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**BEFORE THE UNITED STATES DEPARTMENT  
OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE**

**In the Matter of:** : **Docket Nos:**  
: **Proposed Amendments to the** : **AO-11-0333;**  
**Mideast Federal Milk Order** : **AMS-DA-11-0067;**  
**(7 C.F.R. §1033)** : **DA-11-04**

**POST-HEARING BRIEF ON BEHALF OF CONTINENTAL DAIRY  
PRODUCTS, INC., DAIRY FARMERS OF AMERICA, INC. (DFA),  
DAIRYLEA COOPERATIVE INC. (DAIRYLEA), ERIE COOPERATIVE  
ASSOCIATION, FOREMOST FARMS USA, COOPERATIVE (FFUSA),  
MICHIGAN MILK PRODUCERS ASSOCIATION, INC., (MMPA),  
NATIONAL FARMERS ORGANIZATION, INC. (NFO), PRAIRIE FARMS  
DAIRY, INC. AND WHITE EAGLE COOPERATIVE ASSOCIATION**

**Benjamin F. Yale (Reg. No. 0024730)**  
**Yale Law Office, LPA**  
**527 N. Westminster Street, P.O. Box 100**  
**Waynesfield, OH 45896**  
**419-568-6401; Fax 419-568-6413**  
**ben@yalelawoffice.com**

**Marvin Beshore, Esquire**  
**Attorney ID # PA 31979**  
**130 State Street, P.O. Box 946**  
**Harrisburg, PA 17108-0946**  
**717-236-0781; Fax 717- 236-0781**  
**MBeshore@beshorelaw.com**

**Attorneys for Continental Dairy Products, Inc.,  
Dairy Farmers of America, Inc.,  
Dairylea Cooperative Inc.,  
Erie Cooperative Association,  
Foremost Farms USA, Cooperative,  
Michigan Milk Producers Association, Inc.,  
National Farmers Organization, Inc.,  
Prairie Farms Dairy, Inc., and  
White Eagle Cooperative Association**

**Date: November 30, 2011**

## **I. INTRODUCTION**

This hearing concerns proposals to address the urgent need to modify the pool distributing plant definition for Federal Order 33. The hearing was called on a proposal originally submitted by four dairy farmer cooperatives marketing member milk on Order 33. Subsequently, support for the proposal was joined by five other dairy farmer cooperative associations. This brief is filed on behalf of those nine cooperatives, in support of the need to immediately amend the pool distributing plant provisions of Order 33.

The need for the hearing arises from the extremely unusual removal from federal order marketwide pool status of a major distributing plant located geographically in the interior of a federal milk order marketing area. While there have been a number of occasions in various orders when major distributing plants have shifted regulation from the order in which they are located to another order, to the best of our knowledge there have not been any prior circumstances where a major, high Class I utilization plant located in the heart of a federal order area has moved from fully regulated to partially regulated, i.e. non-pool, status. This circumstance threatens the integrity of the federal order pools and the marketwide pooling system. It requires the Secretary's most urgent attention and resolution.

## II. FACTUAL BACKGROUND

### A. Proponents

The cooperative proponents, collectively and through common marketing agencies, market considerably in excess of 50% of Order 33 pooled milk. The proponent cooperatives are:

- Continental Dairy Products, Inc. -- a member-owned Capper-Volstead cooperative of 29 farms producing milk in Michigan, Indiana, and Ohio. During the course of a year Continental will pool milk on Federal Milk Marketing Orders 5, 6, 7, 30, 32, and 33.
- Dairy Farmers of America, Inc.(DFA) -- a member-owned Capper-Volstead cooperative of 9,200 farms that produce milk in 49 states. DFA pools milk on 10 of the 11 Federal Milk Market Orders, including the Mideast Federal Order.
- Dairylea Cooperative Inc. (Dairylea) -- a member-owned Capper-Volstead cooperative of 2,000 farms that produce milk in 9 states. Dairylea pools milk on 3 of the 10 Federal Milk Marketing Orders including the Mideast Federal Order.
- Erie Cooperative Association -- a member-owned Capper-Volstead cooperative of 22 farms that produce milk in Ohio and Michigan. Erie pools milk on 2 of the 10 Federal Milk Marketing Orders including the Mideast Federal Order.
- Foremost Farms USA, Cooperative (FFUSA) -- a member-owned Capper-Volstead cooperative of 1,918 farms that produce milk in 7 states. FFUSA pools milk on 4 of the 10 Federal Milk Marketing Orders including the Mideast Federal Order.

- Michigan Milk Producers Association, Inc. (MMPA) -- a member-owned Capper-Volstead cooperative of 1,380 farms that produce milk in 4 states. MMPA pools milk on 5 of the 10 Federal Milk Marketing Orders including the Mideast Federal order.
- National Farmers Organization, Inc. (NFO) -- a member-owned Capper-Volstead cooperative of 1,500 farms that produce milk in 18 states. NFO pools milk on 6 of the 10 Federal Milk Marketing Orders including the Mideast Federal Order.
- Prairie Farms Dairy, Inc., -- a member-owned Capper-Volstead cooperative of 805 farms that produce milk in 7 states. Prairie Farms pools milk on 5 of the 10 Federal Milk Marketing Orders including the Mideast Federal Order.
- White Eagle Cooperative Association -- a member-owned Capper-Volstead cooperative of 12 farms that produce milk in 3 states. White Eagle pools milk on 4 of the 10 Federal Milk Marketing Orders including the Mideast Federal Order.

The proposal was also supported by the Southern Marketing Agency (SMA). SMA is a Capper-Volstead marketing agency in common with seven cooperative members operating in the southern United States. Its members market milk in the Appalachian, Southeast, and Florida federal orders (as well as in other orders, including Order 33). It is a qualified cooperative federation under each of the Appalachian, Southeast, and Florida orders.

**B. Superior Dairy**

Superior Dairy, Inc., of Canton, Ohio (“Superior”) is a mainline dairy processor producing a standard line of dairy products including milk, half & half, cottage cheese, sour

cream, chip dip, bulk ice cream, ice cream cakes. Its products are distributed to grocery stores and other businesses such as Fisher's Foods, Costco, Baskin Robbins, B.J.'s and Wal-Mart. Superior is a family-owned company with 235 to 255 employees, started in 1922. In 2005, it had 180 independent producers representing 75% of their volume, indicating a monthly volume at that time in excess of 30 million pounds, assuming average size producers. At the time of the hearing, Emil Soehnen testified that Superior had 120 independent producers. (TR. (Oct. 5) p.186)

Since at least 1990, and from Federal Register information as far back as 1952, Superior Dairy has been a fully regulated pool distributing plant on Order 33 or the predecessor federal Order 36.

In 2006, Superior began to utilize certain proprietary packaging technology with chain store customers, such as Costco and Sam's Club, which have broad geographic distribution. (TR. (Oct. 5) p. 112) These sales expanded Superior's distribution into new federal orders beyond Order 33. As sales growth occurred in Order 1, the order for the northeast marketing area, and Superior lost other business in Order 33, the Canton plant flipped regulation out of Order 33 into Order 1 in April of 2010. As of the time of the hearing, Superior had monthly receipts at its Canton plant of about 40 million pounds of milk, with about 82% or 32.8 million pounds utilized in Class I. (TR. (Oct. 5) p. 111) Approximately 28% of these Class I sales, just over 9 million per month, are distributed in Order 1, while 20%, about 6.6 million per month, are distributed in Order 33. (TR. (Oct. 5) p. 113) The remainder of its sales, some 17.0 million, are distributed in five other federal orders: Orders 5, 6, 7, 30 and 32 and to non-federally regulated areas of Pennsylvania, New York, and Virginia.

**C. Other participants.**

Also participating in the hearing through counsel were a number of handlers with fully and/or partially-regulated distributing plants located in Pennsylvania. These were: Schneider's Dairy, Guers Dairy, Dean Foods, and Galliker Dairy Company.

**D. Marketing Disorder in Order 33**

The Midcast Marketing Area, Federal Order 33, 7 C.F.R. §1033, reaches from Indiana in the west to west-central Pennsylvania in the east; from Michigan in the north to north central Kentucky in the South. Order 33's Class I sales of approximately seven billion pounds annually ranks at the second largest Class I utilization order in the federal milk order system. Superior Dairy, Canton, Ohio, had been a fully regulated Order 33 distributing plant since the order was promulgated with its current geography as of January 2000. In April 2010, however, Superior became an Order 1 pool distributing plant. (Exh. 6a, p. 10 of 15) This resulted from Superior's expansion of sales to areas outside Order 33. This expansion began sometime after 2006. Its sales currently extend into seven different Orders. (Exh. 6b, p. 11 of 11)

In March 2011, Superior's regulatory status again changed. At that time it became a partially regulated pool distributing plant, thus effectively depooling the Canton plant, its milk supply and sales from federal order regulation. (Exh. 6b, p. 10 of 11) This change in status is a cause of disorderly marketing conditions. The hearing record reveals how this change occurred.

In early 2011, Superior Dairy acquired a previously closed, small processing property at Wauseon, Ohio. This plant, Superior Dairy, Wauseon Ohio, appeared for the first

time on the March 2011 list of pool distributing plants as published by Federal Order 1. In the same month, the Superior Dairy Canton, Ohio, plant disappeared from any Market Administrator listing of pool distributing plants, but appeared in some Market Administrator reports as a partially regulated distributing plant. These events are part of a plan which Superior acknowledges<sup>1</sup> involves transactions intended for the sole purpose of enabling Superior Dairy - Canton to avoid full regulation by falling below the 25% route disposition requirement in any marketing area. (TR. (Oct. 4) pp. 149–51)

Elvin Hollon, testifying for proponents, described the series of transactions and milk movements which accomplished the de-pooling of the Canton Class I facility.<sup>2</sup> The Wauseon, Ohio plant is very small with a small refrigerated storage area and limited milk receiving facilities. The plant's receiving facilities are too small and access is too difficult to routinely receive over-the-road tankers of raw milk. Consequently, for Order regulation purposes, any milk sales of substantial volume associated with the Wauseon, Ohio, plant can only come from the physical movement of packaged product, transferred into and then out of the Wauseon plant. This product movement allows the product's ultimate distribution to be reported on the Wauseon handler report. Superior Dairy Canton is maneuvering enough Order 1 sales through the Wauseon plant and onto the Wauseon handler report to qualify Wauseon as an Order 1 pool distributing plant. These transshipments in turn removed these Order 1 sales from the Canton plant, thereby disqualifying it from full regulation in Order 1 -- or any other Order - by making

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<sup>1</sup> See Soehrlen testimony. (TR. (Oct. 5) pp. 114–15)

<sup>2</sup> Mr. Soehrlen confirmed that Elvin Hollon's description of the operation of the Canton and Wauseon plants, and movement of products between them, was correct. He said: "I would say that was accurate." (TR. (Oct. 5) p. 162 l.24)

sure no individual federal Order marketing area receives 25% of Superior Dairy - Canton's route disposition. (TR. (Oct. 4) pp. 150-51)

Additional first hand testimony from multiple witnesses made clear that the Wauseon facility is only useful as a pooling mechanism and has no commercial viability in its present configuration and probably has no possibility of being commercially viable. Carl Rasch of Michigan Milk Producers Association described how the Wauseon plant had been “previously closed by the two previous owners who found the plant to be inefficient by today's industry standards and economically nonviable.” (TR. (Oct. 5) p. 13, ll. 8-11). He pointed out that the plant was not capable of receiving deliveries in “conventional milk hauling equipment” i.e. over-the-road tankers, and, at least prior to the purchase by Superior, was not equipped with washing equipment. (*Id.* at p. 13 ll. 16–20) Chuck Cortade, a DFA employee who had had responsibility for servicing the plant under pre-Superior ownership, confirmed that the plant’s capacity for processing is perhaps 2 million pounds per month at the maximum, a size almost non-existent among commercial dairy plants today. (Courtade TR. (Oct. 4) pp. 318-319; Weis TR. (Oct. 5) p. 50; Rasch TR. (Oct. 5) pp. 16-18) Its actual usage of milk while operating prior to purchase by Superior was around 1 million pounds per month. (Courtade TR. (Oct. 4) p. 319) The physical site is land-locked; the plant’s size approximates the area of the cooler in a modern dairy plant. It is plainly a facility operated for the sole purpose of de-pooling the Canton plant. (Exh. 23)

Establishing and maintaining the current, artificial status of the Wauseon and Canton plants would appear to be a challenging task requiring sales in multiple Orders and an adroit management of the milk orders of Superior’s customers. This is apparently made possible by Superior’s sales into Orders 1, 5, 6, 7, 30, 32 and 33. (Exh. 21, pp. 11-12; TR. (Oct. 4) pp. 151-



52) Additionally, because of geographic proximity to non-federally regulated areas in central Pennsylvania and western New York, the plant may also have sales in those unregulated areas. Consequently, through this broad geographic distribution, Superior has quite a few marketing area locations to work with in its effort to avoid pool plant status. A rough picture of Superior's distribution in various orders can be gleaned from Order 33 published information which shows the change in route distribution by Order 33 plants, and in Order 33 by Order 1 plants, between March and April 2010 when Superior switched from being pooled on Order 33 to Order 1. (Exh.

24) For April 2010, the Order 33 data indicates that sales by pool plants decreased by approximately 30 million pounds. (Exh. 24) A review of the pool distributing plant list shows the only changes between the two months were the addition of Toft Dairy (from partially regulated status to pool distributing plant and Superior Dairy being dropped from the list). Additionally data shown in the pie chart on Exh. 24 notes that sales by partially regulated plants in Order 33 amounted to 0.79% - an extremely small volume and reflective of the Order preference for full regulatory status. It is also notable on Exh. 24 that sales by Order 33 handlers into unregulated areas varies minimally from month to month and year to year in spite of the change in status of Superior Dairy which would indicate that while Superior may have some sales into unregulated areas, the volume is small and hardly a competitive factor. One can infer that the competition for sales into unregulated areas comes from other fully regulated plants as the change in status by Superior to partially regulated did not result in significantly less pool plant sales into unregulated areas. (Exh. 24)

Superior's partially regulated status is financially beneficial to it, detrimental to pool producers, and of great concern to fully regulated competitors. The economic effects of the

partially regulated status were analyzed in detail by Elvin Hollon and are shown in hearing Exh. 25, a detailed spreadsheet (the embedded formulas for which are in Exh. 25A). The direct benefit to a partially-regulated plant is that it does not have to account to a marketwide pool for the minimum classified use value of its milk acquired from dairy farmers (whether directly or through cooperatives). In other words, it does not have a pool payment – as do all of its fully regulated competitors. On Exhibit 25, Mr. Hollon calculated the hypothetical value of this not-required-payment, using published Order 33 average Ohio producer component values and average utilizations from an array of 20 pool distributing plants supplied by the proponent cooperatives. (TR. (Oct. 4) pp. 155–157) For a hypothetical 40,000,000 pound per month average utilization distributing plant in Order 33 for the 19 months from January 2010 to July 2011 the total value of those payments-not-required was \$7,084,051 or \$372,845 per month. (Exh. 25, col. CCCC) Interestingly, this monthly financial benefit approximates the publicly reported acquisition cost (\$352,000) of the Superior Wauseon plant. (Exh. 23, p. 3a) While use of this benefit is limited to an extent by the requirement of Section 1000.76(b) that the minimum plant blend value be paid to the partially-regulated plant's producer suppliers, in a milkshed where substantial over-minimum premiums must be paid to procure a milk supply (Exh. 25, col. QQ), the non-pooled handler can use the funds not required to be paid into the pool to match pool handlers' over-order premiums, leaving the non-pool, partially regulated handler at a significant cost advantage.

Alternatively, the non-pool partially-regulated handler has funds available to use in competing for market share in the packaged product market. (TR. (Oct. 4) p. 157) That marketplace is known to be quite price competitive and regulatory differences in minimum costs

are a very sensitive issue to regulated distributing plant customers of the proponent cooperatives. (Weis, TR. (Oct. 5) p. 51) In fact, there were inquiries from customers concerning the Superior regulatory status. (Hollon, TR. (Oct. 4) p. 222 )

Besides the disorder in costs among handlers, Superior's non-pool status means a direct loss of the classified values to a federal order pool. The value of \$372,000<sup>3</sup> per month to the Order 33 pool (1.3 billion average pooled volume) is about \$.028 per cwt. on the PPD; and in Order 1 (2.0 billion average pooled volume) is about \$.018 per cwt. These values are lost to all producers in the impacted pool. In an analogous context, the Department has found that a pool impact of \$.01 or more is a basis for a finding of disorderly marketing<sup>4</sup>, and it should do the same here.<sup>5</sup>

In addition to the very direct, disruptive, and disorderly raw milk cost benefits to Superior, and losses to the federal order pool, this change from the status quo has other disorderly elements. When a distributing plant has an unstable regulatory status – one subject to change from month to month – the orderly and appropriate sharing of necessary reserves is jeopardized. Equitable sharing of reserves is one of the pillars of orderly marketing furthered by

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<sup>3</sup> To the extent that Superior's Class I utilization of 82% is less than the average handler utilization of 86% in Exh. 25, the monthly pool payment could be less, depending on Superior's mix of utilization for the remaining 18% of its volume. If it had, for instance, more Class II use than other handlers, that would add to required pool payments. In any case the 82% v. 86% difference is not material to the point.

<sup>4</sup> See Fed. Reg. 74166, 74186 (December 14,2005)(Producer-handler definition hearing)

<sup>5</sup> An element of inequity between pool and non-pool plants which was not calculated in Exh. 25 involves the payment of administrative assessments. Jeff Sims (TR. (Oct. 5) p. 90) pointed out this effect which, in essence, adds insult to the pool handlers' competitive injury from the non-pooling of the partially regulated plant.

marketwide pooling. As Jeff Sims of SMA articulately pointed out, appropriate pooling of reserve supplies is basically made impossible when the regulatory home of the distributing plant is unstable. (TR. (Oct. 5) pp. 80, 93–97)

**In summary, disorderly marketing is caused at the producer level, among producers in the same procurement area, and at the handler level, among plants competing for milk supplies and selling packaged products. The current federal order system is built upon marketwide pools with uniform producer and handler values. That system cannot survive if major players in the geographic area are not part of the marketwide pool.**

### **III. DISCUSSION OF THE PROPOSED ORDER AMENDMENTS**

#### **A. Proposals discussed at the hearing.**

The Cooperatives offered the following order language, amending the pool plant definition of Order 33 by adding the emphasized sentence at the end of part 1033.7(a):

§1033.7 Pool plant.

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

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or §1\_\_\_\_.7(b) of any other Federal milk order, from which during the month 30 percent or more of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least 25 percent

of such route disposition and transfers must be to outlets in the marketing area. **Plants located within the marketing area with combined route disposition and transfers of at least 50% into Federal Order marketing areas but without 25% of route disposition and transfers into any one Federal Order will be regulated as a distributing plant in this Order.**

The proposal would operate rather simply and directly: It would cause any plant located in the marketing area of Order 33 which distributes at least 50% of its fluid milk products – either route disposition or transfers – into federal order marketing areas to be pooled, either on federal order 33 or another order. If the plant did not qualify in any other marketing area, such as was the status of the Canton plant at the time of the hearing and since March 2011, it would be pooled on Order 33. However, a plant would be pooled on another order, such as Order 1, if it met the pooling requirements for that order -- i.e. at least 25% of its distribution in Order 1 -- and that distribution was more than in any other marketing area. The proposal would assure that a plant like Superior-Canton was pooled. It would prevent the disorder inherent in the current partially-regulated status of the plant. But, it would not necessarily assure uniformity of minimum prices among producers in the Order 33 milkshed because a plant, such as Superior, in the marketing area could still be pooled on another order, as was Superior, Canton, for eleven months in 2010 and 2011.

Superior, while opposing any change in regulations at the hearing, described its concerns and problems with being pooled on Order 1, a circumstance which returned a lower PPD than Order 33 pooling. For the eleven months from April 2010 to February 2011 during which Canton was pooled on Order 1, its PPD averaged about \$.13 per hundredweight less than the

Order 33 PPD.<sup>6</sup> (Soehrlen TR. (Oct. 5) pp. 113, 186) This represented a difference of about \$500,000 in pool values to the Canton plant which it claimed it needed to make up to its suppliers to keep them competitive. Because of this problem, Superior, alternatively, supported a change in the language of Order 33 which would lock the Canton plant into pooling on Order 33 if it were required to be pooled. (Soehrlen TR. (Oct. 5) pp. 138–140) Superior offered two sets of language to lock it into Order 33. Each alternative would revise the last sentence of Hearing Proposal 1, as indicated:

“\*\*\*\* Plants located within the marketing area with combined route disposition and transfers of at least 50% into Federal Order marketing areas ~~but without 25% of route disposition and transfers in any one federal order~~ will be regulated as a distributing plant in this Order.”

or

“\*\*\*\* Plants located within the marketing area with combined route disposition and transfers of at least 50% into Federal Order marketing areas ~~but without 25% of route disposition and transfers in any one federal order~~ and such distribution is into four or more marketing areas will be regulated as a distributing plant in this Order.”

The single difference between the Superior alternatives is that the second alternative would apply only to plants, such as Superior, with sales into four or more marketing areas. It would allow plants with sales into only three areas to evade regulation through transactions like that being presently engaged in by Superior through the Wauseon facility.

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<sup>6</sup> In addition to the difference in PPD values between Order 1 and Order 33, Order 33 has a somatic cell count adjuster which is not in Order 1. The value of this adjuster exacerbates the differences in PPD between Order 1 and Order 33 and provides another reason why procurement area uniformity is important. For instance, for July 2011 (Exh. 8), the last month for which pool data is in the record, Order 33 producers received \$1,538,889 in somatic cell value payments, an average of \$.11 per cwt on all pool milk. This value is in addition to the PPD.

**B. Review of prior USDA consideration of distributing plant lock-in provisions**

The primary basis for associating plants with a federal milk order pool has long been the area in which a plant distributes fluid milk products. Thus, it has often been said that the physical location of the plant is not a direct factor in whether a plant is pooled or where a plant is pooled. But, at the same time, there are exceptions where the location of the plant, rather than the area of sales, determines its pool status; and by all indications there always have been such exceptions in the system. We know, for instance, that in 1952 in the very area of Canton (Stark County) Ohio, the location of distributing plants established their status as pool plants in the federal milk order. See "Milk in Stark County, Ohio Marketing Area" 17 Fed. Reg. 9922, 9923 (§ 963.3) (Nov. 4, 1952) codified at 7 C.F.R. Part 963 (1956). This hearing presents a circumstance where geography is more important than sales for determining – “locking-in” – the most stable and orderly criteria for pooling certain distributing plants.

All federal orders currently authorize the locking-in to the order of geographic location of all plants whose predominant product is aseptic or UHT, long shelf life products. See 7 C.F.R. § 1033.7(c) and 1 \_\_\_\_\_.7(c) in all other orders. This provision was adopted in the federal order reform decision of 1999 for the following reasons:

The consolidated orders also include provisions that lock plants processing primarily ultra-high temperature (UHT) or extended shelf-life milk into regulation under the order for the area in which the plant is located. Such plants often have widely dispersed route sales into a number of order areas, with sporadic deliveries to different areas. Without some type of lock-in provision, such a plant may be pooled in several different orders in as many months. At the same time, the plant’s milk supply generally is procured from a given group of producers located in the same area as the UHT (or extended shelf-life) plant. Having the

plant pooled under a succession of different orders with widely varying blend prices creates a disorderly condition for the producers involved.

64 Fed. Reg. 16046 (April 2, 1999)(Official Notice taken of this decision) Prior to federal order reform making this pooling criteria uniform among all orders, there were a series of individual order hearings and amendments dealing with individual UHT plants in various orders all with the same result of pooling the plants in the order of location.<sup>7</sup>

Several order decisions have locked-in distributing plants processing conventional fluid milk products on the basis of their location in orders in the southeast United States. In 1988 the Kroger plant at Winchester Kentucky was 'locked-in' to pooling under the then-Louisville-Lexington-Evansville Order, where it was located, "irrespective of the market in which the plant has most of its fluid milk products distribution" (which was Order 33). See 53 Fed. Reg. 14804 (April 26, 1988). The key determinant in the decision was that "most of the plant's milk supply is obtained from producers located in the same geographical area as producers supplying handlers regulated by the Louisville order and other orders south and east of the plant's location." This created a "pricing problem affecting the procurement of adequate milk supplies" which "override the traditional basis for pooling a distributing plant." Later in 1988, a decision amended the Nashville Marketing Order to lock-in three plants located in that marketing area despite two of the plants having greater distribution in the Memphis, and Georgia orders. Milk procurement

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<sup>7</sup> The first such hearing involved the UHT plant at Savannah Georgia. Milk in the Georgia Marketing Area. See 47 Fed.Reg. 14919 (April 7, 1982) ("The amendment would provide that a distributing plant located within the marketing area that processes and distributes primarily aseptically processed fluid milk products would be fully regulated under the Georgia order, irrespective of the market or markets in which the products may be distributed.") There were subsequent pre-order-reform hearings amending the Michigan Order and the Southwest Plains Order (and perhaps others) to accommodate UHT plants in those areas.



issues and producer price uniformity were found to override the factor of distribution area. See 53 Fed. Reg. 38730, 38735–36 (October 3, 1988) The unifying circumstance in these decisions was the need to stabilize the procurement of milk supply for a plant which had distribution in more than one order, thus subjecting it to potential shifts in pooling with shifts in business patterns.

In the FAIR Act final rule, the locking-in of distributing plants was discussed:

On the basis of the distributing plant pooling standards included for all eleven orders in this final decision, there are three non UHT pool distributing plants that would have more sales in an order area other than the one in which they are regulated. Two of these plants are the Superbrand Dairy Products distributing plant in Greenville, South Carolina, and the Kroger Dairy distributing plant in Winchester, Kentucky, both located in the Appalachian order, but which likely will qualify for pooling under the Southeast and Mideast orders. In addition, the Hiland Dairy plant in Fayetteville, Arkansas, in the Southeast consolidated area, likely will qualify for pooling under the Central order. **In cases in which these plants compete almost entirely for a producer milk supply in the area in which they are located, lock-in provisions are incorporated to assure that the plant is pooled where located for the purpose of competitive equity.** (Emphasis added)(64 Fed. Reg. 16046 (April 2, 1999)(Official Notice taken of this decision)

Finally, recognizing the possible need for future individualized plant lock-in provisions, the Federal Order Reform decision implemented language in each federal order which foreshadows and accommodates the potential for individual order lock-ins. This language for Order 33 is at 1033.(g)(5) and provides:

“(g) The term pool plant shall not apply to the following plants . . .  
(5) A plant qualified pursuant to paragraph (a) of this section that is located in another Federal order marketing area if the plant meets the pooling requirements of such other Federal order and does not have a majority of its route distribution in this marketing area for 3

consecutive months or if the plant is required to be regulated under such other Federal order without regard to its route disposition in any other Federal order marketing area,"<sup>8</sup>

In summary, while sales area remains the primary criterium for pooling distributing plants, both Order 33 and Order 1, the orders most directly involved here, and the federal order system in general recognize the need for, and the propriety of, plant lock-ins in appropriate situations.

**C. Support for the Order 33 lock-in alternative.**<sup>9</sup>

On the basis of full consideration of this hearing record, including the testimony of Superior Dairy, the proponent cooperatives are of the unanimous view that the first alternative lock-in proposal offered by Superior Dairy represents the best order amendment to resolve the Superior Canton pooling status. This provision will address the first priority which motivated this hearing request: to assure that the Canton plant is always pooled in a federal order marketwide pool. Furthermore, it will stabilize the Canton plant's order of pooling to Order 33 which is the order area from which it must procure its raw milk supply and in which it is located. It will also enable the orderly pooling of reserve milk supplies which is only possible with stable, predictable pooling. (Sims TR. (Oct. 5) pp. 80, 93-99) Thus, permanent, stable pooling of the

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<sup>8</sup> Identical or equivalent language is in each order as follows: See 7 CFR Secs. 1001.7(h)(5), 1030.7(h)(5), 1032.7(h)(5), 1033.7(h)(5), 1124.7(h)(5), 1126.7(g)(5), 1131.7(g)(5), 1005.7(h)(4), 1006.7(g)(4), and 1007.7(g)(4).

<sup>9</sup> The proponent cooperatives' support for the Order 33 lock-in alternative, as detailed hereafter, does not imply abandonment of the proposal noticed in the hearing. It does, however, mean that these cooperatives see the hearing proposal as a second best solution to the disorderly marketing conditions being experienced. If the Secretary for whatever reason were to find that the Order 33 lock-in should not be adopted, the cooperatives urge adoption of the proposal as noticed for the hearing.

Canton plant in Order 33 will work to the best interests of the producers supplying the Canton plant and all producers in the Order 33 pool. It will meet the Canton plant's expressed preference and it will insure the Canton plant's competitors that it is subject to uniform minimum federal order pricing in a marketwide pool, just as the competitors are. This alternative avoids the potential of Canton moving back and forth between Order 1 and Order 33 (or any other order) as would be possible under the proposal in the hearing notice. This proposal also will apply to Canton (or any other plant) if it were to have distribution in only 3 orders – which Superior's second alternative would not do. For all these reasons, the proponent cooperatives believe the Superior first alternative proposal should be adopted.

Adoption of this alternative will mean, on the basis of Superior-Canton's current distribution, that it is not pooled in the order where it has the plurality of its distribution, currently Order 1. Superior presently distributes about 28% of its Class I volume in Order 1 versus about 20% in Order 33. If Superior were located in the non-federally regulated area of central Pennsylvania, or western New York, where the milksheds for Order 1 and Order 33 intersect and overlap along with the milksheds for state regulated plants, a stronger case could be made for inflexibly regulating Superior in the order where it has its plurality of sales. However, Superior is in the interior of Order 33 and it procures all of its milk supply, independent and cooperative, from the Order 33 milkshed. This tips the balance of regulatory stability to locking the plant into Order 33 so that the plant's procurement is stabilized and its suppliers are not disadvantaged by the regularly-lower PPD of Order 1 versus Order 33. As in prior circumstances, such as with the Winchester Kentucky plant, it is appropriate to consider the

procurement area for the plant's milk supply and to assure regulatory stability and equity in that supply area and to those suppliers.

This is not a case where there is a great disparity in sales between Order 1 and Order 33. Indeed, the majority of sales from Superior Canton are into **neither** Order 1 nor Order 33. In essence, the greatest 'loss' in Class I values, if one is to view it that way, is to the collective producers located in several other orders. If Canton were to be pooled in Order 1, 72% of the sales captured by that pool are from out of the area; the ratio for Order 33 is 80%, only 8% greater than Order 1. Neither Order 1 nor Order 33 has a majority claim to these Class I sales. The procurement area issue tilts the balance to the most orderly resolution for all concerned which is an Order 33 lock-in.

#### **IV. NEED FOR EXPEDITED ACTION**

It is imperative that these issues be addressed on an expedited basis, by utilizing an interim order with the opportunity for comments, or via the immediate adoption of final amendments. The Secretary should find on this record that "due and timely execution of his functions imperatively and unavoidably requires such omission" pursuant to 7 C.F.R. § 900.12(d) on the following grounds which proponents and supporting witnesses established:

- Each month in which Superior Canton is not fully regulated an average of about \$372,000 is irretrievably lost to the producer-settlement fund of the marketwide pool. There is no mechanism for producers to recover this lost revenue. If a producer referendum is required for approval of any order amendments, which is possible in Order 33, the financial loss to the pool will be extended for at least an

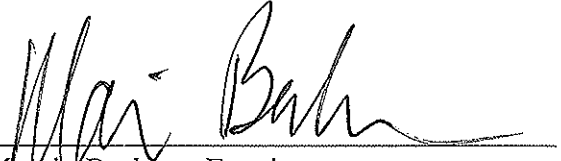
additional month just to take the referendum.

- The failure of the Superior Canton plant to be fully pooled causes disorderly marketing conditions in multiple respects: At the producer level, among producers in the same procurement area, and at the handler level, among plants competing for milk supplies and selling packaged products. The current federal order system is built upon marketwide pools with uniform producer and handler values. That system cannot survive if major players in the geographic area are not part of the marketwide pool.
- Any delay in correcting this condition undermines confidence in the system among regulated parties and “loss of confidence . . . is the ultimate disorder.” (Sims TR. (Oct. 5) p. 89) The conditions documented in the hearing present “the most emergent kind of disorderly marketing conditions.” (Sims TR. (Oct. 5) pp. 91-92)
- The Superior Wauseon plant is an operation designed solely for the purpose of utilizing a loophole in the current regulations to obtain a competitive advantage. The plant serves no ongoing commercial purpose and in fact requires uneconomic movements of milk each and every month of its operation, a condition which necessarily brings the order regulations into disrepute and which undermines confidence in the integrity of the system.
- The Secretary has the authority to implement order changes on an expedited basis in order to fulfill his statutory functions and should do so on the basis of this record.

V. CONCLUSION

On the basis of all of the foregoing, and the testimony and evidence at the hearing, the proponent Cooperatives respectfully submit that the pool plant definition in Order 33 should be immediately amended to lock-in the Superior Canton plant to regulation under Order 33 by adoption of the language suggested by Superior Dairy in its alternative 1.

Respectfully Submitted,

By: 

Marvin Beshore, Esquire  
Attorney ID # PA 31979  
130 State Street, P.O. Box 946  
Harrisburg, PA 17108-0946  
717-236-0781, Fax: 717-236-0791  
MBeshore@beshorelaw.com

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Benjamin F. Yale (Reg. No. 0024730)  
Yale Law Office, LPA  
527 N. Westminister Street, P.O. Box 100  
Waynesfield, OH 45896  
419-568-6401; Fax 419-568-6413  
ben@yalelawoffice.com