

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Parts 1005, 1007, 1011, and 1046****[Docket No. AO-388-A9, et al.; DA-96-08]****Milk in the Carolina and Certain Other Marketing Areas; Tentative Decision on Proposed Amendments To Marketing Agreements and Orders**

7 CFR Part	Marketing area	Docket No.
1005	Carolina .....	AO-388-A9
1007	Southeast .....	AO-366-A38
1011	Tennessee Valley	AO-251-A40
1046	Louisville-Lexington-Evansville.	AO-123-A67

**AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This tentative partial decision proposes, on an emergency basis, amendments to four Federal milk orders in the Southeastern United States. The amendments would establish a transportation credit balancing fund from which to reimburse handlers for the cost of importing bulk milk into these markets for fluid use when milk supplies that are normally associated with these markets are insufficient to meet fluid needs. The amendments also would establish a monthly assessment to maintain the solvency of the fund and a methodology for computation of the transportation credits. The proposed rules are based upon proposals that were considered at a public hearing held May 15-16, 1996, in Charlotte, North Carolina. Producers in the affected areas will have an opportunity to vote on the interim amendments before they go into effect.

**DATES:** Comments must be submitted on or before August 19, 1996.**ADDRESSES:** Comments (4 copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.**FOR FURTHER INFORMATION CONTACT:** Nicholas Memoli, Marketing Specialist, Order Formulation Branch, USDA/AMS/Dairy Division, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 690-1932.**SUPPLEMENTARY INFORMATION:** This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the agency to

examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Agricultural Marketing Service has determined that this rule will not have a significant economic impact on a substantial number of small entities. No new entities will be regulated as a result of the proposed rules and any changes experienced by handlers will be of a minor nature.

The amended orders will promote orderly marketing of milk by producers and regulated handlers by providing transportation credits to assist them in bringing supplemental milk to the market for fluid use. The record of this proceeding indicates that supplemental milk is regularly imported into the Southeastern United States, that the burden of cost for providing this service has been increasing, and that it falls unevenly among the handlers and dairy farmers operating in these markets.

There will be a modest assessment on handlers to provide funds for the proposed new transportation credits, which will be used to reimburse handlers for the costs that they incur, but this assessment will not exceed 6 cents per hundredweight of Class I producer milk. The assessment will be reduced or waived completely once the balance in the transportation credit balancing fund is sufficient to cover the sum of six months' credits. The 6-cent per hundredweight assessment translates to about one-half cent per gallon of milk.

At present, all handlers regulated under the 4 milk orders involved in this proceeding file a monthly report of receipts and utilization with the market administrator. The proposed amendments resulting from this proceeding will only add 2 lines of information to this report. However, only those handlers applying for transportation credits on supplemental milk will have to provide this additional information to the market administrator. The estimated time to collect, aggregate, and report this information, which is already compiled for other uses, is less than 15 minutes per month.

The net impact of the proposed amendments on dairy farmers should be insignificant. Some dairy farmers may experience a reduction in their blend price during the first year that the new rules are in effect. This reduction, which should amount to less than 5 cents per hundredweight, will occur only if the balance in the transportation credit balancing fund is insufficient to cover the current month's transportation credits. Once the fund has been fully endowed, dairy farmers would experience no reduction in the uniform

price as a result of transportation credits.

The preamble of this tentative decision clearly explains to all handlers and dairy farmers in these markets how the new provisions will work. The market administrator will send a copy of this decision to each handler, cooperative association, and nonmember dairy farmer covered by these orders. In addition, the market administrator's office is accessible by telephone for any additional questions that may arise during regular business hours.

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

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

Prior documents in this proceeding:

Notice of Hearing: Issued May 1, 1996; published May 3, 1996 (61 FR 19861).

**Preliminary Statement**

A public hearing was held to consider proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice (7 CFR Part 900), in Charlotte, North Carolina, on May 15-16, 1996. Notice of such hearing was issued on May 1,

1996, and published May 3, 1996 (61 FR 19861).

Interested parties were given until May 28, 1996, to file post-hearing briefs on the proposals as published in the Federal Register and as modified at the hearing. Comments also were requested on whether the proposals should be considered on an emergency basis.

Interested parties may file written exceptions to this tentative decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250 by the 30th day after publication of this decision in the Federal Register. Four 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 material issues on the record of the hearing relate to:

1. Transportation credits for supplemental bulk milk received for Class I use.
2. Deductions from the minimum uniform price to producers.
3. Whether emergency marketing conditions in the 4 regulated marketing areas warrant the omission of a recommended decision with respect to Issue No. 1 and the opportunity to file written exceptions thereto.

This tentative partial decision only deals with Issues 1 and 3. Issue 2 will be handled through normal rulemaking procedures in a forthcoming recommended decision.

#### 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. Transportation Credits for Supplemental Bulk Milk Received for Class I use*

Federal Milk Orders 1005, 1007, 1011, and 1046 (hereinafter referred to as "the 4 orders") should be amended to provide a transportation credit for supplemental bulk milk that is transferred from an other order plant to a pool plant during the months of July through December. A credit also should be provided to those handlers who import supplemental bulk milk for fluid use directly from producers' farms. For plant milk, the credit should be limited to milk that is allocated to Class I and should be computed at a rate equal to 3.7 cents per 10 miles per cwt. or fraction thereof from the transferor plant to the transferee plant. The credit should be reduced to the extent that the Class I price at the transferee plant

exceeds the Class I price at the transferor plant.

In the case of milk received directly from producers' farms, the origination point of a bulk tank truck containing more than one producer's milk should be the city closest to the farm from which the last farm pickup was made. Alternatively, the origination point may be the location specified on a certified weight receipt obtained at an independently operated truck stop after the last farm pickup has been made. The credit should be computed by multiplying 3.7 cents times the number of 10-mile increments between the origination point and the location of the plant receiving the milk, less any positive difference in the Class I prices at the two points under the order receiving the milk.

A transportation credit for bulk milk received from an other order plant for Class I use was proposed by Mid-America Dairymen, Inc., a cooperative association that represents approximately 50 percent of the producers in Orders 5, 7, and 11, and nearly one-third of the producers in Order 46.

A spokesman for Mid-Am testified that: (a) The Southeast states are chronically short of milk for fluid use at certain times of the year and this shortage will be particularly acute during the upcoming summer and fall months; (b) the Federal order Class I pricing structure will not accommodate the movement of milk from surplus markets to deficit markets; (c) the burden of supplying the 4 Southeast markets with supplemental milk for fluid use falls disproportionately on the cooperative associations serving these markets; (d) the Agricultural Marketing Agreement Act provides for "marketwide service payments" to provide for greater equity between producers and handlers supplying a market with supplemental milk during short production months; and (e) therefore, the Secretary should immediately amend the 4 orders effective July 1, 1996, to provide relief to those handlers who will be relied upon to provide supplemental milk to meet the fluid needs of consumers in the area.

The General Manager of Carolina Virginia Milk Producers Association (CVMPA), a cooperative association with producers supplying plants regulated under all 4 orders, testified in support of Mid-Am's proposed transportation credits but stated that the proposal should be expanded to include supplemental milk received directly from producers' farms. The spokesman testified that during the period from July

through December 1995, CVMPA imported more than 19 million pounds of plant milk at a transportation cost of 307 thousand dollars. During that same period, however, CVMPA imported more than 38 million pounds of supplemental producer milk directly from farms at a cost of 528 thousand dollars, he said.

The CVMPA spokesman testified that supplemental milk shipped directly from producers' farms can often be purchased at lower cost than plant milk. He also noted that this farm-shipped milk is often of better quality because it requires less handling. He concluded that the orders should be amended to give handlers the economic incentive to transport milk in the most efficient manner.

A spokesman for Milk Marketing, Inc. (MMI), a cooperative association supplying handlers under Orders 11 and 46, testified in opposition to the Mid-Am proposal as it relates to Order 46. The MMI spokesman stated that MMI opposed the proposal on the basis that over-order charges would be a better method of obtaining reimbursement for the costs associated with importing milk into the market for fluid use. Also, he said that MMI did not support the proposal because it did not provide a transportation credit for bulk supplemental milk shipped directly from producers' farms to plants. However, he said that if the Department should adopt Mid-Am's proposal, it should be expanded to include supplemental milk received directly from producers' farms. Receiving milk in this manner, he explained, would encourage hauling efficiencies, improve milk quality, eliminate pump-over expenses, and reduce product loss due to handling.

Select Milk Producers, Inc., a New Mexico dairy cooperative that provides supplemental milk to the Southeast markets, endorsed the suggestion of CVMPA and MMI to provide transportation credits for farm-to-plant milk as well as plant-to-plant milk.

The Mid-Am proposal also received a qualified endorsement from Fleming Dairy. The spokesman for Fleming, which operates pool distributing plants in Nashville, Tennessee, and Baker, Louisiana, suggested that Mid-Am's proposal be modified to restrict transportation credits to the months of July through October instead of July through December. He also suggested eliminating the provision proposed by Mid-Am that would permit credits during the months of January through June if the Class I utilization during the month is higher than 80 percent.

The Fleming spokesman stated that during the months when transportation credits are in effect, Class III-A pricing in these markets and in the surrounding markets should be suspended. At the present time, he said, the presence of Class III-A pricing in these markets significantly adds to the cost of obtaining supplemental milk because cooperatives and fluid milk processors have to bid this supplemental milk away from butter-powder plants.

A spokesman for Land O' Sun Dairies, Kingsport, Tennessee, Milkco, Inc., Asheville, North Carolina, and Hunter Farms, Charlotte and High Point, North Carolina, also offered constructive criticism of the Mid-Am proposal. The spokesman suggested that handlers seeking reimbursement for transportation costs should be required to show that they, in fact, incurred the cost. If the actual transportation cost was less than the credit provided in the order, a handler should only receive reimbursement for the cost actually incurred. He also questioned whether the proposed 3.9 cents per 10 miles accurately represented the cost of transporting bulk milk and he criticized the proposal for not restricting transportation credits on the movement of bulk milk between the 4 orders involved in this proceeding. Finally, the witness suggested borrowing funds from the producer-settlement fund reserve, instead of the marketwide pool, when the proposed transportation credit balancing fund contains an insufficient balance to cover a month's transportation credits.

Several proprietary handlers testified in opposition to the proposed transportation credits. The president of Southern Belle Dairy, Somerset, Kentucky, stated that handlers make choices in arranging for their milk supplies and the Federal order program should not be called upon to "absolutely level the playing field." He said the proposed 6-cent assessment for the transportation credit balancing fund would put Southern Belle at a competitive disadvantage with its competitors in Indiana, Virginia, West Virginia, and Ohio. He also stated that it will promote inefficient movements of milk by giving regional cooperatives the opportunity to divert regional milk supplies to Florida and then replace those supplies with supplemental milk at handlers' expense. Finally, he criticized the proposal for not including the suspension of Class III-A pricing.

The Director of Milk Procurement for Dean Foods Company, Franklin Park, Illinois, also testified in opposition to the Mid-Am proposal. He said that negotiation between buyer and seller

was the best vehicle to recover costs and that proprietary handlers that purchase all or part of their milk supply from independent producers should not be expected to pay into a transportation pool to assure a milk supply for processors who choose to purchase their milk from a "marketing agency." The proposed amendments, he said, could create false shortages and force fluid processors to make unnecessary payments into a transportation pool for the sole benefit of cooperatives.

The vice president of finance for Holland Dairies, Holland, Indiana, also testified in opposition to the proposal. The witness stated Holland Dairies has developed its own milk supply from independent producers and, as a result, carries the risk of balancing this milk supply during the flush and short seasons of production. He said that while the proposed transportation credits would cost Holland Dairy a considerable amount of money, it would provide no apparent benefit to Holland Dairy. He concluded that suppliers of milk in the Southeast voluntarily chose to do business in that region and should therefore be required to manage their business accordingly.

Briefs. Several briefs were filed following the hearing. A brief from the Kroger Company indicates Kroger's opposition to the transportation credit proposal. Kroger states in its brief that " \* \* \* a temporary situation should not be used as justification for a permanent change in the order which would allow the use of pool money to cover the cost of transportation \* \* \* the current system has worked in the past and will continue to do so in the future."

Holland Dairies, Inc., in its brief, reiterated its opposition to the transportation credit proposal. Holland stated that "it is completely unfair to independent handlers and processors to legislate that they are required to pay into a fund that only a cooperative can draw funds from." (It appears from this statement that Holland has misconstrued the proposal. As proposed, and as adopted herein, transportation credits would be available to any handler that brings supplemental milk into the market. Accordingly, should Holland Dairy run short of milk during the months of July through December, it could import milk from Wisconsin or Michigan, for example, and receive a transportation credit for such milk.)

While conceding that the Southeast has always been in a deficit position, Holland maintains that handlers should pay for supplemental milk through premiums outside of the order. Holland is also concerned that stair stepping of

milk to markets farther south will occur and that normal deliveries should be excluded from receiving a transportation credit.

Holland also argues in its brief that handlers should have a choice of buying milk from a cooperative association or from independent producers. It states that the proposed transportation credits would eliminate this choice.

Holland contends that Order 46 should not be part of the proposed transportation credit because it is far removed from deficit areas in Georgia and Florida. Finally, it states that if a transportation credit is implemented, it should not apply for the first 250 miles.

A brief filed on behalf of the Fleming Company states that the proposed transportation credits are compellingly supported by the evidence in this proceeding. Fleming, however, reiterates its suggestion that the credits be limited to the months of July through October and suggests a further limitation based upon mileage or source of supply. The handler again expresses a concern about Class III-A pricing and suggests that it be suspended when supplemental milk is needed in the Southeast. Fleming urges the Secretary to act on an emergency basis to adopt the proposal.

A brief was also filed on behalf of Land O' Sun Dairies, Milkco, Inc., and Hunter Farms. The plants of these handlers are regulated under Orders 5 and 11.

These handlers note in their brief that "the record discloses a disturbing trend in raw milk production and fluid consumption in the Southeastern United States \* \* \* raw milk production has not been keeping pace with consumption in the Southeast." While desiring to maintain a local dairy industry in the Southeast, they recognize that "some considerations must be made for obtaining fluid milk supplies from non-local sources when that milk is needed."

The brief of these handlers indicates that they are not opposed to adoption of a modified transportation credit proposal. They are concerned, however, that the provision not be abused. For this reason, they offer several suggestions to prevent abuse. One suggestion is to exclude bulk shipment of milk between the 4 orders from receiving any transportation credits. (This suggestion has been adopted in this decision.)

Another suggestion of these handlers is to establish historical movements of milk from these 4 orders to the 3 Florida orders. If a handler or a cooperative association shipped anything more than these historical shipments to Florida

and, at the same time, imported milk into the market from which these Florida shipments originated, the new or replacement milk would not qualify for a transportation credit.

These 3 handlers state that they are opposed to a provision in the Mid-Am proposal that would permit transportation credits during the months of January through June if a market's Class I utilization exceeds 80 percent. The basis for their opposition, according to their brief, is that some parties may try to manipulate the Class I utilization in one or more of these markets, causing some handlers to pay an assessment for transportation credits while their competitors in one or more of the other 4 markets involved in this proceeding do not.

Taken to its logical conclusion, the position of these 3 handlers seems to be that this provision should be administered as if the 4 separate markets were, in fact, one market. This would have to be so because the only way that the assessment for the transportation credits can be uniform among the 4 individual orders is if the transportation credits given out each month are proportionately the same in each market. It is unlikely that this will be the case since the Class I utilization does vary among the 4 markets. It is conceivable that during some months Orders 5, 7, or 11 may need supplemental milk, while Order 46 may not. Thus, transportation credits and assessments for transportation credits would be applicable under Orders 5, 7, and/or 11, but not Order 46.

The 3 handlers also state that transportation credits should not apply for the first 100 miles of shipment and that the credit should be something less than the proposed 3.9 cents per 10 miles. They also suggest borrowing money from the producer-settlement fund reserve, rather than the producer-settlement fund itself, when transportation credits exceeds the available funds in the transportation credit balancing fund. In support of this idea, they state that local milk production has suffered enough and payments to producers should not be reduced further by taking money out of the producer-settlement fund.

The brief of the 3 handlers supports the proposal of CVMFA to allow farm-to-plant supplemental milk to qualify for a transportation credit. However, they suggest limiting this milk to dairy farms located outside of the 4 marketing areas.

Finally, the 3 handlers express their concern about the possible exclusion of Order 46 from the transportation credit proposal. If this were to happen, they

state, it would disrupt the competitive relationship among competing handlers in Orders 5, 11, and 46.

A brief was received on behalf of Select Milk Producers (SMP), a cooperative association based in Artesia, New Mexico. The brief states that SMP expects to market milk in the Southeast marketing area in the fall of 1996 and therefore requests that transportation credits be extended to farm-to-plant milk as well as to plant-to-plant milk.

SMP states that they concur with MMI's suggestion regarding the application of transportation credits for farm-to-plant supplemental milk. SMP suggests that supplemental milk be defined as milk that was not associated with any of the 4 markets during the prior months of January through July.

Southern Belle Dairy, Somerset, Kentucky, reiterated their opposition to the transportation credit proposal for Order 11 in its brief. Southern Belle states that it bears the full cost of its milk supply and that it has made private arrangements to solve any problem that might arise. It also contends that the proposal would reduce their competitive relationship vis-a-vis handlers in other markets and that the Tennessee Valley order does not need the transportation credits. Finally, it states that Florida is an integral part of the deficit problem in the Southeast and, accordingly, should be included in the solution to the problem.

Southern Belle concludes that the proposed transportation credits are simply a money-shifting scheme whereby dairies such as itself that have developed an independent supply of milk over a long period of time will be forced to subsidize other dairies who have not invested in these relationships which would ensure a steady supply of milk.

Gold Star Dairy, Little Rock, Arkansas, also filed a brief in opposition to the proposed transportation credits. This handler maintains that there is no need for supplemental milk in the western part of the Southeast market, and that, in those parts of the marketing area where supplemental milk is being brought in, cooperatives are now being compensated through over-order charges.

Gold Star argues that it has little in common with plants in the eastern part of the marketing area; it does not share a common supply area with them; it is only technically part of the Southeast market because it is within the defined marketing area; it is already paying for marketwide services through over-order charges; and that if, notwithstanding these arguments, the Secretary should adopt the proposed transportation

credits, the assessment to fund the credits should not be based on Class I sales made outside the marketing area.

In its brief, Carolina-Virginia Milk Producers Association offers several suggestions for implementing its modified proposal, which would provide transportation credits for supplemental milk supplied to the market directly from producers' farms. The cooperative supports a prohibition on credits for milk moving between the 4 markets, as well as the proposed hauling rate of 3.9 cents per 10 miles. CVMFA also endorses a suggestion made at the hearing to borrow funds from the producer-settlement fund reserve, rather than the producer-settlement fund itself, when there are insufficient funds in the transportation credit fund to cover a current months' credits. It states that the reserve fund could be paid back in future months for the money that is borrowed.

With respect to the mechanics of providing transportation credits for farm-to-plant milk, CVMFA suggests defining "supplemental milk" as the milk of dairy farmers which is pooled only during the period of market shortage. Specifically, it suggests that transportation credits not be available to a dairy farmer who was a producer on any of the 4 markets "for more than 35 days during more than 8 months in the previous July-June period."

To determine the origination point for farm-to-plant milk, CVMFA suggests using the county courthouse closest to the farm of the last producer whose milk is on the load. It also suggests subtracting any positive difference between the Class I price at the receiving pool plant and the Class I price at the origination point in computing the net transportation credit. This treatment would make the transportation credit computation virtually identical for transfers of plant milk and direct farm-to-plant deliveries.

Finally, CVMFA suggested the requirement that receiving handlers provide the market administrator with a list of the producers for whom transportation credits are requested.

Milk Marketing, Inc., filed a brief reiterating its opposition to the transportation credit proposal for Order 46 only. It maintains that over-order pricing is the best method for handling additional costs associated with importing milk to the market for fluid use. MMI states that if the Department should nevertheless adopt a transportation credit provision for Order 46, the provision should include an extension of the credit to cover supplemental milk shipped directly from farm to plant. Several of the

safeguards mentioned in the brief are similar to those already described with respect to CVMFA's brief.

Mid-America Dairymen, Inc., submitted a lengthy brief setting forth the historical background for the hearing, pertinent facts and figures brought out in the hearing record, the legislative history for the marketwide service payment provision contained in the Agricultural Marketing Agreement Act, a review of past agency decisions concerning transportation credits, and a comprehensive review of the arguments supporting its proposal.

Several points brought out in Mid-Am's brief are particularly noteworthy and should be emphasized. Mid-Am points out once again that a disproportionate share of the supplemental milk that is brought into the Southeast markets is brought in by the cooperative associations serving these markets. It argues that the costs incurred in importing this milk cannot simply be passed on to their customers because it would put these customers at a competitive disadvantage with other handlers who are fortunate enough to have adequate supplies of locally-produced milk to meet their needs.

Mid-Am contends that the cost of supplying these markets with surplus milk puts their member producers at a disadvantage compared to non-member producers who do not share in this cost. The cooperative also points out that when these markets are short of milk, it shuts down its manufacturing plants, which adds to its cost. It notes, for instance, that during the months of July through December 1995, it shut down its facilities in Louisville, Kentucky, Lewisburg, Tennessee, and Franklinton, Louisiana.

In its review of the legislative history of the Food Security Act of 1985, the foundation for the marketwide service provision in § 608c(5)(J) of the Act, Mid-Am notes that Congress sought to achieve equity between producers or handlers who bear service costs that benefit the market and those who do not. It included an excerpt from one of the committee reports (reprinted at 1985 U.S. Code Congressional and Administrative News 1103), which appears to be particularly relevant to the proposal at hand. It reads: "\* \* \* At the moment, there are three major problems with respect to the operation of the Federal order systems: (1) minimum Federal order Class I prices are not adequate to attract the necessary supply to meet the Class I needs in deficit areas; (2) handlers who must go outside their territory to acquire additional milk incur greater costs for milk than handlers who obtain all of their milk

from the local area; and (3) those producers who assume the responsibility of supplying the needs of the market have to pay the cost of transporting supplemental milk, resulting in producers not receiving uniform prices." Mid-Am argues that its proposal for transportation credits conforms to the equity-promoting goals described in the legislative history.

Mid-Am also argues that its proposal conforms with past agency decisions. Among many quotes included in its brief is the following from a final decision issued October 8, 1987, incorporating permanent transporting credits in the Chicago Regional order (52 FR 38240): "\* \* \* a major purpose of the order program is to assure an adequate supply of pure and wholesome milk for the fluid market and to establish and maintain orderly marketing conditions. This includes adopting order provisions to facilitate securing adequate supplies of milk to meet the market's fluid needs. The record shows that obtaining adequate milk for those needs is not being accomplished in an orderly and equitable fashion under the current order provisions."

Mid-Am states that the suggested modifications of MMI and CVMFA to provide transportation credits for farm-to-plant milk should be given favorable consideration by the Secretary. It urges the Secretary to incorporate appropriate safeguards, however, to ensure that no artificial economic advantage is created for supplies that are not normally associated with the market.

Mid-Am notes that the supply/demand situation in the Southeast has become particularly acute in recent months. It emphasizes that the shortage this summer and fall will likely be even worse than in 1995, pointing to reduced production during the first 4 months of 1996, compared to a year earlier, especially in Tennessee and Kentucky, 2 important supply areas for the Southeast. It also notes that the Olympic Games that will be held in Atlanta this summer will likely increase consumer demand for fluid milk. It urges the Secretary to issue an expedited decision that would allow the transportation credits to be effective by July 1, 1996.

Conclusion. Testimony and exhibits introduced at the hearing indicate that the Southeastern United States has a chronic shortage of milk for fluid use in the summer and fall months, which often extends into the winter months. This shortage has been worsening over time as milk production has declined and population has increased, and this trend is likely to continue, exacerbating the problem of obtaining a sufficient

supply of milk for fluid use in an orderly and equitable manner. Under current arrangements, the costs of obtaining an increasing supply of supplemental milk are not being borne equally by all handlers and producers in each of the 4 orders. The service provided by handlers, particularly, cooperative associations, in obtaining sufficient supplies of milk is a service of marketwide benefit for which the Secretary is authorized to include provisions in Federal milk orders to compensate handlers. The record of this hearing demonstrates that disorderly marketing conditions exist because of the significantly different costs that are incurred by handlers who provide the additional service versus those who do not. The increasing magnitude of the disproportionate sharing of costs is jeopardizing the delivery of adequate supplies of milk for fluid use. Thus, the record justifies the adoption of these provisions to restore stability and order in providing adequate supplies of milk for fluid use for Orders 5, 7, 11, and 46, as explained below.

Data in the record of this hearing show that the area covered by Orders 5, 7, 11, and 46 is a highly seasonal, deficit milk production area. As shown in Table 1, milk production in the 12 Southeast states of Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, and West Virginia has fallen from 15.4 billion pounds in 1988 to 14.5 billion pounds in 1995. Based upon this trend, production in the year 2000 is expected to be 13.1 billion pounds.

TABLE 1.—MILK PRODUCTION AND POPULATION IN 12 SOUTHEASTERN STATES 1988–2010

Year	Population	Production (lbs.)
1988 .....	57,961,000	15,432,000,000
1989 .....	58,732,000	15,356,000,000
1990 .....	59,266,000	15,505,000,000
1991 .....	60,265,000	15,362,000,000
1992 .....	61,090,000	15,499,000,000
1993 .....	61,926,000	15,310,000,000
1994 .....	62,767,000	14,994,000,000
1995 .....	63,573,000	14,554,000,000
2000 .....	66,876,000	13,114,000,000
2005 .....	70,471,000	11,603,000,000
2010 .....	74,066,000	10,092,000,000

Source: Population—U.S. Bureau of the Census.

Milk Production—*Milk Production*, NASS, USDA, Washington, DC.

The bar graph below compares quarterly production in the 12 Southeastern states during the past 4 years. It shows that quarterly production is down from the previous year's quarter

for the past 4 years. The graph also shows that not only has production decreased for 4 consecutive years, but that such decreases have occurred at an

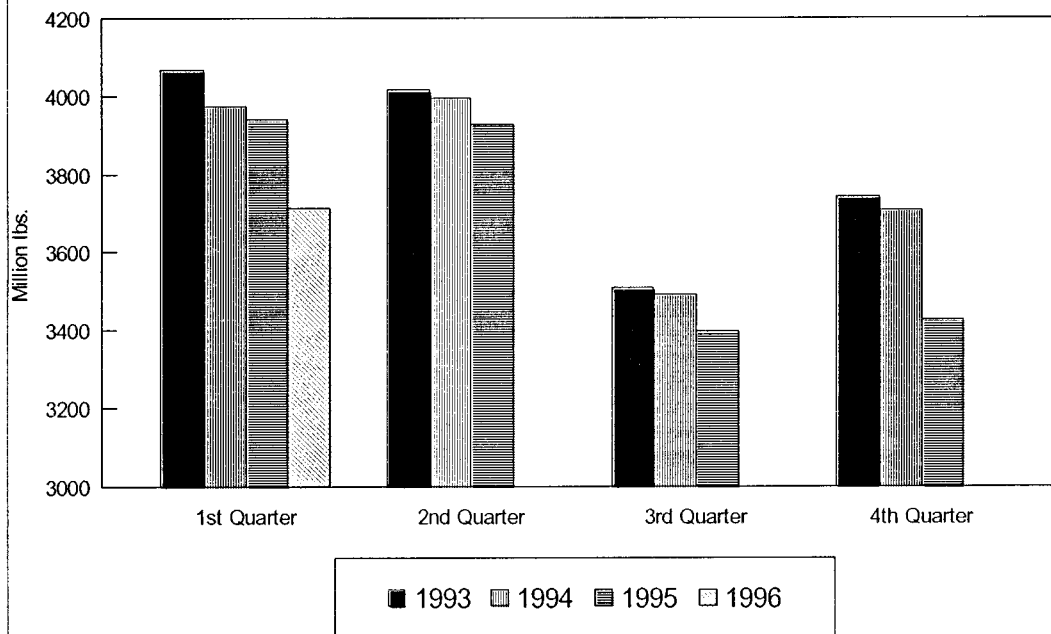
accelerating rate. Furthermore, the graph demonstrates that the degree of seasonality between the relatively flush

and short production months has also been increasing.

**BILLING CODE 3410-02-P**

## Milk Production for 12 Southeastern States\*

1993-1996



\* Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia

Source: Milk Production - Milk Production, NASS, USDA, Washington D.C.

While production in the Southeast has been declining, the population of this area has been rising. As shown in Table 1, the population of the 12 Southeastern states rose from 57.9 million in 1988 to 63.5 million in 1995. By the year 2000, population is expected to reach 66.8 million.

Data in the record indicates that the per capita consumption of all dairy products in the 12 Southeastern states has grown in the past 7 years, from 568 pounds (milk equivalent) per capita in 1988 to 582 pounds in 1995. Conservatively estimating no growth in the per capita consumption of fluid milk products in the next 10 years, the deficit in Southeast milk production will grow significantly based upon population growth alone. According to Census Bureau data, 16 states will gain more than 1 million persons by the year 2020; 7 of these states are covered at least in part by the milk orders involved in this proceeding. There clearly is no question concerning the continuing—and, in fact, growing—need to import supplemental milk into the Southeastern United States for fluid use.

The record shows that the production decline and the population increase has resulted in an increasing Class I utilization in these 4 markets. During the period from April 1995 to April 1996, producer milk pooled under the 4 orders decreased by 42 million pounds. At the same time, the Class I utilization of producer milk under the 4 orders increased by almost 13 percentage points to 77.5 percent. It undoubtedly would have increased even more except for the fact that the milkshed continues to expand in a northerly and westerly direction to more and more distant farms. In this regard, it should be noted that milk has been regularly flowing into the Southeast markets from Texas and New Mexico, and there are indications that such shipments will start sooner than ever this summer.

These markets are tightest during the late summer and fall months. The Class I utilization reached 86.1%, 85.5%, 83.7%, and 80.2% in Orders 5, 7, 11, and 46, respectively, during August 1995. This compares to 84.0%, 83.3%, 85.1%, and 73.8%, respectively, one year earlier. Percentages of this magnitude indicate a very tight market situation when taking into consideration the bottling schedule of fluid milk plants, the desire of handlers to make some Class II products locally, and the unavoidable need to process some local milk into storable manufactured products, particularly on weekends when it is not needed for fluid use.

It is impossible to reveal precisely the total amount of supplemental milk

needed by these markets because of restrictions on the release of confidential data (i.e., data represented by less than 3 handlers). In addition, much of the supplemental milk that is needed entered these markets directly from the farms of dairy farmers who are not regular suppliers of these markets. With these shortcomings taken into consideration, market administrator data entered in the record for Orders 5, 11, and 46 show that bulk receipts of other order milk for Class I use increased from 13.1 million pounds in 1993 to 49.6 million pounds in 1995. For these 3 markets, the data also show that first quarter receipts of bulk other order milk for Class I use is running at more than 10 times the level of 1995.

It is difficult to compare similar data for Order 7 to earlier periods because several markets were merged into the present Southeast marketing area in July 1995. Thus, shipments which formerly would have been other order bulk transfers are now transfers between pool plants within the order. Nevertheless, treating the merged order as if it were still 5 separate orders and comparing the other order bulk receipts for Class I use in 1995 to 1993 indicates a more than twofold increase in such receipts.

Data entered into the record by Mid-Am shows that during the months of July through December 1995 more than 100 million pounds of other order bulk receipts were transferred into Orders 5, 7, 11, and 46. According to Mid-Am, the cooperative also brought in supplemental producer milk on a direct-ship basis. The record data also show that while Mid-Am represents 47 percent of the producer milk pooled under the 4 markets, it accounted for more than 70 percent of the other order bulk milk that was brought into these markets during the months of July through December 1995.

Exhibits entered by CVMFA show that the cooperative imported more than 19 million pounds of other order plant milk during the months of July through December 1995, while at the same time bringing in more than 38 million pounds of supplemental milk directly from producers' farms. The exhibits show that the transportation cost for these supplemental purchases were nearly one million dollars.

A detailed breakdown of Mid-Am's interorder transfers during the months of July and August 1995 shows the location of the transferor plant and the transferee plant, the mileage between the two plants, the total cost of hauling the milk, and the freight rate broken down into 10-mile increments. During July and August 1995, the exhibit shows

that the average hauling cost for this milk was 3.7 cents per 10 miles.

The Mid-Am spokesman testified that Mid-Am was proposing a hauling credit of 3.9 cents per 10 miles due to increasing fuel costs in recent months, justifying a slightly higher credit.

After carefully reviewing the record testimony and data, it is concluded that a transportation credit for supplemental milk during the seasonally short period of July through December is fully justified for this year's milk shortage and on a continuing basis, as needed, for future years. Such a credit will restore market order and provide the opportunity for all handlers to bring in supplemental milk when needed for fluid use.

While handlers opposed to the incorporation of these credits in the orders argue that reimbursement for transportation costs should be handled outside the order, experience has shown that this is not always possible. The absence of reimbursement for the costs of providing supplemental milk by cooperatives in this area last summer and fall demonstrate very well what can happen in a competitive market situation. Over-order pricing does not always ensure either stability or uniform costs among handlers. Also, premiums can disappear as quickly as they are introduced even when markets are desperately short of milk because of the pressure to maintain uniform costs among competing handlers.

Over-order pricing has been used in these markets in the past to equalize costs among handlers, but the industry was much different than it is today. There are now far fewer, but larger, fluid processing plants operating in these markets, creating daily and weekly demands to which the market's suppliers must react. On the supply side, the number of cooperative associations has decreased dramatically in the last decade. Consequently, only a few organizations are incurring costs in providing balancing services for these markets and the amount of milk being handled is far greater than the quantity of milk handled by any single cooperative in prior years. For this reason, it is imperative that the cooperatives and handlers providing balancing services for the benefit of the entire market be fairly compensated for these costs to ensure that an adequate supply of milk is available for fluid use.

In fact, the current market is not meeting the standard of orderly marketing. Markets which, at times, are short of milk must have some structure to provide for sharing the costs in the movement of supplemental milk to processors. Otherwise, orderly



marketing conditions can deteriorate and all handlers will not be competing for a supply of milk on an equal footing.

Under current market conditions, producers supplying these markets are also negatively affected. Producers who are members of cooperative organizations incurring the costs of supplemental milk are forced to bear the costs unfairly relative to nonmember producers.

The Agricultural Marketing Agreement Act recognized that disorderly markets can occur in a market when there are no standards which all segments of the market must satisfy. In this case, such standards must apply to all milk supplied to the regulated market. When the market fails to provide this equity, it becomes necessary for the order structure to provide the system.

As indicated, over-order premiums may be used to serve this purpose. This record clearly indicates, however, that such is not the case in these markets. The record, in fact, clearly indicates that the supplemental milk supplies, as they are currently being handled, are creating disorder. It is, therefore, proper that the regulations be amended to restore order to the system by equitably allocating the costs associated with obtaining supplemental milk supplies.

The adoption of transportation credits will enable handlers to make decisions involving supplemental milk supplies with a greater degree of certainty and be assured that the equity required by the Act is provided.

Congress recognized the inequities that can and do occur in supplying markets with supplemental milk and provided the Secretary of Agriculture with certain tools to handle these problems. The record of this hearing clearly demonstrates a need for these remedies in the 4 orders involved in this proceeding. Moreover, the production and population statistics justify the incorporation of these tools on a permanent basis so that they can be used when needed. The alternative approach, which some handlers appear to favor, is to hold a hearing and temporarily amend the orders each time a crisis occurs. However, as last fall's crisis demonstrated, it is very difficult to hold hearings and amend orders after these problems already have occurred. It is much better to anticipate the problems and have provisions that can be used as needed. Accordingly, the permanent incorporation of provisions to facilitate the importation of supplemental milk to these deficit markets is the most prudent course of action to follow and is fully supported by the record of this hearing.

The amendments adopted in this tentative decision are similar to those proposed by Mid-Am, but also differ in several respects. First, the transportation credits should be limited to the months of July through December. It should not include other months when the Class I utilization is over 80 percent because handlers would not know until after the month is over whether or not they would be eligible for a transportation credit on bulk milk brought into the market.

A better approach during the months of January through June would be to simply give the market administrator the authority to expand the transportation credit period if market conditions indicate that producer milk for Class I use will be in short supply and the marketwide Class I utilization is likely to exceed 80 percent. The market administrator is in an excellent position to review such a request, which should be made in writing at least 15 days prior to the beginning of the month for which it is to be effective.

Upon receiving a request to extend the transportation credit period, the market administrator will notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, views, and arguments. The market administrator's notice to interested parties also may invite comments on other remedies that may be available including, but not limited to, an increase in the supply plant shipping percentage as provided in §§ 1005.7(b), 1007.7(f), and 1011.7(b)(4) and, in the case of Order 7, the desirability of adjusting diversion limitations as provided in § 1007.13(d)(9). Any decision to extend the transportation credit period must be issued in writing prior to the first day of the month for which the extension is to be effective.

The provisions adopted in this decision also differ slightly from Mid-Am's proposal with respect to plant-to-plant shipments that are eligible for transportation credits. As proposed by Mid-Am, Class I bulk transfers from any other order plant would qualify for transportation credits. As adopted in this decision, however, the credits are limited to plants that are outside of the marketing areas of Orders 5, 7, 11, and 46.

There was a great deal of concern expressed at the hearing about "stair stepping" milk from one market to another. For instance, if milk from Order 11 was transferred to Order 7 while at the same time supplemental milk was brought into Order 11 from Order 46, handlers in Order 11 conceivably could be contributing funds

to replace milk that, if not sent to Order 7, would have been available to Order 11 handlers.

This issue can be quite complex, particularly in large markets, such as the Southeast market. It may very well make economic sense to ship surplus milk from one part of a market (for example, southern Louisiana in the Order 7 marketing area) to another market that is short of milk (for example, the Upper Florida market) while during the same day bring in bulk milk for a handler in another part of the marketing area (for example, Fleming Dairy in Nashville) from another order plant (other than from one of the 4 orders involved in this proceeding). Given the order's current pricing structure, it is unrealistic to expect milk from southern Louisiana, where the Class I differential price is \$3.58, to be shipped north to Nashville, where the Class I differential price is \$2.55.

The attached order amendments place no restriction on the the interorder shipment of milk among the 4 markets, but they do not provide transportation credits for such shipments. The record of this hearing supports a restriction of credits to milk that is truly supplemental to the market. For this reason, transportation credits should be restricted to bulk shipments from plants outside of these 4 marketing areas. Data and testimony in the record indicate that nearly all of the supplemental milk needed for these 4 markets comes from plants located outside of the 4 marketing areas anyway, so that the restriction should not be a major problem for handlers in locating supplemental milk. Moreover, handlers may still obtain plant milk from within the 4 orders; they simply would not be able to get a transportation credit for such milk.

Another departure from the original Mid-Am proposal concerns the milk eligible for the transportation credit. It was apparent from hearing testimony and briefs that other cooperatives operating in these markets are more apt to supply the market with supplemental milk on a direct-ship basis rather than transferring milk from an other order plant. Such cooperatives include CVMPA, MMI, and Select Milk Producers. The testimony was convincing that permitting a credit on such imports would be more equitable to those organizations that are unable to import plant milk, would promote efficiencies in bringing supplemental milk directly from producers' farms, would result in better quality milk because unnecessary pumpovers are eliminated, and would result in less milk lost due to reduced handling.

While the inclusion of farm-to-plant milk is a logical extension of the transportation credit concept, there are some practical problems to overcome in implementing such a provision. One of the first problems that arises in constructing a transportation credit on farm-to-plant milk is distinguishing a market's regular producer milk from its supplemental producer milk on which the credit would apply.

A primary consideration in distinguishing the market's regular producers from the supplemental producers is the location of producers' farms. It is reasonable to conclude that the markets' regular producers are located reasonably close to the plants receiving their milk. Thus, such producers' farms are likely to be within the geographic marketing areas defined in each order. Accordingly, transportation credits should not apply to any producer whose farm is located within any of the 4 marketing areas. This provision was suggested by MMI and should be adopted.

Not all of the pool distributing plants regulated under these orders are located within the defined marketing areas. For example, a pool distributing plant regulated under Order 5 is located in Lynchburg, Virginia, which is outside of the Order 5 marketing area. In such a case, some other location criteria is needed to distinguish a regular producer from a supplemental producer.

In its suggested language, MMI proposed restricting supplemental producers to those who are more than 85 miles from Louisville or Lexington, Kentucky, or Evansville, Indiana. This proposal should be adopted but expanded to cover all pool distributing plants within or outside of the 4 marketing areas. In other words, farm-to-plant milk that is eligible for a transportation credit must be produced on a farm that is outside of the 4 marketing areas and at least 85 miles away from the plant to which the milk is delivered.

In addition to considering the geographic location of a dairy farm for the purpose of determining whether milk from that farm is supplemental to a market's needs, attention should be focused on whether milk from that farm is regularly associated with the market or is shipped to the market as needed.

As noted earlier, MMI in its brief stated that transportation credits should not apply to the milk of a dairy farmer who was a producer under Orders 5, 6, 7, 11, 12, 13, or 46 during more than 8 months in the previous July through June period or if more than 32 days' production of the producer was received as producer milk under these orders

during the entire 12-month period. CVMPA's brief contained a similar proposal but did not include Orders 6, 12, and 13 (the 3 Florida orders) and specified 35 days' production, rather than 32, for the prior 12-month period.

These proposals should not be adopted. As proposed, if a dairy farmer was a producer on one of these markets for more than 8 months in the previous July through June period, the dairy farmer could not be considered as a supplemental producer under another one of the 4 markets. For example, if a dairy farmer from Texas was a producer under Order 11 during the months of January through September 1996, that dairy farmer would be ineligible to receive a transportation credit under Order 7 in October 1996, even though the dairy farmer's farm meets the location criteria set forth in this decision for a supplemental producer and the dairy farmer was never previously associated with Order 7.

It is questionable whether the provisions of one order should be based on a dairy farmer's association with another order. Each order should stand on its own. Accordingly, the determination as to whether a producer is regularly associated with a market or is, in fact, only seasonally associated with the market should be based on the dairy farmer's association with that market alone.

Since the need for supplemental milk generally drops off sharply after the month of December—1996 being an exception—in all of these markets and does not reappear, usually, until the month of July, it is reasonable to conclude that the milk of a producer who is located outside of any of these marketing areas generally would not be needed during the months of January through June, but might be needed starting in July. It is also logical that the milk of a supplemental producer would not be needed each day but perhaps once or twice a week. Accordingly, if a dairy farmer was a regular supplier of the market during January through June—i.e., a "producer" on the market for more than 4 of those months—the milk of such a dairy farmer should not be considered supplemental milk during the following months of July through December. It would be unduly restrictive to disqualify a dairy farmer for shipping a limited amount of milk during one or two months of the January through June period, however, because even the months of January and June can be short months in the Southeast. Therefore, the provision should be flexible enough to accommodate some shipments to the market during the January through June period.

Specifically, a dairy farmer should not lose his/her status as a supplemental producer if his/her milk is shipped to a market for not more than 2 months of the January through June period.

However, shipments during this period should be of a limited duration, so not more than 32 days' production may have been received as producer milk during the two months of the January through June period in which the dairy farmer was a producer on the market.

Having established the criteria to distinguish a supplemental producer from a regular producer, attention must now focus on the provisions needed to establish the transportation credit for farm-to-plant supplemental milk. The first question that arises in this regard is the determination of the origination point for the load of milk. Two problems arise. First, there may be more than one dairy farmer's milk on the truck. Second, even if a dairy farmer can fill up an entire truck with milk, his or her farm may be impossible to pinpoint on a map.

This decision adopts two alternatives to determine the origination point for a load of farm-to-plant milk. First, after filling the tank truck with farm milk, the hauler may elect to stop at an independently operated truck stop to obtain a certified weight receipt identifying the truck, the gross weight of the loaded truck, the time and date, and the location of the truck stop. This certificate would be turned over to the pool plant operator receiving this load of milk and, in turn, be made available to the market administrator for verification of the information. Truck stops with scales are commonly found along major highways and in small towns and cities. Thus, it would be neither time-consuming nor expensive to fulfill this requirement.

Alternatively, if the hauler does not obtain a certified weight receipt to establish an origination point, the market administrator will determine the location of the farm of the last load of milk that was added to the truck, locate the nearest city, and compute the mileage from that city to the receiving pool plant for purposes of determining the mileage. If this alternative understates the mileage involved to the plant, the hauler can easily obtain a certified weight receipt if that would result in a more accurate transportation credit.

Traditionally, provisions in Federal milk orders have used the county courthouse as a basing point to determine mileage. In their briefs, MMI and CVMPA suggested using the county courthouse closest to the farm of the last producer on the route to establish the

origination point for a load of farm-to-plant milk. The reason for not adopting this suggestion is that there are now more precise ways of measuring the mileage between various points using any of several computer mapping programs that are available in addition to more traditional standard highway mileage guides that are available to the market administrator. By specifying "city" rather than "county courthouse," in conjunction with providing the option of establishing location based upon a certified weight receipt, we hope to achieve greater precision in establishing the mileage between the last producer's farm and the plant to which the milk is delivered.

This decision adopts the proposed transportation credit balancing fund concept proposed by Mid-Am, as well as a monthly assessment on Class I milk to provide revenue for the fund. It differs from the proposal, however, in using the higher of the hauling credits distributed in the immediately preceding 6 months or in the preceding July–December period for purposes of determining the current month's assessment level in § 100X.81(a). This was done to ensure that the fund will have a sufficient balance to meet the markets' needs when credits start to be distributed in the month of July. As proposed by Mid-Am, if no credits were distributed during the months of January through June, no new assessment would be warranted. Therefore, the yardstick to measure the assessment level would begin to decline in January and, if no new credits were given out, would be zero by July. This depletion of the fund could jeopardize its usefulness and require the market administrator to transfer funds for transportation credits from the producer-settlement fund.

This should only be done as a last resort. It will be less likely to occur by using the alternative yardstick approach adopted in this decision for determining the minimum balance needed in the transportation credit balancing fund.

The market administrator is authorized to maintain the transportation credit balancing fund, deposit assessments into it, and distribute transportation credits from it. Payments due from a handler will be offset against payments due to a handler.

The use of a transportation credit balancing fund will permit assessments that are needed for the transportation credits to be spread out throughout the year. This will permit the assessment rate to be kept at a lower and more stable level. It will also allow handlers to reflect the assessment in their pricing

plans. At the maximum level permitted, the 6-cent assessment represents about one-half cent of the raw product cost of a gallon of milk.

In its brief, Gold Star Dairy suggested exempting from the assessment Class I sales made outside of the 4 marketing areas. This suggestion should not be adopted. While such an exemption might put Gold Star in a more favorable position with competitors in other markets, such as the Texas marketing area, it would not be fair to those handlers with whom Gold Star competes in the Southeast marketing area, its primary sales territory. Moreover, if supplemental milk is brought into any one of the 4 markets to supply a handler, there is no reason why that handler should not bear its fair share of the transportation costs for such milk, regardless of where the handler may eventually sell it.

The market administrator will announce the assessment for the transportation credit balancing fund on the 5th day of the month preceding the month to which it applies. Accordingly, on the 5th day of December, the assessment would be announced for January. An exception to this rule should be made during the first month that transportation credits are in effect because otherwise all of the first month's transportation credits would have to come out of pool funds. Accordingly, for the first month that these rules are in effect, the assessment for the transportation credit balancing fund will be announced no later than the Federal Register publication date of the interim order amending the orders. For example, if the interim order amending the orders is published on July 1, 1996, handlers will be notified of the assessment for July on, or a few days before, that day. On July 5, handlers will be notified of the assessment for August.

For the first 3 months that these amendments are effective, the assessment for the transportation credit balancing fund should be 6 cents per hundredweight. It is necessary to specify a rate in Section 81(c) of the attached orders because there is no 6-month credit distribution history from which to determine it, as provided in paragraph (a) of Section 81.

It is possible that during the first year that these provisions are in effect, and possibly thereafter under unusual conditions, it may be necessary to transfer funds from the producer-settlement fund to pay the transportation credits that are distributed. Transferring funds from the producer-settlement fund will result in lower uniform prices to producers. For this reason, several parties suggested,

instead, borrowing from the producer-settlement fund reserve and paying back the reserve fund in future months from transportation credit assessments that are collected.

The market administrator maintains a producer-settlement fund (psf) reserve equal to approximately 4–5 cents per hundredweight of producer milk in the pool. This reserve is used to pay audit adjustments and other unforeseen expenses.

The suggestion to borrow from the reserve is no doubt well-intentioned, but the alternative of transferring funds from the psf itself is the better approach for several reasons.

First, the reserve fund is maintained as a cushion to provide ready cash for audit adjustments and other unforeseen expenses that arise. Depleting this reserve to pay for transportation credits, even for a temporary period of time, would not be prudent.

Second, we appreciate the concerns of those who do not want to reduce the blend price to producers to pay for transportation credits, but we believe that this transfer of funds may only be necessary during the first year that this provision is in effect. Thereafter, there should be adequate funds in the transportation credit balancing fund to pay for future transportation credits.

Third, by transferring funds from the psf, rather than borrowing the funds from the psf reserve, it will not be necessary to postpone the disbursement of credits, as might be necessary under the alternative approach suggested by Milkco and others. To the extent that reimbursement for transportation expenses is postponed, certain handlers will be disadvantaged relative to others who did not incur such expenses.

Finally, by transferring funds from the psf, rather than borrowing the funds from the psf reserve, producers will be sharing with handlers the cost of supplying the market with supplemental milk. This will help to minimize the assessment to handlers during months when transportation credits are not needed because the current month's assessments will not be used to pay back funds borrowed from the psf reserve for prior months but, instead, will be used to pay only current months' credits or to build up the transportation credit balancing fund for future months.

At this hearing, concern was once again expressed about the difficulty of obtaining supplemental milk when the Class III–A price is allegedly providing a profitable market for manufacturers of nonfat dry milk. A proposal was made to suspend Class III–A pricing while transportation credits are in effect.

As noted earlier, Mid-Am testified that it shut down its butter-powder plants in these 4 markets during the months of July through December 1995. Therefore, to the extent that handlers were competing with butter-powder plants for supplemental milk, it was not supplemental milk in these 4 markets.

The proposal to suspend Class III-A pricing in other markets goes beyond the scope of this hearing. Therefore, the proposals to suspend such pricing must be denied.

Several handlers criticized the proposed transportation credits for not including the Florida markets. They argued that since the Florida markets are the markets most in need of supplemental milk, it is unfair that handlers in those markets do not have to pay the assessment for the transportation credit balancing fund.

There was no testimony at this hearing concerning the current premium structure in the Florida markets. It is a known fact, however, that the Florida markets are 100 percent cooperatively supplied and that the premium structure in those markets as of the September 1995 hearing was markedly different (and much higher) than the premium structure prevailing in Orders 5, 7, 11, and 46.

Whether or not the Florida markets have the type of transportation credits adopted in this decision is immaterial to the need for such provisions in Orders 5, 7, 11, and 46. Given the tight supply situation prevailing in the Florida markets, it is unlikely that any Florida handler would have a pricing advantage over a handler regulated under one of the 4 markets involved in this proceeding. Moreover, since cooperative associations control the entire supply of milk in the Florida markets, those markets do not have to deal with the difficult issue of unequal sharing of the cost of supplying the market with supplemental milk (i.e., the member versus nonmember issue).

The absence of a transportation credit in Florida does not mean that handlers in Orders 5, 7, 11, and 46 will bear the cost of providing supplemental milk to Florida. To the extent that milk is shipped to Florida from any of the 4 markets involved in this proceeding, such milk likely would have been shipped with or without Florida's participation in the current hearing.

### *3. Whether Emergency Marketing Conditions in the Four Regulated Areas Warrant the Omission of a Recommended Decision and the Opportunity to File Written Exceptions Thereto With Respect to Issue 1*

The omission of a recommended decision was proposed by the Mid-Am spokesman. He also requested that the issue be handled on an expedited basis, but suggested that the Secretary may wish to issue a tentative final decision to provide another opportunity for comments and adjustments to the amendments. No testimony was received in opposition to the request.

The due and timely execution of the functions of the Secretary under the Act imperatively and unavoidably require the omission of a recommended decision and an opportunity for written exceptions with respect to Issue No. 1. The continued orderly marketing of milk in the respective areas requires that the attached order be made effective as soon as possible, since the amount of supplemental milk needed for Class I use in each of the four orders is expected to increase significantly during the summer and fall months. Handlers, cooperative associations, and others should know promptly and with certainty how the Department is proposing to facilitate the importation of supplemental milk so that arrangements may be made.

It is therefore found that good cause exists for omission of a recommended decision and the opportunity for filing exceptions to it. As noted earlier, however, this decision is being issued as a tentative final decision. What this means is that producers will vote on the amendments to the 4 orders just as they would with a normal final decision. However, interested parties will have 30 days from the Federal Register publication of this tentative final decision to comment on it. After the comment period is over, the Department will then issue a final decision, and producers will again have an opportunity to vote on the orders as amended.

### *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 aforesaid orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to each of the aforesaid tentative marketing agreements and orders:

(a) The tentative marketing agreements and orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

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

(c) The tentative marketing agreements and the orders, 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, marketing agreements upon which a hearing has been held.

### *Interim Marketing Agreement and Interim Order Amending the Orders*

Annexed hereto and made a part hereof is an Interim Order amending the orders regulating the handling of milk in the aforesaid marketing areas, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions. It is hereby ordered that this entire decision and order amending the orders be published in the Federal Register. Parties who desire to enter into a marketing agreement covering the terms and conditions of the attached interim order may request a marketing agreement from the market administrator of the respective order.

### Determination of Producer Approval and Representative Period

April 1996 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the orders, as amended and as hereby proposed to be amended, regulating the handling of milk in the aforesaid marketing areas is approved or favored by producers, as defined under the terms of the individual orders (as amended and as hereby proposed to be amended), who during the representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

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

The agent of the Secretary to conduct such referendum is hereby designated to be Arnold M. Stallings.

List of Subjects in 7 CFR Parts 1005, 1007, 1011, and 1046

Milk marketing orders.

Dated: July 12, 1996.

Michael V. Dunn,

*Assistant Secretary, Marketing and Regulatory Programs.*

### Interim Order Amending the Orders Regulating the Handling of Milk in Certain Specified Marketing Areas

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

### Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and

confirmed, except where they may conflict with those set forth herein.

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

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

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

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

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

### Proposed Interim Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in each of the specified marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby amended, as follows:

The authority citation for 7 CFR Parts 1005, 1007, 1011, and 1046 is revised to read as follows:

Authority: 7 U.S.C. 601-674.

### PART 1005—MILK IN THE CAROLINA MARKETING AREA

1. In § 1005.30, paragraphs (a) and (c) are revised to read as follows:

#### § 1005.30 Reports of receipts and utilization.

\* \* \* \* \*

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

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

(2) Receipts of milk from handlers described in § 1005.9(c);

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

(4) Receipts of other source milk;

(5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal Orders 1007, 1011, and 1046, for which a transportation credit is requested pursuant to § 1005.82;

(6) Receipts of producer milk described in § 1005.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to § 1005.82(c)(2);

(7) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1005.40(b)(1); and

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

\* \* \* \* \*

(c) Each handler described in § 1005.9 (b) and (c) shall report:

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

(2) The utilization or disposition of all such receipts; and

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1005.82, all of the information required in paragraphs (a) (5) and (6) of this section.

\* \* \* \* \*

2. Section 1005.61 is amended by redesignating paragraphs (a)(4), (a)(5), (b)(5), and (b)(6) as paragraphs (a)(5), (a)(6), (b)(6), and (b)(7), respectively, amending paragraph (b)(3) by revising "(a)(3)" to read "(a)(4)" and "(a)(4)(ii)" to read "(a)(5)(ii)", amending newly designated paragraphs (b)(6) by revising "(b)(4)" to read "(b)(5)", amending newly designated paragraph (b)(7) by revising "(b)(5)" to read "(b)(6)", and adding new paragraphs (a)(4) and (b)(5) to read as follows:

#### § 1005.61 Computation of uniform price (including weighted average price and uniform prices for base and excess milk).

(a) \* \* \*

(4) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1005.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1005.80;

\* \* \* \* \*

(b) \* \* \*

(5) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1005.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1005.80;

\* \* \* \* \*

3. Following § 1005.78, a new undesignated center heading and §§ 1005.80, 1005.81, and 1005.82 are added to read as follows:

#### Marketwide Service Payments

##### **§ 1005.80 Transportation credit balancing fund.**

The market administrator shall maintain a separate fund known as the Transportation Credit Balancing Fund into which shall be deposited the payments made by handlers pursuant to § 1005.81 and out of which shall be made the payments due handlers pursuant to § 1005.82. Payments due a handler shall be offset against payments due from the handler.

##### **§ 1005.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month, each handler shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I milk assigned pursuant to § 1005.44 by \$0.06 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the higher of the following amounts:

(1) The total transportation credits dispensed during the prior July–December period; or

(2) The total transportation credits dispensed during the immediately preceding 6-month period.

(b) On or before the 13th day after the end of the month, the market administrator shall credit the transportation credit balancing fund, from the producer-settlement fund, any amount deducted pursuant to § 1005.61 (a)(4) or (b)(5).

(c) The market administrator shall announce publicly on or before the 5th day of the month the assessment pursuant to paragraph (a) of this section for the following month, except that for the first month that this section is effective the assessment shall be announced no later than [the publication date of the final rule in the Federal Register] and for the first 3 months that this section is effective the assessment pursuant to paragraph (a) of this section shall be 6 cents per hundredweight.

##### **§ 1005.82 Payments from the transportation credit balancing fund.**

(a) On or before the 13th day after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1005.30 (a)(5), bulk milk transferred from an other order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1005.30(a)(6), bulk milk directly from producers' farms as specified in paragraph (c)(2) of this section an amount determined pursuant to paragraph (d) of this section. In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1005.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

(b) The market administrator may extend the period during which transportation credits are in effect (i.e., the transportation credit period) to any of the months of January through June if the market administrator receives a written request to do so 15 days prior to the beginning of the month for which the request is made and, after conducting an independent investigation, finds that such extension is necessary to assure the market of an adequate supply of milk for fluid use. Before making such a finding, the market administrator shall notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, views, and arguments. Any decision to extend the transportation credit period must be issued in writing prior to the first day of the month for which the extension is to be effective.

(c) The transportation credit described in paragraph (a) of this section shall apply to the following milk:

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1007, 1011, and 1046, and allocated to Class I milk pursuant to § 1005.44; and

(2) Bulk milk classified pro rata as Class I milk pursuant to § 1005.44 received directly from the farms of dairy farmers at pool distributing plants under the following conditions:

(i) The dairy farmer was not a "producer" under this order during

more than 2 of the immediately preceding months of January through June and not more than 32 days' production of the dairy farmer was received as producer milk under this order during that period; and

(ii) The farm on which the milk was produced is not located within the specified marketing area of this order or the marketing areas of Federal Orders 1007, 1011, or 1046, and, is not within 85 miles of the plant to which its milk is delivered.

(d) Transportation credits shall be computed as follows:

(1) For milk described in paragraph (c)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway distance between the transferor plant and the transferee plant;

(ii) Multiply the number of miles computed in paragraph (d)(1)(i) of this section by 0.37 cents;

(iii) Subtract the other order's Class I price applicable at the transferor plant's location from the Class I price applicable at the transferee plant as specified in § 1005.53;

(iv) Subtract any positive difference computed in paragraph (d)(1)(iii) of this section from the amount computed in paragraph (d)(1)(ii) of this section; and

(v) Multiply the remainder computed in paragraph (d)(1)(iv) of this section by the hundredweight of milk described in paragraph (c)(1) of this section.

(2) For milk described in paragraph (c)(2) of this section:

(i) Each milk hauler that is transporting the milk of producers described in paragraph (c)(2) of this section may stop at the nearest independently-operated truck stop with a truck scale and obtain a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop. The location of the truck stop shall be used as a starting point for the purpose of measuring the distance to the pool plant receiving that load of milk. If a weight certificate for a supplemental load of milk for which a transportation credit is requested is not available, the market administrator shall use the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant;

(ii) For each bulk tank load of milk received pursuant to paragraph (d)(2)(i) of this section, the market administrator shall determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

(iii) Multiply the number of miles computed in paragraph (d)(2)(ii) of this section by 0.37 cents;

(iv) Multiply the number computed in paragraph (d)(2)(iii) of this section by the hundredweight of milk described in paragraph (c)(2) of this section;

(v) Subtract this order's Class I price applicable at the origination point determined pursuant to paragraph (d)(2)(ii) of this section from the Class I price applicable at the distributing plant receiving the milk; and

(vi) Subtract any positive difference computed in paragraph (d)(2)(v) of this section from the amount computed in paragraph (d)(2)(iv) of this section.

#### **PART 1007—MILK IN THE SOUTHEAST MARKETING AREA**

4. The authority citation for part 1007 continues to read as follows:

Authority: 7 U.S.C. 601–674.

4a. In § 1007.30, paragraphs (a) and (c) are revised to read as follows:

##### **§ 1007.30 Reports of receipts and utilization.**

\* \* \* \* \*

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

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

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

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

(4) Receipts of other source milk;

(5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal Orders 1005, 1011, and 1046, for which a transportation credit is requested pursuant to § 1007.82;

(6) Receipts of producer milk described in § 1007.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to § 1007.82(c)(2);

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

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

\* \* \* \* \*

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

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

(2) The utilization or disposition of all such receipts; and

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1007.82, all of the information required in paragraphs (a) (5) and (6) of this section.

\* \* \* \* \*

5. Section 1007.61 is amended by redesignating paragraphs (a)(4), (a)(5), (b)(5), and (b)(6) as paragraphs (a)(5), (a)(6), (b)(6), and respectively, (b)(7), amending (b)(3) by revising “(a)(3)” to read “(a)(4)” and “(a)(4)(ii)” to read “(a)(5)(ii)”, amending newly designated paragraph (b)(6) by revising “(b)(4)” to read “(b)(5)”, amending newly designated paragraph (b)(7) by revising “(b)(5)” to read “(b)(6)”, and adding new paragraphs (a)(4) and (b)(5) to read as follows:

##### **§ 1007.61 Computation of uniform price (including weighted average price and uniform prices for base and excess milk).**

(a) \* \* \*

(4) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1007.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1007.80;

\* \* \* \* \*

(b) \* \* \*

(5) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1007.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1007.80;

\* \* \* \* \*

6. Following § 1007.78, a new undesignated center heading and §§ 1007.80, 1007.81, and 1007.82 are added to read as follows:

##### **Marketwide Service Payments**

##### **§ 1007.80 Transportation credit balancing fund.**

The market administrator shall maintain a separate fund known as the *Transportation Credit Balancing Fund* into which shall be deposited the payments made by handlers pursuant to § 1007.81 and out of which shall be made the payments due handlers pursuant to § 1007.82. Payments due a handler shall be offset against payments due from the handler.

##### **§ 1007.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month, each handler shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I milk assigned

pursuant to § 1007.44 by \$0.06 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the higher of the following amounts:

(1) The total transportation credits dispensed during the prior July–December period; or

(2) The total transportation credits dispensed during the immediately preceding 6-month period.

(b) On or before the 13th day after the end of the month, the market administrator shall credit the transportation credit balancing fund, from the producer-settlement fund, any amount deducted pursuant to § 1007.61 (a)(4) or (b)(5).

(c) The market administrator shall announce publicly on or before the 5th day of the month the assessment pursuant to paragraph (a) of this section for the following month, except that for the first month that this section is effective the assessment shall be announced no later than [the publication date of the final rule in the Federal Register] and for the first 3 months that this section is effective the assessment pursuant to paragraph (a) of this section shall be 6 cents per hundredweight.

##### **§ 1007.82 Payments from the transportation credit balancing fund.**

(a) On or before the 13th day after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1007.30(a)(5), bulk milk transferred from an other order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1007.30(a)(6), bulk milk directly from producers' farms as specified in paragraph (c)(2) of this section an amount determined pursuant to paragraph (d) of this section. In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1007.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

(b) The market administrator may extend the period during which transportation credits are in effect (i.e., the *transportation credit period*) to any



of the months of January through June if the market administrator receives a written request to do so 15 days prior to the beginning of the month for which the request is made and, after conducting an independent investigation, finds that such extension is necessary to assure the market of an adequate supply of milk for fluid use. Before making such a finding, the market administrator shall notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, views, and arguments. Any decision to extend the transportation credit period must be issued in writing prior to the first day of the month for which the extension is to be effective.

(c) The transportation credit described in paragraph (a) of this section shall apply to the following milk:

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1005, 1011, and 1046 allocated to Class I milk pursuant to § 1007.44; and

(2) Bulk milk classified pro rata as Class I milk pursuant to § 1007.44 received directly from the farms of dairy farmers at pool distributing plants under the following conditions:

(i) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of January through June and not more than 32 days' production of the dairy farmer was received as producer milk under this order during that period; and

(ii) The farm on which the milk was produced is not located within the specified marketing area of this order or the marketing areas of Federal Orders 1005, 1011 or 1046, and, is not within 85 miles of the plant to which its milk is delivered.

(d) Transportation credits shall be computed as follows:

(1) For milk described in paragraph (c)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway distance between the transferor plant and the transferee plant;

(ii) Multiply the number of miles computed in paragraph (d)(1)(i) of this section by 0.37 cents;

(iii) Subtract the other order's Class I price applicable at the transferor plant's location from the Class I price applicable at the transferee plant as specified in § 1007.52;

(iv) Subtract any positive difference computed in paragraph (d)(1)(iii) of this section from the amount computed in paragraph (d)(1)(ii) of this section; and

(v) Multiply the remainder computed in paragraph (d)(1)(iv) of this section by

the hundredweight of milk described in paragraph (c)(1) of this section.

(2) For milk described in paragraph (c)(2) of this section:

(i) Each milk hauler that is transporting the milk of producers described in paragraph (c)(2) of this section may stop at the nearest independently-operated truck stop with a truck scale and obtain a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop. The location of the truck stop shall be used as a starting point for the purpose of measuring the distance to the pool plant receiving that load of milk. If a weight certificate for a supplemental load of milk for which a transportation credit is requested is not available, the market administrator shall use the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant;

(ii) For each bulk tank load of milk received pursuant to paragraph (d)(2)(i) of this section, the market administrator shall determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

(iii) Multiply the number of miles computed in paragraph (d)(2)(ii) of this section by 0.37 cents;

(iv) Multiply the number computed in paragraph (d)(2)(iii) of this section by the hundredweight of milk described in paragraph (c)(2) of this section;

(v) Subtract the order's Class I price applicable at the origination point determined pursuant to paragraph (d)(2)(ii) of this section from the Class I price applicable at the distributing plant receiving the milk; and

(vi) Subtract any positive difference computed in paragraph (d)(2)(v) of this section from the amount computed in paragraph (d)(2)(iv) of this section.

#### **PART 1011—MILK IN THE TENNESSEE VALLEY MARKETING AREA**

7. In § 1011.30, paragraphs (a) and (c) are revised to read as follows:

##### **§ 1011.30 Reports of receipts and utilization.**

\* \* \* \* \*

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

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

(2) Receipts of milk from handlers described in § 1011.9(c);

(3) Receipts of milk from handlers described in § 1011.9(d);

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

(5) Receipts of other source milk;

(6) Receipts of bulk milk from a plant regulated under another Federal order, except Federal Orders 1005, 1007, and 1046, for which a transportation credit is requested pursuant to § 1011.82;

(7) Receipts of producer milk described in § 1011.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to § 1011.82(c)(2);

(8) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1011.40(b)(1); and

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

\* \* \* \* \*

(c) Each handler described in § 1011.9(b), (c) and (d) shall report:

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

(2) The utilization or disposition of all such receipts; and

(3) With respect to milk for which a cooperative association is requesting a transportation credit pursuant to § 1011.82, all of the information required in paragraphs (a) (6) and (7) of this section.

\* \* \* \* \*

8. Section 1011.61 is amended by redesignating paragraphs (a)(4), (a)(5), (b)(5), and (b)(6) as paragraphs (a)(5), (a)(6), paragraph (b)(6) and (b)(7), respectively amending paragraph (b)(3) by revising "(a)(3)" to read "(a)(4)" and "(a)(4)(ii)" to read "(a)(5)(ii)", amending newly designated paragraph (b)(6) by revising "(b)(4)" to read "(b)(5)", amending newly designated paragraph (b)(7) by revising "(b)(5)" to read "(b)(6)", and adding new paragraphs (a)(4) and (b)(5) to read as follows:

##### **§ 1011.61 Computation of uniform price (including weighted average price and uniform prices for base and excess milk).**

(a) \* \* \*

(4) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1011.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1011.80;

\* \* \* \* \*

(b) \* \* \*

(5) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1011.82 exceeds the available balance



in the transportation credit balancing fund pursuant to § 1011.80;

\* \* \* \* \*

9. Following § 1011.78, a new undesignated center heading and §§ 1011.80, 1011.81, and 1011.82 are added to read as follows:

#### Marketwide Service Payments

##### **§ 1011.80 Transportation credit balancing fund.**

The market administrator shall maintain a separate fund known as the Transportation Credit Balancing Fund into which shall be deposited the payments made by handlers pursuant to § 1011.81 and out of which shall be made the payments due handlers pursuant to § 1011.82. Payments due a handler shall be offset against payments due from the handler.

##### **§ 1011.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month, each handler shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I milk assigned pursuant to § 1011.44 by \$0.06 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the higher of the following amounts:

(1) The total transportation credits dispensed during the prior July–December period; or

(2) The total transportation credits dispensed during the immediately preceding 6-month period.

(b) On or before the 13th day after the end of the month, the market administrator shall credit the transportation credit balancing fund, from the producer-settlement fund, any amount deducted pursuant to § 1011.61 (a)(4) or (b)(5).

(c) The market administrator shall announce publicly on or before the 5th day of the month the assessment pursuant to paragraph (a) of this section for the following month, except that for the first month that this section is effective the assessment shall be announced no later than [the publication date of the final rule in the Federal Register] and for the first 3 months that this section is effective the assessment pursuant to paragraph (a) of this section shall be 6 cents per hundredweight.

##### **§ 1011.82 Payments from the transportation credit balancing fund.**

(a) On or before the 13th day after the end of each of the months of July through December and any other month

in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1011.30(a)(6), bulk milk transferred from an other order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1011.30(a)(7), bulk milk directly from producers' farms as specified in paragraph (c)(2) of this section an amount determined pursuant to paragraph (d) of this section. In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1011.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be made to such cooperative association rather than to the operator of the pool plant at which the milk was received.

(b) The market administrator may extend the period during which transportation credits are in effect (i.e., the transportation credit period) to any of the months of January through June if the market administrator receives a written request to do so 15 days prior to the beginning of the month for which the request is made and, after conducting an independent investigation, finds that such extension is necessary to assure the market of an adequate supply of milk for fluid use. Before making such a finding, the market administrator shall notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, views, and arguments. Any decision to extend the transportation credit period must be issued in writing prior to the first day of the month for which the extension is to be effective.

(c) The transportation credit described in paragraph (a) of this section shall apply to the following milk:

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1005, 1007, and 1046, and allocated to Class I milk pursuant to § 1011.44; and

(2) Bulk milk classified pro rata as Class I milk pursuant to § 1011.44 received directly from the farms of dairy farmers at pool distributing plants under the following conditions:

(i) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of January through June and not more than 32 days' production of the dairy farmer was

received as producer milk under this order during that period; and

(ii) The farm on which the milk was produced is not located within the specified marketing area of this order or the marketing areas of Federal Orders 1005, 1007, or 1046, and, is not within 85 miles of the plant to which its milk is delivered.

(d) Transportation credits shall be computed as follows:

(1) For milk described in paragraph (c)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway distance between the transferor plant and the transferee plant;

(ii) Multiply the number of miles computed in paragraph (d)(1)(i) of this section by 0.37 cents;

(iii) Subtract the other order's Class I price applicable at the transferor plant's location from the Class I price applicable at the transferee plant as specified in § 1011.52;

(iv) Subtract any positive difference computed in paragraph (d)(1)(iii) of this section from the amount computed in paragraph (d)(1)(ii) of this section; and

(v) Multiply the remainder computed in paragraph (d)(1)(iv) of this section by the hundredweight of milk described in paragraph (c)(1) of this section.

(2) For milk described in paragraph (c)(2) of this section:

(i) Each milk hauler that is transporting the milk of producers described in paragraph (c)(2) of this section may stop at the nearest independently-operated truck stop with a truck scale and obtain a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop. The location of the truck stop shall be used as a starting point for the purpose of measuring the distance to the pool plant receiving that load of milk. If a weight certificate for a supplemental load of milk for which a transportation credit is requested is not available, the market administrator shall use the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant;

(ii) For each bulk tank load of milk received pursuant to paragraph (d)(2)(i) of this section, the market administrator shall determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

(iii) Multiply the number of miles computed in paragraph (d)(2)(ii) of this section by 0.37 cents;

(iv) Multiply the number computed in paragraph (d)(2)(iii) of this section by

the hundredweight of milk described in paragraph (c)(2) of this section;

(v) Subtract this order's Class I price applicable at the origination point determined pursuant to paragraph (d)(2)(ii) of this section from the Class I price applicable at the distributing plant receiving the milk; and

(vi) Subtract any positive difference computed in paragraph (d)(2)(v) of this section from the amount computed in paragraph (d)(2)(iv) of this section.

#### **PART 1046—MILK IN THE LOUISVILLE-LEXINGTON-EVANSVILLE MARKETING AREA**

10. The authority citation for part 1046 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended (7 U.S.C. 601–674).

10 a. In § 1046.30, paragraphs (a) and (c) are revised to read as follows:

##### **§ 1046.30 Reports of receipts and utilization.**

\* \* \* \* \*

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

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

(2) Receipts of milk from handlers described in § 1046.9(c);

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

(4) Receipts of other source milk;

(5) Receipts of bulk milk from a plant regulated under another Federal order, except Federal Orders 1005, 1007, and 1011, for which a transportation credit is requested pursuant to § 1046.82;

(6) Receipts of producer milk described in § 1046.82(c)(2), including the identity of the individual producers whose milk is eligible for the transportation credit pursuant to § 1046.82(c)(2);

(7) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1046.40(b)(1); and

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

\* \* \* \* \*

(c) Each handler described in § 1046.9 (b) and (c) shall report:

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

(2) The utilization or disposition of all such receipts; and

(3) With respect to milk for which a cooperative association is requesting a

transportation credit pursuant to § 1046.82, all of the information required in paragraphs (a) (5) and (6) of this section.

\* \* \* \* \*

11. Section 1046.61 is amended by redesignating paragraphs (a)(4), (a)(5), (b)(5), and (b)(6) as paragraphs (a)(5), (a)(6), (b)(6), and (b)(7), respectively, amending paragraph (b)(3) by revising “(a)(3)” to read “(a)(4)” and “(a)(4)(ii)” to read “(a)(5)(ii)”, amending newly designated paragraph (b)(6) by revising “(b)(4)” to read “(b)(5)”, amending newly designated paragraph (b)(7) by revising “(b)(5)” to read “(b)(6)”, and adding new paragraphs (a)(4) and (b)(5) to read as follows:

##### **§ 1046.61 Computation of uniform price (including weighted average price and uniform prices for base and excess milk).**

(a) \* \* \*

(4) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1046.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1046.80;

\* \* \* \* \*

(b) \* \* \*

(5) Deduct the amount by which the amount due from the transportation credit balancing fund pursuant to § 1046.82 exceeds the available balance in the transportation credit balancing fund pursuant to § 1046.80;

\* \* \* \* \*

12. In § 1046.73, paragraph (f)(2) is revised to read as follows:

##### **§ 1046.73 Payments to producers and to cooperative associations.**

\* \* \* \* \*

(f) \* \* \*

(2) On or before the 10th day after the end of the following month for milk received during the month an amount computed at not less than the value of such milk at the minimum prices for milk in each class, as adjusted by the butterfat differential specified in § 1046.74 applicable at the location of the receiving handler's pool plant and any transportation credit that is due the cooperative association pursuant to § 1046.82(a), less the payment made pursuant to paragraph (f)(1) of this section.

13. Following § 1046.78, a new undesignated center heading and §§ 1046.80, 1046.81, and 1046.82 are added to read as follows:

##### **Marketwide Service Payments**

##### **§ 1046.80 Transportation credit balancing fund.**

The market administrator shall maintain a separate fund known as the

Transportation Credit Balancing Fund into which shall be deposited the payments made by handlers pursuant to § 1046.81 and out of which shall be made the payments due handlers pursuant to § 1046.82. Payments due a handler shall be offset against payments due from the handler.

##### **§ 1046.81 Payments to the transportation credit balancing fund.**

(a) On or before the 12th day after the end of the month, each handler shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I milk assigned pursuant to § 1046.44 by \$0.06 per hundredweight or such lesser amount as the market administrator deems necessary to maintain a balance in the fund equal to the higher of the following amounts:

(1) The total transportation credits dispensed during the prior July–December period; or

(2) The total transportation credits dispensed during the immediately preceding 6-month period.

(b) On or before the 13th day after the end of the month, the market administrator shall credit the transportation credit balancing fund, from the producer-settlement fund, any amount deducted pursuant to § 1046.61 (a)(4) or (b)(5).

(c) The market administrator shall announce publicly on or before the 5th day of the month the assessment pursuant to paragraph (a) of this section for the following month, except that for the first month that this section is effective the assessment shall be announced no later than [the publication date of the final rule in the Federal Register] and for the first 3 months that this section is effective the assessment pursuant to paragraph (a) of this section shall be 6 cents per hundredweight.

##### **§ 1046.82 Payments from the transportation credit balancing fund.**

(a) On or before the 13th day after the end of each of the months of July through December and any other month in which transportation credits are in effect pursuant to paragraph (b) of this section, the market administrator shall pay to each handler that received, and reported pursuant to § 1046.30(a)(5), bulk milk transferred from an other order plant as described in paragraph (c)(1) of this section or that received, and reported pursuant to § 1046.30(a)(6), bulk milk directly from producers' farms as specified in paragraph (c)(2) of this section an amount determined pursuant to

paragraph (d) of this section. In the event that a qualified cooperative association is the responsible party for whose account such milk is received and written documentation of this fact is provided to the market administrator pursuant to § 1046.30(c)(3) prior to the date payment is due, the transportation credits for such milk computed pursuant to this section shall be paid to such cooperative association by the pool plant operator pursuant to § 1046.73(f)(2).

(b) The market administrator may extend the period during which transportation credits are in effect (i.e., the transportation credit period) to any of the months of January through June if the market administrator receives a written request to do so 15 days prior to the beginning of the month for which the request is made and, after conducting an independent investigation, finds that such extension is necessary to assure the market of an adequate supply of milk for fluid use. Before making such a finding, the market administrator shall notify the Director of the Dairy Division and all handlers in the market that an extension is being considered and invite written data, views, and arguments. Any decision to extend the transportation credit period must be issued in writing prior to the first day of the month for which the extension is to be effective.

(c) The transportation credit described in paragraph (a) of this section shall apply to the following milk:

(1) Bulk milk received from a plant regulated under another Federal order, except Federal Orders 1005, 1007, and 1011, and allocated to Class I milk pursuant to § 1046.44; and

(2) Bulk milk classified pro rata as Class I milk pursuant to § 1046.44

received directly from the farms of dairy farmers at pool distributing plants under the following conditions:

(i) The dairy farmer was not a "producer" under this order during more than 2 of the immediately preceding months of January through June and not more than 32 days' production of the dairy farmer was received as producer milk under this order during that period; and

(ii) The farm on which the milk was produced is not located within the specified marketing area of this order or the marketing areas of Federal Orders 1005, 1007, or 1011, and, is not within 85 miles of the plant to which its milk is delivered.

(d) Transportation credits shall be computed as follows:

(1) For milk described in paragraph (c)(1) of this section, the market administrator shall:

(i) Determine the shortest hard-surface highway distance between the transferor plant and the transferee plant;

(ii) Multiply the number of miles computed in paragraph (d)(1)(i) of this section by 0.37 cents;

(iii) Subtract the other order's Class I price applicable at the transferor plant's location from the Class I price applicable at the transferee plant as specified in § 1046.52;

(iv) Subtract any positive difference computed in paragraph (d)(1)(iii) of this section from the amount computed in paragraph (d)(1)(ii) of this section; and

(v) Multiply the remainder computed in paragraph (d)(1)(iv) of this section by the hundredweight of milk described in paragraph (c)(1) of this section.

(2) For milk described in paragraph (c)(2) of this section:

(i) Each milk hauler that is transporting the milk of producers

described in paragraph (c)(2) of this section may stop at the nearest independently-operated truck stop with a truck scale and obtain a weight certificate indicating the weight of the truck and its contents, the date and time of weighing, and the location of the truck stop. The location of the truck stop shall be used as a starting point for the purpose of measuring the distance to the pool plant receiving that load of milk. If a weight certificate for a supplemental load of milk for which a transportation credit is requested is not available, the market administrator shall use the nearest city to the last producer's farm from which milk was picked up for delivery to the receiving pool plant;

(ii) For each bulk tank load of milk received pursuant to paragraph (d)(2)(i) of this section, the market administrator shall determine the shortest hard-surface highway distance between the receiving pool plant and the truck stop or city, as the case may be;

(iii) Multiply the number of miles computed in paragraph (d)(2)(ii) of this section by 0.37 cents;

(iv) Multiply the number computed in paragraph (d)(2)(iii) of this section by the hundredweight of milk described in paragraph (c)(2) of this section;

(v) Subtract this order's Class I price applicable at the origination point determined pursuant to paragraph (d)(2)(ii) of this section from the Class I price applicable at the distributing plant receiving the milk; and

(vi) Subtract any positive difference computed in paragraph (d)(2)(v) of this section from the amount computed in paragraph (d)(2)(iv) of this section.

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