the hearing, NYSDF offered a modification to Proposal 5, proposing that the performance standard during the months of January through July only apply to supply plants located outside

[1] The dairy industry term known as a ''free-ride'' period is often used to describe those time periods when no performance standard is specified.

of the states that comprise the Northeast order. The justification for this modification, the witness said, is that during the spring months when additional milk is not usually needed by distributing plants, it prevents the uneconomic movement of milk by supply plants located within the marketing area. The NYSDF modification would make Proposal 5 similar to amendments recently adopted by the Mideast order, the witness noted.

Proposal 8, submitted by Friendship Dairies (Friendship), a partially regulated handler on the Northeast order, seeks to amend the order's *Pool plant* provision by excluding milk received by supply plants from producers who would not be eligible to be pooled under the Northeast order from the total volume of milk used to determine the amount of milk a supply plant would need to deliver to distributing plants in order to satisfy the supply plant performance standards.

The *Producer* provision of the Northeast order describes those producers who would not be eligible for pooling on the Northeast order. They include: an entity that operates their own farm and plant at their sole enterprise and risk, commonly referred to as a producer handler; a dairy farmer whose milk is received at an exempt plant excluding producer milk diverted to the exempt plant; a dairy farmer designated as a producer under another Federal order; a dairy farmer whose milk is reported as diverted to a plant fully regulated under another Federal order that is assigned to Class I; or a ''dairy farmer for other markets,'' which is a dairy farmer whose milk during certain months of the year is received by a pooling handler and that pooling handler caused the milk from such dairy farmer to be delivered to any plant as other than producer milk or delivered to any other Federal milk order.

A witness appearing for Friendship testified that the current method used in determining if a supply plant has met a performance standard is examining the total amount of milk received at the plant and the amount of those receipts shipped to distributing plants. As a supply plant procures additional milk to offset the milk it transfers or diverts to distributing plants, the additional milk receipts become included in the plant's total milk receipts, the witness said. This increases the quantity of milk that must be transferred or diverted by the supply plant to distributing plants to meet the performance standard for pooling purposes, the witness explained. Basing the supply plant qualification percentage exclusively on the supply plant's producer milk supply, the witness concluded, would reduce the amount of milk that Friendship would have to ship every month to pool distributing plants in order to be pooled under the terms of the order. Friendship testified that they must include milk received from cooperatives that has already been qualified for pooling by the cooperative in the total receipts used to determine the amount of milk they must ship to meet supply plant performance requirements. The Friendship witness noted that adoption of Proposal 8 would address this by excluding pre-qualified cooperative milk from the volume of receipts upon which a supply plant must make shipments in order to be designated as a pool supply plant.

The Friendship witness also noted that excluding milk received from producers not eligible to be pooled on the Northeast order from the performance standards for supply plants has been adopted in the pooling provisions of other Federal orders. The witness clarified that in these other Federal orders where a similar provision is present, the supply plant performance standard is based on the amount of milk produced by dairy farmers that is pooled through association with the supply plant, regardless of whether or not it was diverted from the plant.

A witness appearing for ADCNE expressed opposition to Proposal 8 noting that it would liberalize supply plant performance standards. According to the witness, the intent of supply plant pooling provisions are to qualify both the plant and the operator of the plant. It is meaningless to qualify a supply plant, the witness noted, in which the operator does not control the milk of a group of dairy farmers. A cheese plant operator would never incur the costs to ship milk from the plant to a distributing plant, the witness offered by example, unless the plant intended to pool a group of dairy farmers and draw from the pool.

ADCNE further noted opposition to Proposal 8 in their post-hearing brief by emphasizing that the operator of a supply plant has an option of whether or not to be pooled. According to ADCNE, the operator of a plant can acquire and maintain their own producer milk supply and can pool the plant by meeting the pooling standards of the order, or choose nonpool status and purchase milk supplies from other pool or non-pool handlers.

A proposal, published in the hearing notice as Proposal 9, also submitted by Friendship, seeking to amend the *Pool plant* provision, should not be adopted. The proposal would credit route distribution from the plant and transfers in the form of packaged fluid milk products to distributing plants to the total shipments from a supply plant in determining if the supply plant has met the performance standard of the order. Currently, route distribution is not credited against the total milk receipts in determining if a plant has met the supply plant performance standard.

The Friendship witness stated that Proposal 9 is meant to address only Class I products packaged at the Friendship plant and not Class I products purchased from other plants which they subsequently distribute. To exclude the possibility of a partially regulated distributing plant becoming fully regulated by the adoption of Proposal 9, the Friendship witness modified their proposal at the hearing to only include route distribution and transfers of packaged fluid milk in qualifying supply plants whose milk utilization is at least 50 percent in Class II, Class III or Class IV products.

The Friendship witness testified that their plant has unique characteristics—they produce non-fat dry milk (a Class IV product) and cultured buttermilk (a Class I product). It is the production of buttermilk, the witness noted, that causes their plant to be designated as a partially-regulated distributing plant under the consolidated Northeast order. The witness testified that their plant could not meet the supply plant performance standards if the amount of milk distributed on routes in the form of packaged fluid milk products counted towards pool qualification.

The Friendship witness maintained that the Northeast order's pooling provisions are unfair because, in their view, buttermilk satisfies an established Class I demand, but is still factored into determining if a supply plant has met the order's performance standards by shipping milk to a distributing plant. The Friendship witness asserted that currently the only way to qualify their plant is to fulfill someone else's need for Class I milk without receiving any credit for its own contribution to the Class I market.

The witness stressed that Proposal 9 is not intended to qualify previously partially-regulated distributing plants which are not currently fully regulated on the Northeast order. The witness saw the potential to have a supply plant who also distributes Class I products to meet the supply plant performance standards under a liberal reading of Proposal 9. To address this unintended occurrence, the witness modified Proposal 9 to apply only to supply plants that process at least 50 percent of their total physical milk receipts into products other than Class I. With this modification, the

witness noted, the possibility of distributing plants becoming pooled as supply plants is eliminated.

A witness appearing on behalf of ADCNE testified in opposition to Proposal 9. The witness said that the proposal does not specify that the plant's route distribution be located within the Northeast marketing area and could have the possible unintended consequence of pooling partially regulated distributing plants on the order with route distribution greater than the supply plant performance standard of 10 or 20 percent. Additionally, the ADCNE witness testified that purchases and transfers of Class I products into and out of manufacturing plants could occur which would only serve to circumvent the intent of the Federal order provisions of requiring a supply plant to actually supply the Class I market as a condition for pooling its milk supply. The ADCNE witness was of the opinion that Proposal 9 combines the characteristics of two different pooling provisions for the benefit of a few supply plants that may have Class I sales and only serves to confuse the pooling provisions of the order.

Additionally, ADCNE noted in their post-hearing brief that such a change could allow nonpool manufacturing plants, currently without their own producer supply, a means of ''gaming'' the system by transferring packaged product into and then back out of the plant for the sole purpose of meeting the supply plant performance standard. Such a change would be de-stabilizing to the market, lead to disorderly marketing conditions, and make procurement efforts by Class I processors more difficult and costly, noted ADCNE.

Proposal 10, also submitted by Friendship, proposed to lower the supply plant performance standards by 5 percentage points to a new standard of 5 percent in each of the months of August and December; and by 10 percentage points to a new level of 10 percent in each of the months of September through November. Proposal 10 is not recommended for adoption.

According to the Friendship witness, the objective of the Federal milk marketing order program is the equitable sharing of Class I revenue amongst all producers who supply the marketing area. This objective is defeated, the witness said, when performance standards result in the exclusion of some producers from the orders marketwide pool. According to the witness, producers without access to a Class I outlet have to ''buy'' market access from those producers who dominate the market's Class I milk supply, or move milk not needed for Class I use over long distances for the sole purpose of meeting a performance standard, which only results in the displacement of milk supplying other Class I plants, and in unwarranted additional transportation costs to those producers seeking to pool their milk on the order.

The Friendship witness also testified that the current supply plant performance standard of 10 percent in the months of August and December and 20 percent in each of the months of September through November were chosen in an arbitrary manner to create a ''performance hurdle'' that a plant must leap to participate as a pool supply plant on the Northeast order. Reducing these performance standards by 5 percentage points to 5 percent for each of the months of August and December, and by 10 percentage points to 10 percent in each of the months of September through November would assure sufficient performance in supplying the Class I market without causing unnecessary milk shipments solely to meet the pooling standards of the order, the witness said.

b. Unit Pooling Standards for Distributing Plants

A proposal, published in the supplemental hearing notice as Proposal 14, is recommended for adoption. Specifically, Proposal 14 seeks to amend the *Pool plant* unit pooling feature by specifying that a plant of the pool plant unit which is not a distributing plant process at least 60 percent of its total producer milk receipts (including milk received from cooperative handlers) into Class I or Class II products, and the plant be physically located in the Northeast marketing area. Accordingly, the non-distributing plant of the pooling unit would be permitted to process up to 40 percent of its total producer milk receipts into Class III or IV products. Proposal 14 was offered by NYSDF. A witness representing the H.P. Hood Company (H.P. Hood), a fully regulated milk handler who pools milk on the Northeast order, testified on behalf of NYSDF.

The unit pooling provision of the Northeast order currently allows for two or more plants located in the marketing area and operated by the same handler to qualify for pooling as a ''unit'' by meeting the total and in-area route disposition standard as if they were a single distributing plant. To qualify as a pooling unit, at least one plant of the unit must qualify as a pool distributing plant on its own standing, and the other plant(s) of the unit must process only Class I or II milk products. The pooling unit must also meet the total route distribution standard of 25 percent, and 25 percent of its route distribution must be within the marketing area.

The NYSDF witness testified that adoption of Proposal 14 would allow H.P. Hood and other similarly situated unit-pool handlers greater flexibility in how they pool their milk on the Northeast order. According to the witness, present unit pooling standards unduly restrict milk use at the non-distributing plant(s) of the unit to Class I or II products. The witness indicated that adoption of Proposal 14 would also aid cooperatives and other plants in how they pool milk because a pooling unit would be expanded to include milk balancing operations that produce Class III and Class IV milk products to be the non-distributing plant(s) of the pooling unit. The disparity in current provisions, the NYSDF witness stressed, is that the primary plant of a pooling unit can still produce a limited amount of Class III or IV products, while the non-distributing plant(s) in the unit cannot. According to the NYSDF witness, Proposal 14 adds flexibility to current provisions by allowing the non-distributing plant(s) in the unit to process up to 40 percent of total producer receipts into Class III or IV milk products.

No testimony was received in opposition to the adoption of Proposal 14.

c. Standards for Producer Milk

Several amendments to the *Producer milk* provision of the Northeast order, contained in certain features of both Proposals 3 and 6, should be adopted. Specifically, the following changes to the *Producer milk* provision are recommended for adoption: (1) Establishing an explicit standard that one-day's milk production of a dairy farmer be received at a pool plant before the milk of the dairy farmer is eligible for diversion to non-pool plants; (2) Clarifying that a producer may touch-base anytime during the month; (3) Eliminating the ability to simultaneously pool the same milk on the Northeast order and on a marketwide equalization pool operated by another government entity; (4) Establishing an explicit diversion limit standard for producer milk of 90 percent in each of the months of January through August and December, and of 80 percent in each of the months of September through November (Milk in excess of the diversion limits will not be considered as producer milk and the pool plant must designate to the Market Administrator which deliveries are to be

de-pooled. Furthermore, milk diverted in excess of the diversion limit standards will not result in a loss of producer status under the order); and (5) Granting authority to the Market Administrator to adjust the touch-base standard and the diversion limit standard as market conditions warrant.

The current *Producer milk* provision of the Northeast order considers milk of a dairy farmer to be producer milk when the dairy farmer has delivered milk to a pool plant. This event is commonly referred to as ''touching-base.'' Once an initial delivery is made, all the milk of a producer is eligible to be diverted to nonpool plants and continues to be priced under the terms of the order. While there are no specific year-round diversion limits for distributing plants, a diversion limit for supply plants is functionally set at 100 percent minus the applicable performance standard specified for supply plants. Therefore, in the months of August and December, a supply plant can divert no more than 90 percent of its total milk receipts to nonpool plants. During each of the months of September through November, a supply plant can currently divert no more than 80 percent of its total milk receipts to nonpool plants. During each of the months of January through July, no diversion limits for supply plants are specified. Additionally, the Northeast order currently does not limit the ability to simultaneously pool the same milk of a producer on the order and on a marketwide equalization pool operated by another government entity.

Proposal 3, offered by NYSDF, seeks to modify the *Producer milk* provision of the order by: (1) Establishing a two-day touch-base standard in each of the months of August through December; (2) Setting an explicit limit on the amount of producer milk that can be diverted from any type of pool plant to nonpool plants at 60 percent of total receipts in each of the months of August through December, and 75 percent in each of the months of January through July; (3) Clarifying that any milk diverted in excess of the diversion limits will not be considered producer milk; and (4) Providing authority to the Market Administrator to adjust diversion limit standards.

A witness appearing on behalf of NYSDF was of the opinion that current pooling provisions of the Northeast order are inadequate and have resulted in milk being pooled on the order that does not demonstrate regular and consistent performance in supplying the Class I needs of the market. The witness explained that after a pool plant receives the milk of a producer, the plant can then divert unlimited quantities of that producer's milk. The diverted milk need never again be physically received at a pool plant and need not ever be made available for satisfying the market's Class I needs, the witness said, yet such milk would continue to be pooled and receive the blend price of the Northeast order. Consequently, the witness stated, Northeast order producers are receiving an otherwise lower blend price because of the increased quantity of milk being pooled at lower valued uses. The witness characterized pooling milk in this way as ''artificial pooling.''

NYSDF offered a modification to Proposal 3 in their post-hearing brief. The NYSDF modification proposed that diversion limit standards for supply plants should be 100 percent minus the proposed supply plant performance standards. Therefore, NYSDF wrote, the diversion limit in August would be 85 percent, 75 percent in each of the months of September through November, and 90 percent in the month of December.

The NYSDF witness testified that milk in excess of the proposed diversion limit standards should not be pooled because the order would be pooling the excess reserves of another market to the detriment of those pooled producers whose milk regularly and consistently serves the Northeast Class I market. According to the witness, during some months when milk production is plentiful, total pool milk receipts from as many as 800 producers located far from the marketing area have exceeded 100 million pounds. The NYSDF witness was of the opinion that the milk of these producers was not only unneeded to supply the Northeast order fluid needs but a vast majority of the distant milk was never physically received on a regular or consistent basis at a Northeast pool plant.

The NYSDF witness testified that milk diverted in excess of the specified diversion limits should not be considered as producer milk, and therefore, should not be pooled on the order. The witness also emphasized that the Market Administrator should be given the authority to adjust diversion limits and the touch-base standard as market conditions warrant.

The NYSDF witness is of the opinion that the two-day touch-base standard offered in Proposal 3 is reasonable and would eliminate the ability to artificially pool milk on the order by requiring a producer to deliver at least two-days' milk production to a pool plant in each of the pool-qualifying months before the milk of that producer would be eligible for diversion to nonpool plants. The higher touch-base standard in the months of August through December would also more fully assure fluid handlers an adequate supply of milk to meet the needs of their customers when milk supplies are less abundant, the witness added.

A witness appearing on behalf of ADCNE testified in opposition to Proposal 3. The witness said that implementation of a two-day touch-base standard would result in disorderly market conditions because the cost to producers in meeting this pooling standard could increase significantly. The witness presented testimony describing the vast geographic area and other characteristics of the Northeast order that would give rise to increased costs to producers. The witness explained that because most Northeast order producers are not located near a Class I handler, a higher touch-base standard would result in the uneconomic movement of milk and in higher overall transportation costs. The witness also suggested that higher transportation costs could prevent some producers from being able to pool their milk on the order.

The ADCNE witness also expressed opposition to the portion of Proposal 3 that would lower diversion limit standards. The witness did agree that the current lack of specific diversion limits could cause harm in the orderly marketing of milk. In ADCNE's opinion, the proposed diversion limits for the months of August through December are too restrictive and could result in disorderly marketing conditions. Rather, ADCNE was of the opinion that establishing performance standards for supply plants in each of the months of January through July was a more appropriate alternative than making restrictive changes to the order's diversion limit standards.

Proposal 6, offered by ADCNE, also seeks to amend the *Producer milk* definition of the Northeast order. Specifically, the proposal seeks to: (1) Establish year-round diversion limit standards of 80 percent in each of the months of September through November, and 90 percent in each of the months of January through August and December; (2) Clarify that a producer can touch-base anytime during the month to make their milk eligible for diversion to nonpool plants; (3) Clarify that over-diverted milk will not result in a dairy farmer losing producer status on the order; (4) Eliminate the ability to simultaneously pool the same milk on the Northeast order and on a marketwide equalization pool operated by another government entity; and (5) Provide authority to the Market

Administrator to adjust diversion limit standards applicable to those handlers who receive marketwide service payments when warranted.

A witness appearing on behalf of ADCNE testified that the pooling provisions of the Northeast order need to be considered on an emergency basis to correct loopholes that could lead to further erosion of blend prices and disorderly market conditions. The witness also testified that the lack of specific year-round diversion limit standards for distributing plants needs to be corrected because the absence of such standards currently allows distributing plants the ability to pool large quantities of milk during the spring months when milk supplies are plentiful through the diversion process. According to the witness, the only functional restrictions on diversions from a distributing plant during those months are economic considerations and the amount of milk that a distributing plant can physically receive. Theoretically, the witness explained, a single distributing plant could pool all of the milk in the Northeast Order because no diversion limit is specified. The witness stressed that if diversion limit standards are not established for every month, an increase in the amount of milk pooled on the order could result in significantly lower blend prices paid to producers.

The ADCNE witness also explained that a producer should not lose producer status under the dairy farmer for other markets provision of the Northeast order in the event that a handler over-diverts the milk of a producer. In this regard, the witness explained that Proposal 6 would allow for pooling the milk of producers in the following month in the event that milk of a dairy farmer is over-diverted in the current month.

The ADCNE witness also testified that while no entities are currently engaging in the practice of simultaneously pooling the same milk on the Northeast order and on a marketwide equalization pool operated by another government entity (commonly referred to as ''double-dipping''), the opportunity for it exists, especially with the Western New York State Milk Marketing Order that shares a common milkshed with the Northeast order marketing area. The ADCNE witness stipulated that eliminating the ability to double-dip would have no effect on milk priced by State-operated programs that provide for marketwide pooling of milk pricing premiums such as the Pennsylvania Milk Marketing Board, the Maine Milk Commission, or the Virginia Milk Commission.

The pooling standards of all milk marketing orders, including the Northeast order, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market as a condition for receiving the order's blend price. The pooling standards of the Northeast order are represented in the *Pool Plant*, *Producer*, and the *Producer milk* provisions of the order. Taken as a whole, these provisions are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market. In addition, these provisions provide the criteria for identifying those producers and plants whose milk is reasonably associated with the market by supplying the Class I needs and thereby sharing in the marketwide distribution of proceeds arising primarily from Class I sales. Pooling standards of the Northeast order are based on performance, specifying standards that, if met, qualify a producer, the milk of a producer, or a plant to share in the benefits arising from the classified pricing of milk.

Pooling standards that are performance-based provide the only viable method for determining those eligible to share in the marketwide pool. This is because it is the additional revenue from the Class I use of milk that adds additional income, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the distribution of pool proceeds. Pool plant standards therefore are needed to identify the milk of those producers who are providing service in meeting the Class I needs of the market. This is important because producers whose milk is pooled receive the market's blend price. If the pooling provisions do not reasonably accomplish these aims, the proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers and can result in an unwarranted lowering of returns to those producers who actually incur the costs of supplying the fluid needs of the market.

Similarly, pooling standards for distributing and supply plants should also provide for those features and accommodations that reflect the needs of proprietary handlers and cooperatives in providing the market with fluid milk and dairy products. When a pooling feature can result in pooling milk which would not reasonably demonstrate serving the fluid needs of the market, it is appropriate to re-examine the need for continuing to provide that feature as a necessary component of the pooling standards of the order. The pooling standards of an order serve to ensure an adequate supply of fluid milk for the market and the proper identification of those producers whose milk does serve the fluid needs of the market, a feature which can diminish these aims should be considered as unnecessary.

The record provides sufficient evidence to conclude that features of the *Pool plant* provision are not appropriate given the prevailing marketing conditions of the Northeast order. The hearing record reveals that the lack of supply plant performance standards in every month and the lack of explicit diversion limit standards for all pool plants in every month of the year has allowed producers from areas located far from the marketing area to participate in the distribution of proceeds from the marketwide pooling of milk without demonstration of a reasonable level of consistent and regular service in meeting the Class I needs of the market. Current performance standards have allowed these producers to receive the Northeast order's blend price by simply making a one-time delivery of milk to a pool plant and thereafter, divert unlimited quantities of milk to nonpool plants located nearer their farms and far from the marketing area. Such milk pooled by diversion cannot reasonably be considered a reserve supply for the marketing order area because it is never again physically received by pool plants regulated by the Northeast order. Furthermore, such milk pooled by way of diversion is not consistently demonstrating performance to serving the market's Class I needs. The pooling of milk through the diversion process evidenced by the record increases the total amount of milk pooled on the order and lowers the blend prices paid to all producers, especially to those producers who consistently deliver milk to the order's pool plants.

The record provides evidence to conclude that performance standards for supply plants should be specified for every month. The performance standards proposed by the ADCNE are reasonable in light of the prevailing marketing conditions reflected in the Northeast marketing area. The concerns of NYSDF, who represented the interests of the many distributing plants regulated under the terms of the order, make clear that since the Northeast milk marketing area was created and implemented as part of Federal milk order reform in January 2000, the need arose at least twice for the Market Administrator to raise the performance

standards for supply plants. This was done so that distributing plant bottlers would be assured of sufficient milk supplies to meet fluid demands.

In this regard, this decision can only conclude that authority provided to the Market Administrator to make the needed adjustments to the performance standards as marketing conditions warrant function well and as intended. The temporary increase in supply plant performance standards brought forth the milk supply needed to satisfy the needs of distributing plants. Accordingly, this decision sees no compelling reason to adopt the higher supply plant performance standards offered by NYSDF. To the extent that the needs of distributing plants have necessitated the need to increase the availability of supply to meet fluid needs, the order provisions have done so. It is reasonable to conclude, therefore, that the order will continue to react as needed to changing marketing conditions into the future.

Handlers and producers are better served by eliminating the ability of a supply plant to automatically be a pool plant if the supply plant had been a pool plant in some prior period as the order currently provides. The granting of automatic pool plant status to a plant does not provide the certainty needed by distributing plants for the order to assure them an adequate supply of milk for Class I uses. Together with other pooling standard inadequacies, it provides an avenue through which more milk can be pooled on the Northeast order than can be considered as part of the legitimate milk supply of the pool plant where automatic pool plant status has been granted. The opportunity to pool milk in this way only serves to increase the volume of milk pooled (at lowered valued uses) without that milk either being committed to, or demonstrating, serving the Class I needs of the market as a condition for receiving the order's blend price. Therefore, the supply plant performance standards should be amended to specify performance to the market in every month of the year. The performance standards of 10 percent in each of the months of January through August and December, and 20 percent in each of the months of September through November should be adopted.

The pool plant feature contained in the Northeast order for split-plants should be removed. No similar provision was contained in the three pre-reform orders consolidated to form the Northeast order. The split-plant provision was included in the consolidated Northeast order in an effort to provide for the uniformity of provisions throughout the reformed Federal milk order system. The provision was established with the intent to allow handlers the ability to process Grade A milk in the pool side of the plant and process Grade B milk in the nonpool side of the plant.

It is clear from the record that handlers in the Northeast marketing area are not utilizing this feature of the pool plant provision and no milk is being pooled on the order in this manner. However, if utilized, the feature can be used as a mechanism for pooling milk on the order that would not need to demonstrate a consistent service to the Class I market. This feature could be used as a loophole through which deliveries of milk to the pool side of a split-plant can then be diverted to the nonpool side of the plant. The diverted milk would never then need to serve the market's Class I needs. The split-plant feature can unintentionally provide the opportunity for milk to become pooled on the Northeast order without that milk demonstrating a reasonable level of service in meeting the market's fluid needs but would share in the revenue generated from Class I sales.

The removal of the split-plant feature is broadly supported by the hearing participants. Since the split-plant feature is not currently utilized by any Northeast handler, no producers currently serving the Northeast market would be adversely affected by its removal from the terms of the order.

The hearing record supports the adoption of certain features of Proposal 8 offered by Friendship. In simple terms the proposal calls for excluding milk received by a supply plant from two sources—milk received from sources not eligible for pooling (for example, milk received from a producer handler or from a dairy farmer for other markets) and from a cooperative association—from the total volume of milk receipts at the supply plant. By excluding such milk receipts from the total actual receipts, the proposal essentially lowers the intended performance standards for supply plants.

As discussed above, the record reveals concern by distributing plants that the pooling standards of the Northeast order need to specify higher performance standards for supply plants and the need for explicit diversion limits and touch-base standards for producer milk. While the higher performance standards called for in the NYSDF proposal are not recommended for adoption, the adoption of certain features of Proposal 8 would essentially reduce the amount of milk that supply plants ship to distributing plants so that the Class I needs of the market can be satisfied. The current performance standards for supply plants are sufficiently liberal, especially in light of the more than 40 percent Class I use of milk in the Northeast marketing area.

The part of Proposal 8 that excludes milk received from producers not eligible for pooling is recommended for adoption since that milk is not eligible to be pooled on the Northeast order. It is reasonable to exclude such receipts for the purposes of determining if the supply plant has met the intended performance standards because milk not eligible for pooling should not be used as a factor for qualification.

The portion of Proposal 8 that is not recommended for adoption specifically excludes supply plant milk receipts from cooperatives as a factor for qualification. This feature should not be adopted because it is viewed as having more to do with a supply plant's ability to draw money from the PSF than it does with demonstrating a reasonable standard of performance in supplying the Class I needs of the market as a condition for participation in the marketwide pool.

As discussed above, the hearing record supports concluding that the Northeast order is not adequately identifying the milk of those producers that are actually supplying the Class I needs of the market on a regular and consistent basis. In this regard, it is clear that certain changes to the *Producer milk* provision of the order should be recommended for adoption.

The current touch-base standard of the Northeast order does not provide detail sufficient to specify the quantity of milk a producer must deliver to pool plants. Currently the order only indicates that if a producer delivers milk to a Northeast order pool plant, the milk of that producer becomes eligible for diversion to nonpool plants. Generally, milk marketing orders that exhibit lower fluid demands require fewer physical deliveries to a pool plant, while markets with higher fluid demands typically specify more frequent deliveries. A touch-base standard that is too high can result in higher transportation costs to producers and cause uneconomic shipments of milk for the sole purpose of meeting a pooling standard. If the standard is too low, fluid handlers may be less assured of an adequate supply of fluid milk to meet the demands of the Class I market.

The hearing record supports concluding that the touch-base standard of the *Producer milk* provision, together with generally inadequate diversion limit standards for all pool plants, contributes to the pooling of milk on the order which does not demonstrate a

reasonable level of service in supplying the Class I needs of the market. There are competing proposals and views on how the order should rely on both the touch-base standard and diversion limit standards so that, together with the performance standards, the Class I needs of the market are satisfied and the order has appropriately identified the milk of those producers whose milk actually demonstrates service in meeting the Class I needs of the market.

The ADCNE proposals place much more weight on the need for explicit diversion limit standards in each and every month that are applicable to both supply and distributing plants than on a two-day touch-base standard proposed by NYSDF. The ADCNE and NYSDF both acknowledge the need for explicit diversion limit standards for all pool plants, although their respective positions of what those standards should be differ only as to what are the most appropriate levels for the Northeast order.

This decision recommends adopting a one-day touch-base standard in the initial pool qualifying month. A touch-base standard that would require more frequent deliveries is not warranted because it would result in higher transportation costs to producers and cause uneconomic shipments of milk for the sole purpose of meeting a pooling standard. A one-day touch-base standard, together with other recommended changes contained in this decision, should adequately contribute in identifying the milk of those producers who regularly supply the market's Class I needs and therefore can be pooled under the terms of the order. The position of the ADCNE that the milk of a producer could touch-base anytime during the initial qualifying month is reasonable and should be adopted for the purpose of clarifying when meeting this standard should occur.

Granting authority to the Market Administrator to adjust the touch-base standard should also be adopted as a key component of the recommended one-day touch base standard. While this feature of the touch-base standard was not included in those proposals amending the *Producer milk* provision of the Northeast order, the record is specific that this was intended. It is also consistent with the authority already granted to the Market Administrator to adjust the performance standards of the order for supply plants.

Providing for the diversion of milk is a desirable and needed feature of an order because it facilitates the orderly and efficient disposition of milk not needed for fluid use. When producer milk is not needed for Class I use, some provision should be made for milk to be diverted to nonpool plants for use in manufactured products. However, it is essential that limits be established to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

In the context of this proceeding, milk diverted by distributing and supply plants is milk not physically received at the plants. While diverted milk is not physically received, it is nevertheless an integral part of the milk supply of the diverting plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not be associated with the diverting plant and should not be pooled. Associating more milk than is actually part of the legitimate reserve supply of the diverting plant can unnecessarily reduce the blend price paid to dairy farmers who service the market's Class I needs.

Without reasonable diversion limits, the order's ability to provide for effective performance standards and orderly marketing is weakened. Diversion limits that are set too high can open the door for pooling much more milk on the market then can be reasonably associated with the reserve supply for the market. The record reveals that unlimited diversion limits for distributing plants in the Northeast order could have contributed to the pooling of large volumes of milk that have not demonstrated performance to the Class I market. The same is also revealed in the record by the lack of explicit diversion limit standards for supply plants in every month.

This decision recommends adopting diversion limit standards for all pool plants as proposed by ADCNE. Specifically, a diversion limit standard of 90 percent in each of the months of January through August and December, and 80 percent in each of the months of September through November should be adopted. Milk diverted in excess of the standards should not be considered producer milk and the pool plant must designate to the Market Administrator which deliveries will be depooled. If the pool plant fails to make a designation, the Market Administrator can depool all of that month's diversions to nonpool plants. As also proposed by ADCNE, this decision can find no reason to cause the loss of producer status under the order in the event a producer's milk is caused to be over diverted. Accordingly, the proviso that a producer will not lose producer status under the order in the event that the milk of a producer is over diverted should be adopted.

To the extent that these diversion limits may warrant future adjustments, this decision recommends granting explicit authority to the Market Administrator to adjust the diversion limit standards when needed. In practice, such authority has already been given to the Market Administrator in that current supply plant diversion limits are functionally set at 100 percent minus the applicable performance standard. In past actions undertaken by the Market Administrator to change supply plant performance standards, the applicable diversion limit was also functionally changed as higher performance standards adopted temporarily also changed supply plant diversion limits. Therefore, providing authority to change the order's diversion limit standards in the way presented in this decision merely serves to clarify an authority already granted to the Market Administrator.

Since the 1960's, the Federal milk order program has recognized the harm and disorder that results to both producers and handlers when the same milk of a producer is simultaneously pooled on more than one Federal order, commonly referred to as ''double-dipping''. In the past, this situation caused disparate prices between producers while handlers were not assured of uniform prices, which gave rise to competitive equity issues.

The need to prevent ''double-dipping'' became critically important as distribution areas expanded and orders merged. The issue of ''double-dipping'' on a marketwide equalization pool operated by another government entity and a Federal order can, for all intents and purposes, have the same undesirable outcomes that Federal orders once experienced and subsequently corrected. While ''double-dipping'' is not presently occurring in the Northeast order, it is clear that the Northeast order should be amended to prevent the ability to pool the same milk on both a Federal order and a marketwide equalization pool operated by another government entity. This action is consistent with other recent Federal order amendatory actions regarding simultaneous pooling on a Federal order and on another government operated program.

The hearing record does not support the adoption of Proposal 9, which seeks to exclude a supply plant's route distribution of packaged fluid milk products from the total volume of milk that it would need to deliver to a distributing plant for the purpose of meeting the order's performance standards. As implied in the name, a supply plant is a supplier of bulk milk

to distributing plants. Supply plant performance standards are intended, in part, to ensure that distributing plants are supplied with enough fluid milk to meet their needs. A plant's route sales in the marketing area are used to determine the pool status of fully or partially regulated distributing plants, not of supply plants.

The hearing record also supports the adoption of Proposal 14 because it serves to provide milk processors in the Northeast with the more orderly marketing of unit-pooled milk without compromising the order's intent to ensure that the Class I needs of the marketing area are satisfied. Unit pooling serves to provide a degree of regulatory flexibility for handlers by recognizing specialization of plant operations and to minimize the uneconomical and inefficient movement of milk for the sole purpose of retaining pool status.

If a plant has combined Class I and II receipts of 60 percent or more, including milk received from cooperative handlers and milk diverted from the plant, and is physically located in the Northeast marketing area, it is reasonable to conclude that the unit's plant does contribute in making milk available on a regular and consistent basis for meeting the fluid needs of the order. Therefore, its adoption is recommended provided all other standards and conditions for unit pooling are met. This should provide for greater flexibility in the types of products a pooling unit may produce such as Class III or Class IV dairy products, in a unit pooled plant. Additionally, providing for the secondary unit-pooled facility to be located within the Northeast marketing area, as well as being primarily involved in producing Class I or Class II milk products, retains safeguards that would prevent the pooling of milk that may be located far from the marketing area which would not demonstrate the standards of performance in servicing the Class I needs of the market.

A proposal published in the hearing notice as Proposal 11, seeking to amend the dairy farmer for other markets feature of the *Producer* provision, was withdrawn at the hearing by the proponent. No further reference to this proposal will be made.

3. Marketwide Service Payments

A proposal, published in the hearing notice as Proposal 7, seeking to establish a 6-cent per hundredweight (cwt) marketwide service payment in the form of a market ''balancing'' credit to handlers should not be adopted. As proposed, a balancing credit would be provided if the handler pools at least a million pounds of milk per month, provided less than 65 percent of such pooled milk is shipped to distributing plants for Class I use or represents at least three percent of the total volume of milk pooled on the Northeast order.

In the context of this proceeding, ''balancing'' refers to those actions performed by handlers that add or remove milk from their supply to accommodate the fluctuating needs of Class I. The Northeast order does not currently contain a marketwide service payment provision.

Proposal 7 was offered by ADCNE and has received additional support or endorsement in writing from the National Milk Producers Federation (NMPF) and the New York State Farm Bureau Federation.

A form of a marketwide service payment was available to certain cooperative handlers in the pre-reform New York-New Jersey milk marketing order. That order was combined with the Middle Atlantic and New England orders to form the consolidated Northeast order. The service payment of the New York-New Jersey order consisted of two components: a cooperative service payment and a balancing payment. The balancing component was far smaller than the proposed six cents per cwt credit under consideration in this proceeding. The cooperative service payment could total up to three cents per cwt. An additional ''up to'' one cent was provided for balancing. By comparison, the marketwide service payment proposal considered in this proceeding is dedicated entirely to compensating eligible handlers for balancing functions.

The ADCNE's rationale for balancing payments rests on the argument that the Northeast order has a large number of independent milk producers (dairy farmers who are not members of a cooperative) who avoid incurring the costs of operating and maintaining facilities that provide outlets for milk when not needed for fluid use. In this regard, they assert that the independent producers essentially receive a higher blend price for their milk because they avoid the costs of balancing which are largely absorbed by dairy farmer cooperatives that own manufacturing plants. As a matter of equity, ADCNE is of the opinion that the entire market, rather than only cooperatives, should share in bearing the costs that arise from providing these market balancing operations and facilities.

In post hearing briefs, support for Proposal 7 was completely withdrawn by Agrimark, a major participant and member of ADCNE who provided testimony at the hearing in favor of adopting a marketwide service payment for balancing. In addition, LOL, also a member of ADCNE, indicated their change to a neutral and uncommitted position for the adoption of a balancing credit.

Testimony advancing the adoption of Proposal 7 was provided by representatives of three members of ADCNE. The majority of their testimony relied on research conducted by USDA's Rural Cooperative Business Service (RCBS) which examined market balancing activities in the Northeast milk marketing area. The research was performed at the request of ADCNE.

An RCBS witness, who participated in conducting the market balancing research, provided testimony concerning the study's methodology, underlying assumptions, and findings. The witness emphasized that the research performed and testimony given was offered as a service to the industry and interested parties and is not in support of, or opposition to, any proposal under consideration in the proceeding.

The RCBS witness testified that the study provides a framework that can be used to estimate the costs associated with balancing the Class I needs of the Northeast marketing area by examining the costs associated with unused milk manufacturing capacity at butter-powder plants located within the marketing area. According to the witness, unused milk manufacturing capacity results from increases or decreases in the demand for fluid milk by Class I handlers given the available milk supply associated with the marketing area. The witness explained that the study also estimates changes in costs associated with different hypothetical levels of idled butter-powder plant capacity when subjected to seasonal variations in milk supplies that cause fluctuations in the amount of milk manufactured at butter-powder plants. The witness indicated that the plant capacity data originated from cooperatives that operated butter-powder plants in the pre-reform orders consolidated to form the Northeast marketing area.

The RCBS witness explained that the study results are theoretical and do not represent actual or existing conditions in the Northeast marketing area. According to the witness, the balancing study employed a comparative static methodology. For the purposes of the study, the witness explained, the research defined the necessary reserve milk supply requirements of the market as the amount of milk required to meet

daily operating fluctuations among distributing plants (operating reserves) and seasonal fluctuations (seasonal reserves). According to the witness, during periods of abundant milk supply in the Northeast marketing area, such reserve milk is used for Class IV manufacturing purposes, specifically for the manufacture of nonfat dry milk (NFDM).

According to the RCBS witness, the study suggests that seasonal variations in the demand for fluid milk cause variations in the supply of milk that would otherwise be used in manufacturing. As a result, milk available for the manufacturing of NFDM fluctuates inversely with the milk supplies needed to meet fluid milk demand, the witness noted. The witness said that as demand for milk for fluid use increases, supplies of milk for manufacturing tend to decline. According to the witness, changes in Class I (fluid) demand change the amount of unused butter-powder plant capacity and that such unused capacity has associated costs.

The RCBS witness explained that the balancing study was conducted using two different scenarios. The witness said the first scenario assumes an operating reserve of milk needed to balance the regions' needs at 10 percent of total fluid demand. The second scenario assumes, according to the witness, an operating reserve of 20 percent. The witness testified that operating costs were compared under these two differing scenarios while other factors were held constant. The witness noted that while the study focuses on estimating costs and changes in estimated costs, the study did not address methods by which to recover or offset costs typically associated with balancing services and operations. The witness indicated that cost recovery methods might include some form of marketwide service payments formalized under the term of a milk marketing order, ''give-up'' charges (a charge by a supplier for making milk available, for example, to a distributing plant), balancing or diversion fees (a charge for accepting milk at a balancing facility when not needed by a Class I bottler), ''over-order'' premiums (a price charged for milk above those minimum prices set under the terms of a milk marketing order), or by pricing formulae included in the classified prices established under a milk marketing order.

A witness for Dairylea, a farmer-owned agricultural marketing and service organization, testified in support of Proposal 7. The witness described the Northeast marketing area as a milk ''megamarket'' characterized by high population and milk production density that requires marketwide service payments for balancing the market's fluid needs. The witness asserted that the Class I needs of the Northeast market are so large and unique among Federal milk orders that without compensation for the costs incurred for balancing, such activities might not otherwise be provided. The witness asserted that there is no other viable market mechanism through which excess milk supplies can be adequately disposed of other than through the butter-powder balancing facilities of the region's six largest cooperative handlers. The witness did note, however, that all manufacturing handlers operating in the Northeast marketing area also perform balancing functions by simply procuring milk from the area's producers.

The Dairylea witness characterized the Northeast as a unique milk-producing region because nearly 25 percent of farmers supplying the market are independent producers and not members of cooperatives. The witness characterized the Northeast's independent producers as largely serving the needs of Class I handlers and as generally not involved in providing balancing facilities and services for the market. Additionally, the witness testified that the marketing area contains nearly 40 percent of all dairy farmer cooperatives in the United States. In comparing outlets for milk, the witness testified that the Northeast marketing area is represented by 32 proprietary handlers and 259 milk plants.

The witness for Dairylea was of the opinion that the unique characteristics and size of the marketing area together with the sheer volume of milk required to supply the fluid needs of the marketing area make it imperative that marketwide service payments be provided to compensate the largest cooperative handlers for the costs that they incur for balancing the market. According to the witness, without cooperatives performing this service, some milk production in the marketing area would not clear the market. The witness did note that some milk produced within the boundaries of the Northeast marketing area is not pooled on the order because it is delivered south to other marketing areas where it receives a higher blend price. The witness similarly acknowledged that milk produced west of the marketing area is delivered to the Northeast marketing area butter-powder plants because being pooled on the Northeast order often commands a higher blend price.

The Dairylea witness also acknowledged that other plants located within the Northeast marketing area (some 184 nonpool plants, many of which are proprietary) also perform significant balancing functions. While the witness was of the opinion that no single nonpool plant could individually provide significant market balancing services, taken as a whole, these plants do provide and perform balancing functions.

The Dairylea witness testified that the members of ADCNE had advanced a conceptually similar marketwide service payment proposal for balancing during the Federal milk order reform effort. The witness testified that Federal order reform provided public debate and analysis on the need for a marketwide service payment for balancing. The witness explained that USDA rejected that marketwide service payment proposal in the reform's recommended decision of 1998 and in its final decision in 1999 because the proposed balancing credit level sought had not been adequately explained.

A second ADCNE witness, representing Agrimark, testified that the Food Security Act of 1985 (commonly referred to as the 1985 Farm Bill) provided authority for Federal milk marketing orders to allow handlers to collect for services rendered that are of benefit to all the market's participants. The witness asserted that the disposal of surplus milk (milk not needed for fluid use) and the procurement of supplemental milk supplies for fluid handlers are specifically identified in the provisions of the 1985 Farm Bill as being of marketwide benefit. The Agrimark witness also asserted that payments for reimbursing handlers who provide services of marketwide benefit may be made from the total sums payable by all handlers for milk—the costs are paid from the total value of milk pooled before the computation of the blend price.

In the opinion of the Agrimark witness, such payments would be made on a uniform basis by all pool participants and thereby all would equitably share in the cost associated with balancing. According to the witness, because independent producers do not operate balancing facilities or perform balancing functions, they have avoided the burden of incurring balancing costs while receiving the benefit of the blend price.

Testimony of the Agrimark witness reinforced the opinion of the Dairylea witness that cooperatives perform the bulk of market balancing functions in the Northeast marketing area throughout the year. As an example, the witness

cited data originating from the Market Administrator's office illustrating that during 2001, cooperative-supplied milk satisfied market shortfalls during those months when milk production was at its lowest in the region. In addition, the witness noted that cooperatives accommodated surplus milk diversions from the Class I market when milk production in the area was higher. The witness stressed that the volume of deliveries to Class I bottlers by cooperatives varied inversely with the delivery volumes by independent milk producers.

According to the Agrimark witness, during November 2001, receipts by the Class I handlers from cooperative suppliers were more than double the level of receipts from independent producers. In contrast, the witness testified that receipts by Class I handlers from cooperative suppliers reached their low point during July 2001, a period of the year when overall milk production in the Northeast was highest. According to the witness, milk deliveries by cooperatives during November to the Class I market were 29 percent above those for July. This data clearly shows, the witness asserted, that milk supplied by cooperatives provided a larger share of market balancing than did independent producer milk.

Relying on data supplied by the Market Administrator, the Agrimark witness testified there are approximately 4,000 independent producers who pool their milk on the Northeast order. The witness indicated that these producers account for approximately 6 billion pounds of milk per year pooled on the order. Of this milk volume, the witness asserted, some 80 percent is supplied for fluid uses in a market whose total Class I use is only 45 percent of the total volume of milk pooled. The witness testified that while independent producer milk is not refused by distributing plants from their producers during slack demand months of the year, cooperative-producer milk is sometimes diverted from Class I use by distributing plants for use in manufacturing. According to the witness, this further demonstrates that it is cooperatives who own manufacturing plants that provide the majority of balancing services for the market.

The witness was of the opinion that cooperative producers are receiving a lower price because cooperatives have absorbed the costs associated with market balancing and as such, balancing costs are not equitably shared among all the market's producers. In addition, the witness expressed the opinion that milk supplied by cooperatives is more likely to be the milk that is diverted away from Class I use than is milk supplied by independent producers. Diversions tend to be made, according to the witness, to cooperatives that operate butter-powder plants. The witness testified that all costs and risks of operating such balancing plants accrue only to the cooperatives, while such costs and risks are essentially avoided by independent producers.

The Agrimark witness testified that excess manufacturing plant capacity occurring during high fluid demand months causes losses for large cooperative handlers that operate balancing plants. According to the witness, Agrimark may be reaching a point where it can no longer operate their balancing plants because of excessive operating costs arising from idled plant processing capacity. High operating costs occur, according to the witness, because there is insufficient milk volume for the plants to operate profitably at certain times of the year.

The witness for Agrimark testified that revenue from the manufacture and distribution of Class IV products and sales of Class I and II products essentially subsidize the balancing operations and activities of cooperatives. In the opinion of the witness, these subsidies are required because the balancing costs they incur are not recoverable from the marketplace. The Agrimark witness also provided information relating to one of their specific plants for comparison with the RCBS study in order to validate the RCBS study cost estimates. For example, the witness indicated that a butter-powder plant, owned and operated by Agrimark, was built in 1919 and has been refurbished on a number of occasions. The witness indicated that while their plant costs and the cost estimates in the RCBS study differ on a number of factors, the RCBS study nevertheless can be relied upon in its totality as an accurate reflection of Agrimark's own plant costs.

A third ADCNE witness appearing on behalf of LOL testified that marketwide service payments are needed for the Northeast milk order to keep balancing plants operating, thus benefitting all market participants. According to the LOL witness, only cooperatives incur the brunt of balancing costs and bear the burden of receiving lower blend prices than would be the case if balancing costs were more equitably shared by all producers who pool milk on the Northeast order. Members of cooperatives are therefore at a disadvantage in the marketplace as compared to independent producers who do not pay for balancing through cooperative membership dues or reduced revenues, the LOL witness concluded.

The LOL witness testified that the ADCNE cooperatives provided balancing services for as much as 21.8 million pounds of milk per day during peak milk production months during 2001. The witness testified that this evidence was based on a survey that LOL conducted using data received from ADCNE member butter-powder plants for the months of May and November of that year. In addition, the LOL witness noted, as did the Agrimark witness, that the Market Administrator's data indicates that 80 percent of independent producer milk is delivered directly to distributing plants for Class I use even though milk supplied by cooperatives represented the bulk of reserve milk pooled on the Northeast order.

Relying on Market Administrator data and the methodology for estimating balancing costs from the RCBS study, the LOL witness asserted that to properly balance the Northeast marketing area, the cooperatives operating butter-powder plants must operate with a 20 percent operating reserve of milk during all seasons. According to the witness, during months of high fluid milk demand, draws on milk supplies from butter-powder plants for delivery to the Class I market resulted in unused butter-powder capacity of as much as 11.5 million pounds in a single month. Accordingly, the witness asserted, the cooperative's butter-powder plants should receive compensation for the cost of maintaining this available but unused processing capacity. According to the witness, the existence of such capacity benefits all producers and handlers participating in the Northeast marketing area and provides a needed alternative outlet for milk.

The LOL witness noted that the balancing cost estimation developed in the RCBS study suggests that four modern, efficient, optimally located, three-million pounds per day butter-powder plants would efficiently balance the Northeast market even though there are seven actual plants located in the marketing area. Nevertheless, the LOL witness was of the opinion that the RCBS study of four theoretical manufacturing plants is an appropriate proxy for all butter-powder plants currently operating in the Northeast region. The witness asserted that LOL's own data and analysis validates the RCBS study's methodology. According to the witness, because the theory so accurately reflects actual marketing conditions, the operators of the seven butter-powder plants have a sound basis

to justify a marketwide service payment for unrecovered costs incurred by balancing the market.

Testimony offered in opposition to the marketwide service payment proposal and the need in general for a balancing credit was advanced by representatives of NYSDF, representatives from the International Dairy Foods Association (IDFA), several proprietary handlers including Friendship Dairy, Queensboro Farms, Marcus Dairy, and Worcester Creameries, Dean Foods, H.P. Hood, and two independent dairy farmers. Representatives for the proprietary handlers testified and all maintained that if a balancing credit feature were adopted, they would not be eligible to receive the proposed marketwide service payments even though they too incur costs for performing market balancing functions. These witnesses also testified that if Proposal 7 were adopted, they would be placed at a competitive disadvantage in procuring milk when compared to large cooperative handlers because they would need to pay a higher effective price for milk. In this regard, the witnesses indicated that as small businesses they would be treated unfairly. Each of the proprietary handlers pointedly observed that the benefit of marketwide service payments would accrue only to the large-scale butter-powder processors located in the Northeast marketing area.

A witness for Queensboro Farms testified that as an operator of a supply plant, the company provides balancing services for the market that are similar to those performed by large-scale NFDM plants and accordingly should receive compensation for providing balancing services if a balancing credit for the order is adopted. However, the witness emphasized and asserted that the proposal unfairly excludes proprietary handlers on the basis of the milk volume eligibility criteria. The witness said that as a matter of fairness and competitive equity, no handler should receive a balancing credit if it is made available only to the largest handlers.

Witnesses appearing on behalf of Marcus Dairy and Worcester Creameries provided testimony supporting the Queensboro Farms witness. The witness for Marcus Dairy noted that the company's cost of sourcing milk would be higher, thus the prices paid to farmers by them would be lower than prices paid by the largest cooperative handlers who would be eligible to receive a marketwide service payment. However, because Marcus Dairy is a small business entity, it would not be eligible for receiving a payment. Similarly, witnesses for Worcester Creameries and Friendship Dairy, both proprietary handlers and small businesses, provided supporting testimony concluding that adoption of a balancing credit, limited to criteria that only a large cooperative could meet, would needlessly harm them by increasing their milk procurement costs.

A witness testifying on behalf of NYSDF noted that every handler in the Northeast marketing area performs some market balancing functions and therefore should be eligible to receive a credit if the decision is to adopt a balancing credit feature for the Northeast milk order. The witness asserted that if the largest handlers received marketwide service payments, then smaller handlers would face relatively higher costs and would therefore be placed at a competitive disadvantage in the price they pay for a supply of milk.

A consultant witness for NYSDF testified that adoption of Proposal 7 would serve to unduly enhance the power of larger cooperatives at the expense of smaller cooperatives. The witness asserted that smaller cooperatives pooling milk on the Northeast order whose monthly milk receipts are not sufficient to meet the proposed criteria for receiving a balancing credit might be forced to affiliate with a larger cooperative eligible to receive marketwide balancing credits. The witness speculated that although smaller cooperatives might receive partial benefit from the credits through affiliation, they also might be absorbed into a larger cooperative's milk marketing operations as the price for receiving this benefit. This witness was also of the opinion that the members of ADCNE have failed to reveal or consider that handlers are charged over-order premiums, give-up fees, or other variously named charges that are essentially already compensating for balancing costs.

A witness appearing on behalf of Dean Foods testified that surplus milk from the Northeast marketing area could at times be shipped to the fluid milk deficit markets of the Southeast and Florida marketing areas. According to the witness, satisfying the demand for fluid milk of the southern marketing areas could serve the same balancing function for the Northeast market's producers seeking compensation to recover costs arising from operating butter-powder plants.

Two independent dairy farmers, one from western New York State and another from Pennsylvania, testified that dairy farmers already pay for balancing as part of the expenses deducted from their milk checks by handlers. The dairy farmers testified that while no specific fee is explicitly itemized as a market balancing charge, they viewed the deduction as a cost they pay for balancing. They testified that they and other producers have been informed by their cooperative handlers, who market their milk, that the cost of balancing is a component of the handling charges that are deducted from their milk checks.

A witness representing IDFA testified in opposition to Proposal 7. The witness noted that the costs of balancing the Northeast milk market are already recovered through revenues received in over-order premiums charged for milk diverted from Class IV to Class I use. In addition, the witness pointed out that the Class IV product pricing formula make allowance factors include balancing costs in determining the Class IV milk price. In this regard, the IDFA witness viewed Proposal 7 as requiring handlers to essentially pay anew for a function already accounted for in market prices.

In addition, the IDFA witness expressed the opinion that consideration of a marketwide service payment proposal to compensate certain handlers for market balancing services should be heard on a national basis instead of on a limited basis for only the Northeast milk order. The IDFA witness stated that adopting Proposal 7 would have multi-regional impacts and perhaps national impacts.

The IDFA witness noted that USDA had previously rejected proposals for marketwide service payments for balancing advanced by ADCNE cooperatives for the Northeast order as part of Federal milk order reform. According to the IDFA witness, USDA rejected these proposals, in part, because the make allowances for Class IV products already included a factor for balancing cost recovery and that the resulting Class IV prices would be at market-clearing levels. The witness concluded that this negates the need for additional compensation for costs already compensated.

The Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders to contain provisions for marketwide service payments. In this context, a marketwide service payment is a charge to all producers of milk, irrespective of the use classification of such milk, that is deducted before computing the order's statistical uniform price. The AMAA specifically identifies the types of services that may be of marketwide benefit. They include, but are not

limited to: (1) Providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers; (2) handling on specific days quantities of milk that exceed quantities needed by handlers; and (3) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

A current example of Federal milk marketing orders that provides for marketwide service payments is the transportation funds for qualified handlers in the Southeast and Appalachian milk marketing orders. In these marketing orders, handlers pay an assessment on producer milk assigned to Class I each month into separate transportation credit balancing funds maintained and operated by the Market Administrator for each order. These funds, originally established in four pre-reform milk orders, were carried into these two consolidated milk marketing orders as a result of the need to import milk into the southeastern regions of the country from other areas during certain times of the year. The provisions provide payments from the funds to handlers who import supplemental milk for fluid use during the generally low milk production months of July through December. The provisions restrict the payments to milk received from other plants or farms located outside of the marketing areas.

Another example of marketwide service payment provision includes the transportation credits and assembly credits employed in the Upper Midwest milk marketing order. Unlike the marketwide service payments of the Appalachian and Southeast orders, the Upper Midwest order's marketwide service payment provides credits to handlers for their total class use value before the blend price is calculated. Because the credits reduce the total dollar value of the pool, it results in a lower blend price to all producers.

In the pre-reform New York-New Jersey milk marketing order, a payment was available to certain cooperative handlers in the form of a cooperative service payment and a balancing payment. These provisions predate the AMAA's amendment by the 1985 Farm Bill. Under the pre-reform New York-New Jersey order, qualified cooperatives could receive up to three cents per cwt on the amount of milk pooled on the order in the form of a cooperative service payment. Plus, there was a component for a balancing payment that could have been up to one cent per cwt provided a cooperative association operated a manufacturing facility. By comparison, the marketwide service payment proposal considered in this proceeding is dedicated entirely to compensating eligible handlers for balancing functions and the rate of compensation at six cents per cwt is much higher.

From testimony by proponents and opponents, as well as in the data supplied for the record by the Market Administrator, it is evident that the Northeast order has certain unique characteristics and marketing conditions. The Northeast marketing area is the single largest marketing area for Class I milk. Approximately 75 percent of the milk pooled on the order is from members of cooperatives with the remainder supplied by independent producers. In this regard, the Northeast marketing area has the largest base of independent producers that pool milk on the order relative to the other 10 Federal milk marketing orders. The marketing area's independent producers tend to be the predominant suppliers of the Class I needs of the marketing area as revealed by evidence showing that some 80 percent of independent milk supplies are pooled by a Class I handler in comparison to cooperative milk supplies. Cooperative milk supplies for the Northeast marketing area supply the vast majority of the marketing area's milk used in Class III and Class IV dairy products.

The Northeast's market structure also is unique given the large use of milk for Class II products such as ice cream, sour cream, yogurt, and cottage cheese. The marketing area can also be characterized as unique by the relatively large number of proprietary handlers, many of them manufacturing entities, located in the marketing area. These handlers provide dairy farmers with alternative outlets for their milk. None of the handlers individually provide balancing services on the scale offered at the plants owned and operated by the large cooperative members of the ADCNE. However, taken as a whole, these plants do provide real and important balancing services that are similar to those provided by the member cooperatives of ADCNE.

The basis of the argument advanced by the proponents of Proposal 7 is that without marketwide service payments, balancing functions are unprofitable and cost recovery is not otherwise supported by market forces. The underpinning of identifying costs relies on the theoretical results of a RCBS study that examined the costs of balancing incurred by cooperatives that operate butter-powder plants in the Northeast by placing a value on unused plant processing capacity. The optimal cost structure for balancing the Northeast marketing area is presented by the proponents as an accurate reflection of the existing structure of the regional milk market. However, actual costs, together with the profitability or lack of profitability of these butter-powder plants, are never adequately addressed. Profitability is important to the issue as it can speak directly to whether or not a marketwide service payment can be justified. This is important because it is the position of the proponents that balancing activities might not otherwise be provided to the marketplace and because there are no other viable market mechanisms through which excess milk supplies can be adequately disposed of other than through the butter-powder balancing facilities of the region's six largest cooperative handlers.

Typically, a review of the profitability would include a presentation and discussion of actual costs and revenues. In this proceeding, neither actual costs nor actual revenues generated from the sale of Class IV products or other methods used to generate revenue are addressed. The record does not contain information regarding revenues for Class IV products generated by the butter-powder operations or related joint-product production processes from some plants that produce NFDM.

Regarding costs, the proponents preferred to rely on a theoretical cost estimating framework rather than on actual costs incurred in performing balancing services. Without actual revenues and costs available for review, it is impossible to credibly assess whether balancing costs are inequitably shared. Similarly, without historical cost and revenue data series, it is not possible to reasonably consider how the profitability of these operations has changed over time under prevailing and/or changing marketing conditions. It is therefore not possible on the basis of the record, to determine if there is a credible need to compensate cooperatives for balancing the market through the use of marketwide service payments.

The record does not support recommending adoption of a marketwide service payment provision for balancing services for the Northeast milk marketing order. Arguments contained in the record in support of Proposal 7 have focused on the need to share the costs that are not recoverable from the marketplace for balancing the Class I needs of the Northeast marketing area more equitably with all producers who pool their milk on the order. Costs have been explained primarily by attempting to place a value on unused

butter-powder manufacturing plant capacity where unused plant capacity is caused by seasonal fluctuations in the relative demands for fluid milk given available milk supplies. Proponents have relied primarily on a theoretical framework developed in an RCBS study, and to a much more limited extent, actual plant replacement cost data to estimate the costs they incur for balancing the market. A balancing cost estimate is derived in the RCBS study from an analysis of competing milk uses that cause butter-powder plants to be operated at less than full capacity which, in turn, is caused by seasonal fluctuations in the demand for Class I milk.

For all intents and purposes, butter-powder plants operated in the Northeast milk marketing area are owned and operated by members of ADCNE. The ADCNE member proponents argue that a significant share of independent producers (dairy farmers who are not members of cooperatives), do not bear the cost burdens that cooperative members (producers) bear by operating and maintaining butter-powder plants that provide a market outlet for cooperatives and independent milk when not needed for the fluid market and that such outlets provide a service that is of marketwide benefit. Proponents for adoption of Proposal 7 maintain that the blend price received by independent producers is higher than it would otherwise be if independent producers had the burden of maintaining and providing services which balance the market.

The central discussion of the proposal to establish a marketwide service payment by proponents is long on articulating costs associated with balancing. However, the discussion of the role and adequacy of revenues generated from providing balancing related activities or revenue generated in the marketplace from the sale of Class IV products is nearly absent. For example, proponent testimony is nearly silent concerning the roles of over-order premiums, give-up charges, make allowances already a part of the pricing formulae of the order, and other charges that generate revenue to offset costs incurred and characterized as associated with providing balancing functions. Nevertheless, it is clear from the testimony that producers and proprietary handlers pay charges and fees for either a supplemental supply of milk or for the removal of milk when not needed for fluid use. Producers and proprietary handlers have had it explained, in varying ways, that such charges and fees are due to costs associated with balancing—that is—supplying additional milk to meet fluid demand, or the removal of milk for surplus disposal when not needed by distributing plants.

Opponents, including proprietary handlers and independent dairy farmers, also argue that balancing costs have already been recouped by the large cooperatives in various ways. The record reveals that proprietary handlers pay give-up charges and over order premiums to cooperative suppliers to obtain milk for Class I use when needed. Costs also are recouped by the imposition of variously-named charges and fees incurred by Class I handlers diverting some of their independent milk supply to a butter-powder plant when not needed for fluid use and in fees deducted from independent producer milk checks that have been explained in various ways to be fees charged for balancing.

Opponents correctly note that the costs of balancing have already been considered and are accounted for in the Class IV product-price formula make allowance used in all Federal milk marketing orders for establishing the Class IV milk price. The Class III/IV pricing formulae adopted in the Class III/IV Interim Decision (65 FR 768832, published December 7, 2002) included a factor to offset the cost of balancing performed by butter-powder manufacturing plants. Official notice is hereby taken of the Class III/IV Final Decision (67 FR 67906, published November 7, 2002). The Class III/IV Final Decision that adopted product price formulas for all Federal milk marketing orders, including the Northeast order, gave specific recognition to costs associated with balancing in the make allowance factor in setting the Class III and Class IV milk price.

Proprietary handlers also stress their opposition to adoption of Proposal 7 on the basis that they would be excluded from receiving a balancing credit, not because they do not provide balancing services, but because of their size. In their view, the exclusion of small businesses would create inequity among handlers in the price they pay for a milk supply because small handlers would need to pay a higher price for milk relative to large cooperative handlers who would be eligible to receive a balancing credit. Independent of the other reasons discussed for not recommending the adoption of a marketwide service payment for balancing, this decision can find no record evidence that adequately addresses why business size should have a bearing on the exclusion of small handlers who perform balancing function but would not be eligible for a balancing credit.

None of the witnesses appearing on behalf of ADCNE would provide information for the record concerning fees charged to distributing plants and other commercial customers from whom cooperative handlers receive payments to compensate for, or to offset, balancing costs. But the record is clear, however, that such fees are charged in various ways and forms. Because balancing costs are recoverable and, in fact, are recovered in various ways, the record cannot support the notion that whatever cost burden is being borne by any financially interested business entity is so inequitable that it necessitates having the Federal government establish a provision to supervise the transfer of funds from one set of business entities to another.

Conversely, the record contains evidence that investments by the large cooperatives in balancing facilities have taken place. For example, testimony by the LOL representative of ADCNE reveals that balancing services and plant expansion for balancing operations took place repeatedly at their Carlisle, PA, facility over the period of 1984–2000, a time span during which no marketwide service payment was provided under the terms of then Middle Atlantic milk marketing order. Testimony by the Agrimark witness similarly reveals repeated investment in their butter-powder plant at Springfield, MA, at a time when no marketwide service payment was provided under the terms of the New England milk marketing order.

In post hearing briefs and comments, support for Proposal 7 was completely withdrawn by Agrimark, one of the cooperatives comprising ADCNE. In addition, LOL, another cooperative member of the ADCNE, changed their position from support to a neutral position.

The record contains no persuasive argument or compelling evidence to find that there are cost inequities that prevail between cooperative dairy farmers and independent dairy farmers to the extent that would warrant adoption of a provision providing payments from one group of producers to another that is supervised by government regulation. The applicable Class III and Class IV pricing formulae and other free market transactions charged by the large cooperatives with balancing facilities sufficiently offset balancing costs and are adequate to sustain existing balancing facilities and operations. Additionally, the Northeast order Class I price is sufficiently high to ensure that a sufficient supply of milk

for fluid use, together with the Class IV price as established under the order, will provide for the orderly disposal of milk when not needed for fluid use. The Northeast order already provides for cost equity in the minimum pricing mechanisms and the marketplace is providing the ability for transactions outside the terms of the order that currently do not exhibit the need for additional regulation.

The record also does not support adoption of Proposal 7 on the basis of strictly theoretical costs. Offsetting costs by providing a balancing payment must be based on evidence of actual costs incurred for two reasons. First, an estimate of actual costs serves to provide and define a reasonable basis from which to determine a total value of the service being provided and corresponding rate at which reimbursement should be made. Secondly, it is real dollars that will be transferred from one group of producers to another.Accordingly, it is reasonable to suppose that those who will have their blend price reduced have an adequate and supportable explanation why, in the interest of producer and handler equity, their revenue will be reduced. In this regard, the record does not provide any indication, other than proponent assertions, that the revenues generated are insufficient to offset inequitably borne costs. Because actual costs are not provided, a finding cannot be made to determine whether or not the proposed balancing credit rate of six cents per cwt is reasonable.

There is no evidence to suggest that milk of producers pooled on the Northeast order will be unable to find markets without the establishment of a balancing credit. The record is clear in demonstrating that balancing functions and services are performed by large cooperatives and they are able to recover costs from those they serviced without government intervention. The record does not reveal or contain evidence demonstrating disorderly marketing conditions occurring because balancing facilities and services are not sufficiently recovering their costs.

This decision concludes that the qualification criteria of Proposal 7 for receipt of a balancing credit would unduly disadvantage handlers who perform a balancing function for the market, but for no reason other than their size, renders them ineligible to recover balancing costs by receipt of a credit. These handlers would suffer adverse business consequences from the higher effective prices they would need to pay to procure a supply of milk. The record does not reveal any justification that explains why other handlers should be denied a credit for performing a similar service. Accordingly, this decision concludes that the eligibility criteria of Proposal 7 would have an adverse impact on these businesses in the Northeast marketing area.

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 Northeast order was first issued and when it was 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 order, 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 marketing area, and the minimum prices specified in the tentative marketing agreement and the order, 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; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, 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, the marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Northeast marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1001

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR part 1001, is proposed to be amended as follows:

PART 1001—MILK IN THE NORTHEAST MARKETING AREA

1. The authority citation for 7 CFR part 1001 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1001.7 is amended by:

a. Revising paragraphs (c)(1) and (c)(2);

b. Removing paragraph (c)(3);

c. Redesignating paragraphs (c)(4) and (c)(5) as (c)(3) and (c)(4);

d. Revising paragraphs (e)(1) and (e)(2); and

e. Removing paragraph (h)(7).

The revisions read as follows:

§ 1001.7 Pool plant.

* * * * *

(c) * * *

(1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than 10 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month.

(2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month.

* * * * *

(e) * * *

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

(2) Other plants in the unit must process at least 60 percent of monthly receipts of producer milk, including cooperative 9(c) milk, only as Class I or Class II products and must be located in the Northeast marketing area, as defined in § 1001.2, in a pricing zone providing the same or a lower Class I price than

the price applicable at the distributing plant(s) included in the unit; and

* * * * *

3. Section 1001.13 is amended by:

a. Revising paragraph (d)(1)

b. Redesignating paragraph (d)(2) as paragraph (d)(3); and

c. Adding paragraphs (d)(2), (d)(4), (d)(5) and (e).

The revision and additions read as follows:

§ 1001.13 Producer milk.

* * * * *

(d) * * *

(1) Milk of a dairy farmer shall not be eligible for diversion unless one day's milk production of such dairy farmer was physically received as producer milk and the dairy farmer has continuously retained producer status since that time. If a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval), the dairy farmer's milk shall not be eligible for diversion unless milk of the dairy farmer has been physically received as producer milk at a pool plant during the month;

(2) Of the total quantity of producer milk received during the month (including diversion but excluding the quantity of producer milk received from a handler described in § 1000.9(c) or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 80 percent during each of the months of September through November and 90 percent during each of the months of January through August and December. In the event that a handler causes the milk of a producer to be over diverted, a dairy farmer will not lose producer status;

(3) * * *

(4) Any milk diverted in excess of the limits set forth in paragraph (d)(2) of this section shall not be producer milk. The diverting handler shall designate the dairy farmer deliveries that shall not be producer milk. If the handler fails to designate the dairy farmer deliveries which are ineligible, producer milk status shall be forfeited with respect to all milk diverted to nonpool plants by such handler; and

(5) The delivery day requirement and the diversion percentages in paragraphs (d)(1) and (d)(2) of this section may be increased or decreased by the market administrator if 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 either on the market administrator's own initiative or at the request of interested persons if the request is made in writing at least 15 days prior to the month for which the requested revision is desired effective. 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 or delivery day requirement must be issued in writing at least one day before the effective date.

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of another government entity.

4. Section 1001.30 is amended by revising the introductory text to read as follows:

§ 1001.30 Reports of receipts and utilization.

Each handler shall report monthly so that the market administrator's office receives the report on or before the 10th day after the end of the month, in the detail and on prescribed forms, as follows:

* * * * *

5. Section 1001.62 is amended by:

a. Revising the introductory text; and

b. Adding paragraph (h).

The revision and addition read as follows:

§ 1001.62 Announcement of producer prices.

On of before the 14th day after the end of the month, the market administrator shall announce the following prices and information;

* * * * *

(h) If the 14th falls on a Saturday, Sunday, or national holiday, the market administrator may have up to two additional days business days to announce the producer price differential and the statistical uniform price.

6. Section 1001.71 is amended by revising the introductory text to read as follows:

§ 1001.71 Payments to the producer settlement fund.

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than two days after the announcement of the producer price differential and the statistical uniform price pursuant to § 1001.62 (except as provided for in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

* * * * *

7. Section 1001.72 is revised to read as follows:

§ 1001.72 Payments from the producer settlement fund.

No later than the day after the due date required for payment to the market administrator pursuant to § 1001.71 (except as provided in § 1001.90), the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1001.71(b) exceeds the amount computed pursuant to § 1001.71(a). 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 the payments as soon as the funds are available.

8. Section 1001.73 is amended by revising paragraphs (a)(1), (a)(2) introductory text, and (e) introductory text to read as follows:

§ 1001.73 Payments to producers and to cooperative associations.

* * * * *

(a) * * *

(1) Partial payment. For each producer who has not discontinued shipments as of the 23rd day of the month, payment shall be made so that it is received by the producer on or before the last day of the month (except as provided for in § 1000.90) for milk received during the first 15 days of the month at not less than the lowest announced class price for the preceding month, less proper deductions authorized in writing by the producer.

(2) Final payment. For milk received during the month, payment shall be made during the following month so it is received by each producer no later than the day after the required date of payment by the market administrator, pursuant to § 1001.72, in an amount computed as follows:

* * * * *

(e) In making payments to producers pursuant to this section, each handler shall furnish each producer (except for a producer whose milk was received from a cooperative association handler described in § 1000.9(a) or 9(c)), a supporting statement in such form that it may be retained by the recipient which shall show:

* * * * *

Dated: March 17, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

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