

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 1005, 1006, and 1007

[Docket No. AO-388-A16, AO-356-A38, and AO-366-A45; DA-04-07]

#### Milk in the Appalachian, Florida, and Southeast Marketing Areas; Decision on Proposed Amendments to Marketing Agreements and to Orders

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule; final decision.

**SUMMARY:** This document proposes to adopt, on an emergency basis, amendments to the Appalachian, Florida, and Southeast Federal milk marketing orders. Specifically, the proposed amendments will implement a temporary supplemental charge on Class I milk that will be disbursed to handlers who incurred transportation costs for bulk milk movements for the Appalachian, Florida, and Southeast orders resulting from hurricanes Charley, Frances, Ivan and Jeanne. The proposed amendments are based on record evidence of a public hearing held in Atlanta, Georgia, on October 7, 2004. This decision requires determination of whether producers approve the orders as proposed to be amended.

#### FOR FURTHER INFORMATION CONTACT:

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**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.

These proposed amendments have been reviewed under Executive Order 12988, 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 request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department 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 Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that

collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During August 2004, the most recent representative month, the milk of 7,239 dairy farmers was pooled under the Appalachian (Order 5), Florida (Order 6), and Southeast (Order 7) milk orders (3,400 Order 5 dairy farmers, 267 Order 6 dairy farmers, and 3,572 Order 7 dairy farmers, respectively). Of the 7,239 dairy farmers, 80 percent met the definition of small business. Specifically, the number of dairy farmers considered small businesses for Order 5, Order 6, and Order 7 were 3,230 or 95 percent, 134 or 50 percent, and 3,407 or 95 percent, respectively. During the same period, there were 65 fully regulated plants under Orders 5, 6, and 7. Of the 65 plants, 7 were considered small businesses. Specifically, there were 25 Order 5 plants (of which 2 were small businesses), 12 Order 6 plants (of which 3 were small businesses), and 28 Order 7 plants (of which 2 were small businesses).

The proposed amendments adopted in this final decision will provide temporary reimbursement to handlers (cooperative associations and proprietary handlers) who incurred extraordinary transportation expenses for bulk milk movements resulting from the impact of hurricanes Charley, Frances, Ivan, and Jeanne on the Southeastern United States, particularly the State of Florida. The proposed amendments were requested by Dairy Farmers of America, Inc., Lone Star Milk Producers, Inc., Maryland & Virginia Milk Producers Cooperative Association, Inc., and Southeast Milk, Inc. The dairy farmer members of these four cooperatives supply the majority of the milk pooled under the Appalachian, Florida, and Southeast orders. The proposed amendments adopted in this final decision will implement, for a 3-month period beginning January 1, 2005, a supplemental increase in the Class I milk price at a rate not to exceed \$.04 per hundredweight of milk in the Appalachian and Southeast orders, and a rate not to exceed \$.09 per hundredweight of milk in the Florida order. The amount generated through the Class I milk increase will be disbursed during February 2005 through April 2005 to qualifying handlers who

incurred extraordinary transportation costs as a result of the hurricanes. The reimbursement for extraordinary transportation costs will be disbursed to qualifying handlers on an actual transportation costs basis or at a rate of \$2.25 per loaded mile, whichever is less.

The aforementioned hurricanes occurred during a 7-week period of time and disrupted the orderly flow of milk movements in and to the Appalachian, Florida, and Southeast marketing areas. The four hurricanes caused handlers in the southeastern markets, particularly in the Florida marketing area, to experience disruptions in moving bulk milk to supply the Class I (fluid milk) needs of the individual marketing areas.

One of the functions of the Federal milk order program is to provide for the orderly exchange of milk between the dairy farmer and the handler (first buyer) to ensure the Class I needs of the market are met. The record evidence clearly reveals that the movements of bulk milk for Orders 5 and 7, and particularly Order 6 were disrupted due to the hurricanes. Accordingly, the adoption of the proposed amendments will provide temporary transportation cost reimbursement to handlers who incurred additional transportation expenses for bulk milk movements that were disrupted as a result of extraordinary weather conditions in Orders 5, 6, and 7.

The proposed amendments will provide reimbursement to handlers for transportation expenses totaling over \$1.6 million for movements of bulk milk due to the hurricanes. The supplemental increase in the minimum price of Class I milk at a maximum rate of \$.09 per hundredweight for Order 6 is anticipated to increase the price of a gallon of milk by not more than \$0.0078 (*i.e.*, less than 1 cent) during each month of the 3-month period. Likewise, a supplemental increase at a maximum rate of \$.04 per hundredweight for Orders 5 and 7 is anticipated to increase the price of a gallon of milk by not more than \$0.0034 (*i.e.*, less than 1 cent) during each month of the 3-month period. The estimated impact on the price per gallon of milk was calculated by converting the hundredweight value to gallons using 8.62 pounds of milk per gallon.

Handlers in Orders 5, 6, and 7 should not be placed at a competitive disadvantage because of the temporary and limited supplemental increase in the minimum Class I milk price. The proposed amendments also are not expected to impact the blend price of dairy farmers. Accordingly, the adoption of the proposed amendments

should not significantly impact producers or handlers due to the limited implementation period and the minimum increase in the Class I milk price.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). As such, the information collection requirements in this final decision do not require clearance by the Office of Management and Budget (OMB) beyond the currently approved information collections. This final decision will impose only minimal reporting requirements on handlers applying for reimbursement of additional transportation expenses incurred due to the aforementioned hurricanes.

Handlers may submit documents supporting their claims with their monthly handler report of milk receipts and utilization. The primary sources of data that would be required for submission to Market Administrators by handlers applying for transportation cost reimbursement currently are used in most business transactions. These documents include—but are not limited to—invoices, receiving records, bulk milk manifests, hauling billings, and contract agreements. Handlers who have applied for or received transportation cost reimbursement through insurance claims or through any State, Federal, or other programs must submit documentation of such claims of reimbursement to the Market Administrators for Orders 5, 6, and 7. Prior documents in this proceeding:

*Notice of Hearing*: Issued September 28, 2004; published September 30, 2004 (69 FR 58368).

#### Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this final decision with respect to proposed amendments to the tentative marketing agreements and the orders regulating the handling of milk in the Appalachian, Florida, and Southeast marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Atlanta, Georgia, on October 7, 2004, pursuant to a notice of hearing issued September 28, 2004, and published September 30, 2004 (69 FR 58368).

The material issues on the record of the hearing relate to:

1. Temporary reimbursement for extraordinary transportation costs resulting from hurricanes; and

2. Determination as to whether emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.

#### 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. *Temporary reimbursement for extraordinary transportation costs resulting from hurricanes*. This final decision proposes to adopt amendments to the Appalachian, Florida, and Southeast milk orders (Orders 5, 6, and 7) that will implement a temporary increase in the minimum Class I milk price to provide reimbursement to handlers who incurred extraordinary transportation expenses to move bulk milk for Orders 5, 6, and 7, as a result of hurricanes Charley, Frances, Ivan, and Jeanne. The record evidence clearly supports the adoption of the proposed amendments to provide temporary reimbursement to handlers who incurred extraordinary transportation expenses due to the unprecedented occurrence of four hurricanes in the Southeastern United States over a 7-week period and the resulting disruption of bulk milk movements for Orders 5, 6, and 7—particularly for Order 6.

A witness testifying on behalf of Dairy Farmers of America, Inc., Lone Star Milk Producers, Inc., Maryland and Virginia Milk Producers Cooperative Association Inc., and Southeast Milk, Inc., (proponent cooperatives) presented testimony in support of Proposal 1 with certain modifications. The witness said that Proposal 1 seeks to provide emergency relief under the Federal milk order system to help reimburse marketers of milk for extraordinary costs incurred moving bulk milk for Orders 5, 6, and 7, as a result of hurricanes Charley, Frances, Ivan, and Jeanne.

The proponent cooperatives' witness stated that Proposal 1, if adopted, would generate funds for reimbursements for extraordinary transportation costs by increasing the Class I price of milk at a rate not to exceed \$.04 per hundredweight in Orders 5 and 7 and at a rate not to exceed \$.09 per hundredweight in Order 6 for the period of January 1, 2005, through March 31, 2005. The witness explained that the funds generated through the Class I milk price increase would be disbursed as relief payments to qualifying handlers and cooperative associations in their

capacity as handlers for a period not to exceed February 2005 through April 2005.

The proponent cooperatives' witness testified that during August and September 2004 four hurricanes (Charley, Frances, Ivan, and Jeanne) made landfall in the Southeastern United States causing disorderly and costly movements of bulk milk in the three southeastern marketing areas, particularly having an impact on the Florida order. The proponent cooperatives' witness noted that hurricane Charley made landfall on August 13, 2004, at Cayo Costa, Florida; hurricane Frances made landfall on September 5, 2004, at St. Marks, Florida; hurricane Ivan made landfall on September 16, 2004, at Mobile, Alabama; and hurricane Jeanne made landfall at Stuart, Florida, on September 25, 2004. According to the witness, the disruptions in bulk milk movements actually began several days before the initial landfall of the first major hurricane (Charley), and ended several days after the landfall of the last hurricane (Jeanne).

According to the proponent cooperatives' witness, reimbursement for extraordinary additional transportation costs as advanced in Proposal 1 would be limited to costs incurred as a result of the aforementioned hurricanes. The witness also indicated that certain milk movements occurred preceding landfall of the hurricanes causing milk to be moved out of the way. In addition, the witness pointed out that following each of the hurricanes, replacement milk was required from other origins and these movements should be considered as part of the additional transportation costs incurred by cooperatives resulting from the hurricanes.

According to the proponent cooperatives' witness, if a potential qualified shipment of milk was moved out of the path of the hurricanes and was received at a distributing plant or was sitting at a distributing plant and then shipped to another plant, then the transportation costs incurred should be entitled to reimbursement if such milk was shipped as bulk milk. The witness stated that to date proponent cooperatives have identified extraordinary transportation costs in excess of \$1.6 million for bulk milk for Orders 5, 6, and 7. The witness stated that these losses would probably not be recouped from other sources. Therefore, the assistance of the Federal milk marketing order program was sought as a means to provide financial relief for these extraordinary additional transportation costs.

The witness for the proponent cooperatives explained that Dairy Cooperative Marketing Association (DCMA), a marketing agency to which all the proponent cooperatives are members, operates as the over order pricing agency in the Southeastern United States by coordinating between cooperatives the over order prices charged to distributing plant customers located predominantly in the Order 5, 6, and 7 marketing areas. According to the witness, many factors affect over order prices including—but not limited to—levels of over order prices in adjacent marketing areas, cost and availability of bulk and packaged alternative supplies, general price level, and regional and national supply and demand relationships.

The proponent cooperatives' witness stated that one of the goals of DCMA is to reduce Class I milk price volatility to its customers. The witness noted that for the months of August 2004 through October 2004, using the Atlanta total Class I milk prices, the DCMA over order Class I pricing system reduced the volatility on the announced Federal order Class I prices by \$.50 per hundredweight.

The proponent cooperatives' witness explained the DCMA over order pricing plan for 2004 using a table that detailed the over order price for Atlanta, Georgia, as follows: (1) For Federal order Class I base prices (Class I price mover) between \$12.00 and \$14.00 inclusive (3.5 percent butterfat equivalent), the Class I over order price, prior to any applicable fuel cost surcharge shall be \$1.45; (2) for each cent the Federal order Class I base price exceeds \$14.00, the Class I over order price will be reduced by one cent up to a maximum decrease of \$0.50 and; (3) for each cent the Federal order Class I base price is less than \$12.00, the Class I over order price will be increased by one cent up to a maximum of \$0.50. The table also noted the location adjustments for Class I over order prices in selected cities.

The witness pointed out that for the past years cooperatives in the Southeastern United States have, through DCMA, utilized a structured system of over order prices that increase when Federal milk order Class I milk prices are at lower levels, and conversely, the over order prices decrease when Federal milk order Class I prices are at higher levels. The proponent cooperatives' witness indicated that this practice may continue during January 2005 through March 2005, which is the period when the Class I milk price would be increased if Proposal 1 is adopted. The witness also asserted that providing the

generation of revenue and disbursement of relief payments under the Federal milk order program would insure all market participants that the rate of payment is equal for all Class I pool handlers and that the costs paid are accurately associated with the hurricane emergency.

The proponent cooperatives' witness said that the proponents would support a requirement that handlers applying for relief payments for extraordinary costs incurred due to the aforesaid hurricanes submit to the market administrator—along with supporting documents—a statement certifying that as of the application date no relief payments had been received and no relief payments were expected to be received through any other state or Federal programs or insurance claims. The proponent cooperatives' witness asserted that without financial assistance provided through the Class I milk price as developed in Proposal 1, marketers of milk, principally cooperative associations, will bear the cost of these unanticipated and extraordinary milk movements.

The witness for the proponent cooperatives' stressed that all of the additional costs associated with transporting loads of milk should be reimbursed but not to exceed \$2.25 per loaded mile. The witness testified that a loaded mile was defined as a one-way hauling cost for milk delivery from the origination point to the destination point. The witness also stated that the \$2.25 mileage rate is a common rate being paid for transporting milk and is a reasonable maximum rate for hauling.

The witness expressed the opinion that the decision process should be concluded very rapidly and suggested that delay would not change the result or the additional transportation costs associated with hurricane related events. In addition, the witness was of the opinion that additional transportation costs should include those additional costs incurred by bulk milk shippers transporting milk to plants outside of hurricane affected areas because these plants packaged milk to replace the production of plants that had been closed due to the extreme weather events in the storm affected areas.

The proponent cooperatives' witness and other proponent witnesses indicated that the movement of milk which would qualify for reimbursement should include: (1) Loads of producer milk delivered or rerouted to a pool distributing plant; (2) loads of producer milk delivered or rerouted to a pool supply plant which was then transferred to a pool distributing plant; (3) loads of

bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant; (4) loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant; and they modified Proposal 1 to include reimbursement for bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants.

The proponent cooperatives' witness and other proponent witnesses testified that storm related rerouting of milk movements should be eligible for reimbursement because they resulted from flooding related road closures, bridge and road washouts, massive power outages, mandatory official evacuation orders, and extended temporary closures of distributing plants—all due to the extreme weather conditions. The witnesses testified that reroutes represent only those portions of milk movements that were other than usual and customary shipping routes from individual shipping points. The witness presented an example of reroutes where bulk milk in Florida on tankers destined for distributing plants was moved out of Florida, parked at a plant lot outside of Florida but not received by the plant, and when the storm had passed the milk was shipped back to distributing plants in Florida for processing.

The proponent cooperatives' witness testified that demonstrated costs are those costs for which documentation, such as bills of lading, truck tickets, truck manifests and driver logs can demonstrate to the satisfaction of milk market administrators that those additional, extraordinary transportation costs occurred. The witness noted that it would be at the sole discretion of the Market Administrator of each order to determine which movements of bulk milk were conducted in the normal course of business and which milk movements were attributable to the four hurricanes and thus should receive reimbursement for extraordinary transportation costs.

In other testimony, the proponent cooperatives' witness explained the methodology used to determine the proposed increases in the Class I price for the Appalachian, Southeast, and Florida milk orders, as advanced in Proposal 1. According to the witness, the extraordinary additional milk transportation costs totaled approximately \$1.6 million for the three Federal milk orders, with \$102,206 associated with the Appalachian order, \$1,139,469 associated with the Florida order, and \$370,085 associated with the Southeast order. The witness testified that monthly volume estimates of Class

I producer milk were used as quantities in the derivation of the rate of increase in the Class I price applicable for each order as advanced in Proposal 1 as follows: 373 million pounds per month for the Appalachian order, 218 million pounds for the Florida order, and 392 million pounds for the Southeast order. According to the witness, the estimated extraordinary costs incurred in each milk marketing area was divided by the estimated pounds of milk pooled on each order and divided by three to provide a monthly rate for each of three months. The rates based on these calculations for each are: \$.0091 per hundredweight per month for the Appalachian order, \$.1735 per hundredweight for the Florida order, and \$.0315 per hundredweight for the Southeast order, according to the witness. The witness acknowledged that these rates differ markedly from the rates requested for each order, as advanced in Proposal 1 and published in the notice of hearing of this proceeding. The witness stated that the differences were attributable to rapidly changing extraordinary transportation cost information collected for each order and changes in cost allocations between orders as information became more accurately available.

The proponent cooperatives' witness explained that under Proposal 1 the temporary increase for the three consecutive months would set an effective cap on the amount of new Class I revenue which could be generated under the temporary amendments at not more than the demonstrated costs of moving milk because of the four hurricanes. The witness emphasized that the total revenues generated under this system would be limited to the costs incurred so that no marketer of milk would profit from the payment for these defined extraordinary hauling costs, but rather would be reimbursed for incurring the costs. In addition, the blend price to producers under Orders 5, 6, and 7 would not increase since the money collected cannot exceed the money spent, noted the witness.

The proponent cooperatives' witness stated that as proposed Proposal 1 would require handlers applying for the relief payments to prove to the satisfaction of the market administrator that milk movements were extraordinary and a result of the hurricane emergencies. As proposed, two limits would be placed on the payments. First, the total amount of reimbursement of extraordinary transportation costs would be limited to the amount of funds collected under the adjustment to the Class I milk value. If

the demonstrated amount exceeded the funds generated from increasing the Class I handler value, then the remaining extraordinary transportation costs would go unpaid. Second, the rate per mile of transportation would be limited to \$2.25 per loaded mile. This limit, stated the witness, insures that marketers of milk cannot garner excessive profits by the inflation of hauling costs.

The proponent cooperatives' witness testified that proponent cooperatives would only be eligible for either a transportation credit payment in the Southeast and Appalachian orders or a temporary transportation relief payment within the provisions of Proposal 1. According to the witness, this would eliminate the possibility of "double dipping" or receiving double compensation for the same transportation costs.

The proponent cooperatives' witness concluded by indicating that, at the end of the proposed 3-month period, if any funds collected through the supplemental increase in the Class I milk price in each individual marketing area were not disbursed then the remaining amount should be refunded to the Class I handlers in proportion to their contribution in that market. The witness stated that a disbursement of any remaining funds through the producer settlement fund of each individual order would be acceptable but the preference of the proponent cooperatives is that the blend price not be enhanced as a result of their proposal. The witness further stated that Proposal 1 is designed to provide Market Administrators the authority to reduce the rate of increase of the Class I milk price to help ensure no excess funds are available for disbursement.

A witness representing Southeast Milk, Inc. (SMI), testified in support of Proposal 1. The witness stated that SMI is a dairy marketing cooperative comprised of approximately 300 dairy farmer members with about 74 percent of its milk production in Florida, 24 percent in Georgia, and the remaining 2 percent in Alabama and Tennessee. During August 2004, the witness noted that SMI dairy farmer members' milk accounted for about 87.5 percent of the producer milk pooled on the Florida order, and 17.8 million pounds of its dairy farmer members' milk was pooled on the Southeast order.

The witness explained how hurricane Frances caused the most disruption due to its enormous size and slow movement across Florida. The witness stated that unlike past hurricanes, hurricane Frances disrupted the entire state. Also, the witness explained the

extreme precautions taken in response to hurricane Frances were a result of the very recent experience of hurricane Charley during mid-August. Additionally, the witness indicated that the majority of SMI's dairy producers located in Florida were directly or indirectly affected by at least one of these hurricanes.

According to the SMI witness, the Florida Department of Agriculture estimates agriculture losses from hurricanes Charley and Frances will exceed \$2.1 billion, excluding the effects of hurricanes Ivan and Jeanne. The witness provided other examples of the disruption caused by these hurricanes indicating that thirty-four of the 36 Florida counties with dairy farms were declared to be eligible for individual assistance by the Federal Emergency Management Agency (FEMA). The witness noted that 144 of the 170 SMI dairy farms, representing almost 88 percent of SMI Florida milk production, are located in counties declared disaster areas as a direct result of the hurricanes. According to the witness, Florida's largest milk producing county, Okeechobee, was declared a disaster area during three of the four hurricanes. The witness testified that at least 700 head of dairy cows, heifers, and calves were killed and the number is increasing daily. In conclusion, the witness estimated that the decline in milk production per cow, due to additional stress cows suffered from the hurricane events, would result in reduced revenue of at least \$15 million.

The SMI witness pointed out that during hurricane Frances, approximately 3 million pounds of milk were dumped at farms or from trailers due to excessive milk age or high temperature with a loss value estimated at \$540,000. It was the opinion of the SMI witness that the dumping of milk was because milk trucks were not able to reach farms due to high winds, downed power lines and trees blocking roads and farm lanes, and law enforcement officials limiting traffic to only emergency vehicles. Also, Florida based milk haulers avoided hurricane zones or were unable to reach certain destinations due to traffic and roads that were only opened northbound. In addition, the witness testified that all of SMI's milk tankers were filled as temporary storage units.

The SMI witness noted that, if implemented, Proposal 1 would help increase the revenue and income of small businesses. According to the witness, if the proposal is not implemented, SMI members alone would pay for the extraordinary

transportation costs incurred in the marketing area. The witness was of the opinion that movements of bulk milk to nonpool plants should be covered under Proposal 1 because milk intended for the Class I market from SMI had to be rerouted to nonpool plants because distributing plants in Florida would not or could not receive milk because of plant closures or suspended operations directly resulting from the hurricanes. The witness testified that the alternative to shipping this Class I milk to nonpool plants was to dump the milk.

The SMI witness concurred with the previous witness that any extra funds collected in the marketing area after all the funds are disbursed should be paid back to the handler who paid those dollars through the producer-settlement fund.

A witness representing Dairy Farmers of America (DFA), a national dairy cooperative with more than 13,000 members that market milk to plants regulated on the Southeast, Appalachian, and Florida orders testified in support of Proposal 1. The DFA witness provided evidence that explained the additional supplemental milk transportation costs of moving milk into the Southeastern United States as a result of hurricanes Charley, Frances, Ivan and Jeanne. The witness testified that beginning on September 11, 2004, several loads of milk originating in Rockingham, Virginia, were ordered by a plant in North Charleston, South Carolina, to be rerouted to a plant in Spartanburg, South Carolina because of weather related concerns. The witness indicated that DFA would provide actual invoices for the transportation costs, including fuel surcharges, plus any other documentation needed by the Market Administrator to prove conclusively that reroutes took place while transporting milk into the southeast area.

A witness representing Lone Star Milk Producers (LSMP), a dairy cooperative that has members in Kansas, Oklahoma, Texas, Missouri, Arkansas, Louisiana, Mississippi, Tennessee, and Kentucky, testified in support of Proposal 1. The witness noted that during the hurricanes LSMP was involved in dispatching milk to points in the Southeastern United States.

The witness provided evidence indicating additional supplemental milk transportation costs that occurred when delivering milk from Chaves County, New Mexico, to a Publix plant in Lakeland, Florida. The witness noted that LSMP delivered two loads an estimated 1,727 miles per load, at a rate of \$2.04 per loaded mile totaling

\$3523.08 per load or \$7046.16 for both loads.

A witness representing Maryland & Virginia Milk Producers Cooperative Association, Inc. (MD&VA), a cooperative with approximately 1,450 members in 11 states marketing milk in the Northeast, Appalachian, and Southeast orders, testified in support of Proposal 1. The MD&VA witness provided evidence indicating that during the hurricane months extraordinary milk movements in the Southeast were incurred. Specifically, the witness related that a load of milk was ordered on September 9, 2004, by the Superbrand plant (Winn Dixie Dairy Plant) in Taylors, South Carolina. The Superbrand plant needed to ship packaged milk to Florida so MD&VA shipped a load of milk from Franklin, Pennsylvania. The load was shipped 518 miles at a hauling cost of \$2.25 per mile, totaling \$1,166.50. The witness explained, additional orders were placed on September 10, 2004, for bulk milk deliveries to the Superbrand plant in Taylors, South Carolina, and MD&VA shipped five loads to the Superbrand plant (*i.e.*, three from Frederick, Maryland, and two from Franklin, Pennsylvania).

A witness representing National Dairy Holdings (NDH), which has 12 Class I processing plants at various locations in the Appalachian, Southeast, and Florida marketing areas, and operates a total of 20 plants across the United States, testified in support of Proposal 1. The witness emphasized that the scope of the devastation and destruction caused by the four hurricanes in the southeastern part of the United States was the basis for NDH's support of the proposal. As a result, stated the witness, NDH shut plants in response to evacuation notices as the storms headed for landfall. Production was stopped and the refrigeration systems and electrical supply were shut down, noted the witness. The aftermath of the hurricanes caused power outages and the plants to remain closed for days, noted the witness.

It was the opinion of the NDH witness that dairy farmers should not be burdened with the entire cost of hauling milk during the hurricanes. In conclusion, the witness stated that raising the revenues for reimbursing transportation costs under the Federal milk marketing orders would ensure equitable treatment for all handlers of Class I milk regulated under the Appalachian, Southeast, and Florida orders.

A witness from Dean Foods Company (Dean Foods) testified in support of Proposal 1. According to the witness,

Dean Foods owns and operates distributing plants fully regulated on the Appalachian, Southeast, and Florida orders. The Dean Foods witness acknowledged that Proposal 1 calls for a temporary increase in Class I differentials—an action the company would normally oppose. The adoption of Proposal 1 would result in an increased cost of milk for Dean Foods, and it is unlikely that the company would be eligible for reimbursement provided for within the proposal, according to the witness. However, the witness stated that after careful consideration and firsthand knowledge of the resulting chaos from hurricanes Charley, Frances, Ivan and Jeanne, it was the opinion of Dean Foods that the adoption of Proposal 1 is the most reasonable solution for hurricane relief for their suppliers in the affected region. The Dean Foods witness concluded that not only should Proposal 1 be adopted, but that it should be considered on an emergency basis, stating that any delay may result in confusion in the regional milk marketplace.

In a post-hearing brief filed by the proponent cooperatives, the cooperatives reiterated their support for Proposal 1 as modified at the public hearing. The proponent cooperatives also expressed their desire that a specific timeframe should not be established for determining the eligibility of extraordinary transportation costs incurred as a result of the four hurricanes.

No additional post-hearing briefs were filed in support of or in opposition to Proposal 1. Also, the record contains no opposition testimony to the adoption of the proposed amendments.

Based on the record evidence of this proceeding, this final decision finds that Proposal 1, with certain modifications, should be adopted for the Appalachian, Florida, and Southeast milk orders to provide reimbursement to handlers who incurred extraordinary transportation costs for bulk milk movements due to disruptions caused by the aforementioned hurricanes. Record evidence clearly indicates that movements of bulk milk for the Appalachian and Southeast orders, and particularly the Florida order were impacted due to hurricanes Charley, Frances, Ivan, and Jeanne. Some witnesses referred to the proposed amendments as providing relief to handlers who incurred extraordinary transportation costs due to the hurricanes. However, the proposed amendments adopted in this final decision provide only reimbursement for extraordinary transportation costs to

qualifying handlers due to the hurricanes.

Record data indicates proponent cooperatives—at the time of the hearing—had identified 664 loads of bulk milk movements for Orders 5, 6, and 7 that were impacted by the hurricanes at an estimated total for extraordinary transportation costs of about \$1.6 million. A breakdown of the record data shows the total loads and estimated extraordinary costs for Orders 5, 6, and 7 are 118 loads at \$102,206, 323 loads at \$1,134,469, and 223 loads at \$370,085, respectively. Record evidence indicates that these extraordinary transportation expenses are a result of circumstances caused by the historically unprecedented landing of four hurricanes across Southeastern United States during a 7-week period.

Record testimony details the impact of these hurricanes on the three orders, particularly Order 6, whereby the normal movement of milk from dairy farmers to processors and consumers was disrupted by unprecedented weather and weather-driven circumstances. The record demonstrates disruption of the milk marketing system that clearly rises to the level of market disorder of varying degrees for the Florida, Southeast, and Appalachian orders. In addition, the record evidence demonstrates that these disorderly marketing conditions were weather-driven events that could not be avoided.

According to the record evidence, the days prior to the initial hurricane Charley through the aftermath of hurricane Jeanne is a period that represents bulk milk movement disruptions caused by official declarations of mandatory evacuations for portions of Florida, processing plant closings for an extended numbers of days and subsequent refusal of milk deliveries by such plants, suspended operations by plants for storm related reasons, and shut-downs of roads and bridges that required large scale re-routing of bulk milk supply traffic to Florida from the Southeast, Appalachian, and other milk marketing areas.

The record of the proceeding shows that handlers experienced other mass disruptions of normal milk marketing including the inability to pick up, deliver, and transport bulk producer milk caused by a wide array of storm related disruptions of power supplies and basic transportation infrastructure with Florida having the most disruptive impact. In varying degrees, the impact cascaded across the integrated bulk milk marketing system of the Appalachian, Southeast, and Florida milk orders.

One of the functions of the Federal milk order program is to provide for the orderly exchange of milk between the dairy farmer and the handler (first buyer) to ensure the Class I needs of the market are met. The record evidence clearly reveals that the movements of bulk milk in Orders 5, 7, and particularly 6 were disrupted due to the hurricanes. Accordingly, the proposed amendments should be adopted in Orders 5, 6, and 7 to provide reimbursement to handlers incurring additional transportation expenses for bulk milk movements due to the unprecedented weather conditions that occurred in the marketing areas and the resulting disruption.

The proposed amendments adopted in this final decision would implement in Orders 5, 6, and 7 a temporary increase in the Class I milk price to provide reimbursement to handlers and cooperative associations in their capacity as handlers (hereinafter referred to as handlers) who incurred extraordinary costs in moving bulk milk as a result of the hurricanes impact on the Southeastern United States, particularly the Florida marketing area. The proposed amendments, for a 3-month period beginning January 1, 2005, would implement an increase in the Class I milk price at a rate not to exceed \$.04 per hundredweight in the Appalachian and Southeast orders, and at a rate not to exceed \$.09 per hundredweight in the Florida order. The funds generated through the temporary Class I milk price increase would be disbursed during February 2005 through April 2005 to qualifying handlers who incurred extraordinary transportation costs as a result of the aforementioned hurricanes. The reimbursement, as proposed by the proponent cooperatives and adopted in this decision, would be disbursed to qualifying handlers on an actual transportation cost basis or at a rate of \$2.25 per loaded mile, whichever is less.

As adopted in this final decision, extraordinary transportation costs eligible for reimbursement are specifically those costs associated with the costs incurred in transporting bulk milk as a result of the hurricanes. As indicated in the record for this proceeding, the extraordinary costs are those costs that are above the usual and customary costs associated with moving bulk milk—including supplemental bulk milk—to the Appalachian, Florida, and Southeast marketing areas. The transportation costs will be the hauling rate including any fuel surcharge. Record data indicates that the fuel surcharge may be included in the flat hauling rate or listed as a separate fee

on the billing documents such as bills of lading, manifest tickets, and invoices. Accordingly, premium charges or give-up charges will not be considered as transportation costs under the proposed amendments.

Record evidence supports applying a maximum mileage rate of \$2.25 per loaded mile. A loaded mile, as explained by proponents at the hearing, is the one-way hauling distance from the origination point to the destination point. Record data reveals the mileage rate charged by haulers and paid by proponent cooperatives ranged from \$2.02 per loaded mile to \$2.27 per loaded mile. This decision finds that the mileage rate of \$2.25 per loaded mile is reasonable and supported by record evidence. Thus, this rate is adopted.

The proposed amendments adopted in this final decision provide, for the months of January 2005 through March 2005, a temporary increase in the price for Class I milk at a maximum rate of \$.09 per hundredweight for the Florida order and at a maximum rate of \$.04 per hundredweight for the Appalachian and Southeast orders.

The proposed amendments, adopted in this final decision, provide that the Market Administrators for Order 5, 6, and 7 calculate the Class I price increase rate based on the total estimated extraordinary transportation costs and the estimated Class I producer milk receipts for January 2005 through March 2005, using 2003 and 2004 order data as a benchmark for estimating the Class I milk receipts.

The rate established by the Market Administrators for Orders 5, 6, and 7 shall be listed on the monthly Federal milk order advance Class I price announcement. The first date for submitting claims to the Market Administrators for Order 5, 6, and 7 for reimbursement of extraordinary transportation costs will be December 10, 2004, thereafter, claims may be submitted through February 1, 2005, for consideration of reimbursement. These deadlines will provide Market Administrators sufficient time to review the claims submitted and determine whether such claims are eligible for reimbursement under the proposed amendments. The rate assessed for January 2005 will be listed on the advance Class I price announcement scheduled to be released on December 23, 2004. For Class I rates that will be assessed in February and March 2005, the rates will be calculated by the Market Administrators for Order 5, 6, and 7 and included on the advance Class I price announcements scheduled to be released January 21, 2005, and February 18, 2005, respectively.

This final decision also provides the Market Administrator of the order with the authority to reduce the rate of increase on the Class I milk price based on the estimated transportation cost reimbursement claims received. Any balance remaining at the end of the disbursement period shall be prorated to Class I pool distributing plant handlers who were assessed the Class I milk price increased rate.

Record evidence indicates that movements of bulk milk in the Appalachian, Florida, and Southeast orders were disrupted as a result of hurricanes Charley, Frances, Ivan and Jeanne from August 2004 through early October 2004. Record testimony reveals that the initial hurricane (hurricane Charley) made landfall on August 10, 2004, but that disruptions in bulk milk movements were experienced days prior to the hurricane making landfall. The record evidence and testimony further indicates that disruptions in milk movements continued through early October 2004. Accordingly, this final decision provides that only extraordinary transportation expenses that were after August 4, 2004, and before October 3, 2004, for each of the three orders should be eligible for reimbursement under the proposed amendments. This established time period should help Market Administrators in determining which transportation costs are eligible for reimbursement under the respective orders.

The proposal, as adopted in this final decision, specifies the types of milk movements that will qualify for transportation cost reimbursement as the following: (1) Loads of producer milk delivered or rerouted to a pool distributing plant; (2) loads of producer milk delivered or rerouted to a pool supply plant which was then transferred to a pool distributing plant; (3) loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant; (4) loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant; and (5) loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants.

As adopted in this final decision, reroutes constitute only those portions of milk movements that were other than usual and customary shipping routes from individual shipping points. The transportation costs associated with the additional movement of the bulk milk to alternative delivery points will be eligible for reimbursement. However, the transportation costs for the initial

movement of the bulk milk will not be eligible for reimbursement.

Other types of movements that are covered under the proposed amendments include but are not limited to transportation costs associated with bulk milk moved out of the path of the hurricanes that was later shipped to a distributing plant. Also, those additional costs incurred by handlers shipping bulk milk to plants outside of hurricane affected areas because these plants packaged milk to replace the production of plants that had been closed due to the extreme weather events in the hurricane affected areas will be eligible for reimbursement.

Proponent cooperatives modified their proposal at the hearing to allow loads of bulk milk transferred or diverted to a plant regulated under another Federal milk order or to other nonpool plants to qualify for transportation cost reimbursement. Record data reveals that at the time of the hearing SMI had identified a total of 130 loads of bulk milk movements for the Florida and Southeast orders that were hurricane related. The record testimony indicates that approximately 50 to 55 percent of these SMI bulk milk movements were to nonpool plants.

The record indicates that fluid processing plants in Florida were not operating for several extended periods during hurricanes Charlie, Frances, Ivan, and Jeanne. According to record evidence, the only option for the marketing of this milk was to ship it to a nonpool plant that was a significant distance from the milk's intended fluid market. This quantity of bulk milk movements represents a substantial percentage of the movements for the Florida order and the estimated extraordinary transportation costs incurred under the Florida order.

Record testimony indicates these loads of bulk milk were initially intended to be delivered to pool distributing plants to fulfill the Class I needs of the market. However, due to disruptions caused by the four hurricanes, the pool distributing plants were closed or their operations suspended for extended periods. Record evidence also indicates that the only alternative to the rerouting of bulk milk was to dump the milk because alternative markets were unavailable.

Since the record establishes that the milk would have been used to supply the Class I market if pool distributing plants would have been able to accept deliveries, such milk movements should be eligible for transportation cost reimbursement under the orders. On the basis of the record evidence, this final decision finds that—in order for



handlers to qualify for reimbursement of extraordinary transportation costs incurred moving bulk milk to nonpool plants—such handlers will be required to provide proof to the satisfaction of the order Market Administrator that such bulk milk movements were hurricane related and that the intended delivery of such milk was to pool distributing plants for Class I use. Handlers should apply under the Order in which the milk was pooled.

Proponent cooperatives modified Proposal 1 at the hearing to prevent the dual reimbursement of transportation costs associated with bulk milk movements under Orders 5 and 7, which currently provide transportation credits for supplemental Class I milk. Specifically, for milk movements that would qualify for reimbursement under Orders 5 or 7 transportation credit provisions and the temporary transportation cost reimbursement proposed amendments, the proponent cooperatives' propose that the amount of reimbursement received under Order 5 or Order 7 transportation credits provisions be reduced by the amount of eligible cost reimbursement that would be due under the temporary reimbursement proposed amendments. This final decision adopts this proposed amendment with modification.

Under the proposed amendments adopted in this decision, handlers who have received transportation credits for movements of bulk milk under Section 82 of Orders 5 and 7 will be eligible to receive reimbursement for the same loads of milk under the transportation cost reimbursement proposed amendments provided such milk movements resulted from the hurricanes. The reimbursement amount will be the difference between the amount of transportation credits received by the handlers under Order 5 or Order 7 and the amount due to such handlers under the transportation cost reimbursement proposed amendments.

The proposed amendments, as adopted in the decision, provide the Market Administrators of Orders 5, 6, and 7 the sole authority to evaluate the evidence to determine which transportation cost claims are eligible for reimbursement. The Market Administrator will review all documents submitted by handlers in a timely manner in determining which claims are eligible for transportation cost reimbursement under the proposed amendments. Under each of the three orders, handlers applying for reimbursement of extraordinary transportation costs must submit proof to the satisfaction of the Market Administrator that such transportation

costs are eligible for reimbursement. Handlers may submit documents supporting their claims with their monthly handler report of milk receipts and utilization. These documents may include but are not limited to invoices, receiving records, bulk milk manifests, hauling billings, transaction records, and contract agreements. Handlers who have applied for or received transportation cost reimbursement through insurance claims or through any State, Federal, or other programs must submit documentation of such claims of reimbursement to the Market Administrators for Orders 5, 6, and 7.

Proponent cooperatives assert that their proposed amendments for transportation cost reimbursement, if adopted, would be of marketwide benefit for market participants (producers and handlers) of Orders 5, 6, and 7. Although the proposed amendments adopted in this final decision address the disorderly movements of bulk milk resulting from the hurricanes, only those handlers who incurred extraordinary transportation costs for certain milk movements will be eligible for reimbursement under Orders 5, 6, and 7. Only extraordinary transportation costs for moving bulk milk due to the hurricanes will be eligible for reimbursement under Orders 5, 6, and 7 and the payments for such costs will be limited to only qualifying handlers (handlers and cooperative associations in their capacity as handlers).

*2. Determining whether emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.* Record evidence supports the adoption of Proposal 1, with modifications, on an emergency temporary basis due to the unprecedented occurrences of hurricanes Charley, Frances, Ivan, and Jeanne within a 7-week period and the resulting disruption on milk movements for Orders 5, 6, and 7. The proposed amendments to Orders 5, 6, and 7 would provide reimbursement to handlers who incurred extraordinary transportation costs for bulk milk movements due to the four hurricanes by temporarily increasing the price for Class I milk and disbursing the funds generated by the Class I milk price increase during February 2005 through April 2005.

Record evidence clearly indicates that movements of bulk milk for the Appalachian and Southeast orders, and particularly the Florida order were impacted due to hurricanes Charley, Frances, Ivan, and Jeanne. Record evidence clearly indicates there were a

number of transportation and marketing disruptions that impacted Orders 5, 6, and 7 due to the hurricanes including official declarations of mandatory evacuations for portions of Florida, processing plant closures and suspended operations, and shut-downs of roads and bridges that required rerouting of bulk milk. Also, record evidence shows that Order 5, 6, and 7 handlers experienced other mass disruptions including the inability to pick up, deliver, and transport bulk producer milk. Accordingly, the timely implementation of the proposed amendments will provide much needed reimbursement to handlers who experienced extraordinary costs in hauling bulk milk for Orders 5, 6, and 7 as a result of the four hurricanes.

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

(a) The tentative marketing agreements and the 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 marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; 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.

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

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the orders regulating the handling of milk in the aforesaid marketing areas, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register**.

#### **Determination of Producer Approval and Representative Period**

August 2004 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 Appalachian, Florida, and Southeast marketing areas is approved or favored by producers, as defined under the terms of the orders (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

#### **List of Subjects in 7 CFR Parts 1005, 1006, and 1007**

Milk marketing orders.

Dated: November 15, 2004.

**A.J. Yates,**  
*Administrator, Agricultural Marketing Service.*

#### **Order Amending the Orders Regulating the Handling of Milk in the Appalachian, Florida, and Southeast Marketing Areas**

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

#### **Findings and Determinations**

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

determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Appalachian, Florida, and Southeast 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 regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which a hearing has been held.

#### **Order Relative to Handling**

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

#### **PARTS 1005, 1006, AND 1007—[AMENDED]**

1. The authority citation for 7 CFR Parts 1005, 1006, and 1007 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

#### **PART 1005—MILK IN THE APPALACHIAN MILK MARKETING AREA**

2. Section 1005.60 is amended by revising paragraph (a) and adding a new paragraph (g) to read as follows:

#### **§ 1005.60 Handler's value of milk.**

\* \* \* \* \*

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts; except that for the months of January 2005 through March 2005, the Class I skim milk price for this purpose shall be the Class I skim milk price as determined in § 1000.50(b) plus \$0.04 per hundredweight, and the Class I butterfat price for this purpose shall be the Class I butterfat price as determined in § 1000.50(c) plus \$0.0004 per pound. The adjustments to the Class I skim milk and butterfat prices provided herein may be reduced by the market administrator for any month if the market administrator determines that the payments yet unpaid computed pursuant to paragraphs (g)(1) through (5) and paragraph (g)(7) of this section will be less than the amount computed pursuant to paragraph (g)(6) of this section. The adjustments to the Class I skim milk and butterfat prices provided herein during the months of January 2005 through March 2005 shall be announced along with the prices announced in § 1000.53(b);

\* \* \* \* \*

(g) For the months of January 2005 through March 2005 for handlers who have submitted proof satisfactory to the market administrator to determine eligibility for reimbursement of transportation costs, subtract an amount equal to:

(1) The cost of transportation on loads of producer milk delivered or rerouted to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(2) The cost of transportation on loads of producer milk delivered or rerouted to a pool supply plant that was then transferred to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne, and;

(3) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(4) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(5) The cost of transportation on loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants which

were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(6) The total amount of payment to all handlers under this section shall be limited for each month to an amount determined by multiplying the total Class I producer milk for all handlers pursuant to § 1000.44(c) times \$0.04 per hundredweight.

(7) If the cost of transportation computed pursuant to paragraphs (g)(1) through (5) of this section exceeds the amount computed pursuant to paragraph (g)(6) of this section, the market administrator shall prorate such payments to each handler based on the handler's proportion of transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section. Transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section which are not paid as a result of such a proration shall be included in each subsequent month's transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section until paid, or until the time period for such payments is concluded.

(8) The reimbursement of transportation costs pursuant to this section shall be the actual demonstrated cost of such transportation of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section, or the miles of transportation on loads of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section multiplied by \$2.25 per loaded mile, whichever is less.

(9) For each handler, the reimbursement of transportation costs pursuant to paragraph (g) of this section for bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section shall be reduced by the amount of payments received for such milk movements from the transportation credit balancing fund pursuant to § 1005.82.

\* \* \* \* \*

#### **PART 1006—MILK IN THE FLORIDA MILK MARKETING AREA**

3. Section 1006.60 is amended by revising paragraph (a) and adding a new paragraph (g) to read as follows:

##### **§ 1006.60 Handler's value of milk.**

\* \* \* \* \*

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts; except that for the months of January 2005 through March 2005, the Class I skim milk price for this

purpose shall be the Class I skim milk price as determined in § 1000.50(b) plus \$0.09 per hundredweight, and the Class I butterfat price for this purpose shall be the Class I butterfat price as determined in § 1000.50(c) plus \$0.0009 per pound. The adjustments to the Class I skim milk and butterfat prices provided herein may be reduced by the market administrator for any month if the market administrator determines that the payments yet unpaid computed pursuant to paragraphs (g)(1) through (5) and paragraph (g)(7) of this section will be less than the amount computed pursuant to paragraph (g)(6) of this section. The adjustments to the Class I skim milk and butterfat prices provided herein during the months of January 2005 through March 2005 shall be announced along with the prices announced in § 1000.53(b);

\* \* \* \* \*

(g) For the months of January 2005 through March 2005 for handlers who have submitted proof satisfactory to the market administrator to determine eligibility for reimbursement of transportation costs subtract an amount equal to:

(1) The cost of transportation on loads of producer milk delivered or rerouted to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(2) The cost of transportation on loads of producer milk delivered or rerouted to a pool supply plant that was then transferred to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne, and;

(3) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(4) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(5) The cost of transportation on loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(6) The total amount of payment to all handlers under this section shall be limited for each month to an amount determined by multiplying the total Class I producer milk for all handlers pursuant to § 1000.44(c) times \$0.09 per hundredweight.

(7) If the cost of transportation computed pursuant to paragraphs (g)(1)

through (5) of this section exceeds the amount computed pursuant to paragraph (g)(6) of this section, the market administrator shall prorate such payments to each handler based on each handler's proportion of transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section. Transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section which are not paid as a result of such a proration shall be included in each subsequent month's transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section until paid, or until the time period for such payments has concluded.

(8) The reimbursement of transportation costs pursuant to this section shall be the actual demonstrated cost of such transportation of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section, or the miles of transportation on loads of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section multiplied by \$2.25 per loaded mile, whichever is less.

\* \* \* \* \*

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

4. Section 1007.6 is amended by revising paragraph (a) and adding a new paragraph (g) to read as follows:

##### **§ 1007.60 Handler's value of milk.**

\* \* \* \* \*

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts; except that for the months of January 2005 through March 2005, the Class I skim milk price for this purpose shall be the Class I skim milk price as determined in § 1000.50(b) plus \$0.04 per hundredweight, and the Class I butterfat price for this purpose shall be the Class I butterfat price as determined in § 1000.50(c) plus \$0.0004 per pound. The adjustments to the Class I skim milk and butterfat prices provided herein may be reduced by the market administrator for any month if the market administrator determines that the payments yet unpaid computed pursuant to paragraphs (g)(1) through (5) and paragraph (g)(7) of this section will be less than the amount computed pursuant to paragraph (g)(6) of this section. The adjustments to the Class I skim milk and butterfat prices provided herein during the months of January 2005 through March 2005 shall be

announced along with the prices announced in § 1000.53(b);

\* \* \* \* \*

(g) For the months of January 2005 through March 2005 for handlers who have submitted proof satisfactory to the market administrator to determine eligibility for reimbursement of transportation costs, subtract an amount equal to:

(1) The cost of transportation on loads of producer milk delivered or rerouted to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(2) The cost of transportation on loads of producer milk delivered or rerouted to a pool supply plant that was then transferred to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne, and;

(3) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(4) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(5) The cost of transportation on loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants which were delivered as a result of hurricanes Charley, Frances, Ivan and Jeanne.

(6) The total amount of payment to all handlers under this section shall be limited for each month to an amount determined by multiplying the total Class I producer milk for all handlers pursuant to § 1000.44(c) times \$0.04 per hundredweight.

(7) If the cost of transportation computed pursuant to paragraphs (g)(1) through (5) of this section exceeds the amount computed pursuant to paragraph (g)(6) of this section, the market administrator shall prorate such payments to each handler based on each handler's proportion of transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section.

Transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section which are not paid as a result of such a proration shall be included in each subsequent month's transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section until paid, or until the time period for such payments has concluded.

(8) The reimbursement of transportation costs pursuant to this

section shall be the actual demonstrated cost of such transportation of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section, or the miles of transportation on loads of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section multiplied by \$2.25 per loaded mile, whichever is less.

(9) For each handler, the reimbursement of transportation costs pursuant to paragraph (g) of this section for bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section shall be reduced by the amount of payments received for such milk movements from the transportation credit balancing fund pursuant to § 1007.82.

\* \* \* \* \*

[This marketing agreement will not appear in the Code of Federal Regulations]

#### Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ \_\_\_\_\_<sup>1</sup> to \_\_\_\_\_, all inclusive, of the order regulating the handling of milk in the (\_\_\_\_\_) Name of order (\_\_\_\_\_) marketing area (7 CFR Part \_\_\_\_\_<sup>2</sup>) which is annexed hereto; and

II. The following provisions: § \_\_\_\_\_<sup>3</sup> Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of \_\_\_\_\_<sup>4</sup>, \_\_\_\_\_ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ \_\_\_\_\_<sup>3</sup> Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) \_\_\_\_\_  
(Title) \_\_\_\_\_  
(Address) \_\_\_\_\_  
(Seal) \_\_\_\_\_  
Attest

<sup>1</sup> First and last sections of order.

<sup>2</sup> Appropriate Part number.

<sup>3</sup> Next consecutive section number.

<sup>4</sup> Appropriate representative period for the order.

[FR Doc. 04-25684 Filed 11-16-04; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

#### 10 CFR Part 430

[Docket No. EE-RM/STD-00-550]

RIN 1904-AB08

#### Energy Conservation Program for Commercial and Industrial Equipment: Energy Conservation Standards for Distribution Transformers

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Advance notice of proposed rulemaking; notice of availability of a supplemental technical support document appendix, and correction.

**SUMMARY:** In conjunction with an earlier advance notice of proposed rulemaking (ANOPR) to establish energy conservation standards for distribution transformers, DOE announces the availability of a supplemental technical support document (TSD) appendix. DOE has also identified a mislabeling found in the ANOPR.

**SUPPLEMENTARY INFORMATION:** As indicated at the public meeting on September 28, 2004, the Department of Energy (DOE) announces the availability of a supplemental TSD appendix entitled, "Appendix 8E: Average Transformer Design Properties from Life-Cycle Cost Model." This appendix provides information for the public to consider in connection with the July 29, 2004, ANOPR (69 FR 45375).

DOE has also identified a mislabeling found in the ANOPR on pages 45401 through 45404 and in Chapter 8 of the TSD on pages 8-38 through 8-43. On these pages, the text mistakenly labels some reported values as an "average manufacturer's selling price" when they should be referred to as the "consumer equipment cost before installation." This mislabeling does not impact the inputs, results, or any other aspect of the ANOPR.