

behalf of Eastern Milk Producers Cooperative Association, a dairy farmer cooperative having some 2,400 members that ship milk to Orders 1, 2, 4, and 36.

A brief filed by Pennmarva noted that while Johanna agrees that a plant should be pooled under the order in which most Class I sales are made, Johanna provided no evidence to support the claim that fluid milk transfers from the Lansdale plant were in fact distributed on routes in the Order 2 marketing area, thereby meeting a defacto route disposition test. Pennmarva argues here that if, in fact, the Lansdale plant has greater route disposition in Order 2 than it has in Order 4, the adoption of Proposal No. 3 will have no effect on the plant. Pennmarva further argues that even if the plant did not now have greater route disposition in Order 2, operators of the plant could implement the changes necessary to ensure greater route sales in Order 2.

To illustrate the need for adopting Proposal No. 3, the Pennmarva brief noted that in 1993, the Lansdale plant had 224 millions pounds of Class I disposition in Order 4 and 245 million pounds of Class I disposition in Order 2, for a total of 469 million pounds. Of that 469 million pounds, Pennmarva indicated that at least 10 percent (46.9 million pounds) of its milk was transferred in bulk or packaged form from Lansdale to other plants. According to Pennmarva, Lansdale consequently distributed on routes no more than 198.1 million pounds in the Order 2 marketing area. Thus, Pennmarva claims that the Lansdale plant distributed 198.1 million pounds of Class I milk on routes in Order 2 versus 224 million pounds of Class I milk in Order 4, clearly revealing that there is more route disposition under Order 4. However, because of the yield provision contained in § 1004.7(f)(2), according to Pennmarva, the Lansdale plant is regulated under Order 2.

The Pennmarva brief contends that Johanna's testimony that the Lansdale Class I-A milk transfers were ultimately distributed on routes in Order 2 is in error. Pennmarva noted that the definition of Class I-A milk under Order 2 is "as route disposition in an other order marketing area" as delineated in § 1002.41(a)(1)(ii) of the New York-New Jersey order. Thus, according to Pennmarva, a plant which otherwise qualifies as an Order 2 pool plant can dispose of milk on routes in the Order 4 marketing area, and such dispositions are classified under Order 2 as Class I-A. Pennmarva indicated that once classified as Class I-A, no further distinction is made regarding the ultimate destination of route sales.

The Pennmarva brief also challenged the Johanna witness' assertion that all of its transferred milk was ultimately distributed on routes in the Order 2 marketing area. Pennmarva noted that transfers were made between Lansdale, PA, and Reddington Farms (an Order 2 pool plant) and that market administrator statistics indicate that Reddington Farms enjoyed Class I route disposition in the Order 4 marketing area in every month between 1991 and 1994.

In response to the Clover Farms' testimony that adoption of Proposal No. 3 would lead to irreconcilable conflict with Order 2 and that such conflict would need to be addressed by the Dairy Division, Pennmarva cited an example of how, through administrative determination, a pooling issue such as this might be handled. The Pennmarva brief asserted that it is within the purview of the Act for proponent cooperatives, which represent volumes in excess of 90 percent of the Order 4 market, to delete provisions which subjugate the order to all other orders and to rely on a route disposition test in determining where a plant should be pooled when it also qualifies for pooling under another order.

According to the Pennmarva brief, orderly marketing within Order 4 should not be hinged on an accommodation to another order. Pennmarva does concede that the interplay of adjoining markets, such as Order 2 and 4, must be considered in maintaining orderly marketing but indicated there is nothing in the record which provides a reason why Order 4 should be subordinated to Order 2 or any other order. This is important, according to Pennmarva, because of the economic hardship brought about through depressed blend prices. Pennmarva indicates that there is no benefit to Order 4 producers from the application of the provisions of § 1004.7(f)(2) and that its elimination will not change the pooling standards of any other Federal order.

In defense of the adequacy of using a route disposition test, the Pennmarva brief cited a recommended decision applicable to another Federal order in which a plant that qualifies under more than one order is regulated under the order which it enjoys the greatest route disposition. This recommended decision indicated that such application normally assures that all handlers having principal sales in a market are subject to the same pricing and other regulatory requirements. Official Notice is taken of the Final Decision (59 FR 26603, published May 23, 1994) for the Southern Michigan marketing area in

which no changes were made regarding this issue from the recommended decision. According to Pennmarva, such an example speaks to a fundamental intent of milk marketing orders—to regulate handlers that compete for sales within the specific geographic definition of the marketing area.

A brief filed by Johanna reiterated their opposition to the adoption of Proposal No. 3.

Reply briefs filed by both Pennmarva and Johanna similarly reiterated their positions given in testimony and in submitted briefs. However, Johanna's reply brief takes objection to Pennmarva's suggestion that Johanna should simply effectuate changes in its Lansdale operations so as to convert its bulk shipments of fluid milk to Order 2 into route disposition and thereby preserve the plant as an Order 2 plant under the strictures of § 1004.7(f)(1). According to Johanna, this suggestion does not take into account the impracticality and costs to Johanna of pooling the Lansdale plant to accommodate the packaging requirements of multiple wholesale customers who presently receive bulk shipments from the Lansdale plant for packaging and ultimate route disposition in Order 2.

Johanna also counters the Pennmarva's reference to another rulemaking proceeding and recommended decision involving a pooling issue of a Ultra High Temperature (UHT) plant in another Federal order. While Pennmarva cited this recommended decision as an example of how administrative intervention could be used to determine where a plant should be regulated, Johanna views this recommended decision as providing certainty and orderly conditions for the UHT plant and its producer on where it will be pooled. In this example, Johanna notes that the route disposition test, as a single criteria for pooling, is rejected because of the unique aspects of the marketing conditions faced by the UHT plant. Such uniqueness should also be recognized for the Lansdale plant, said Johanna, because it makes Class I bulk shipments to an order which does not rely solely on a route distribution pooling test.

At issue regarding Proposal No. 3 is where a plant should be pooled and regulated when it meets the pooling standards of more than one order. Both the proponent and opponents to Proposal No. 3 agree that the market in which fluid sales distributed on routes are greatest is where a plant should be regulated. Where a plant should be regulated is a most important feature of