UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	2005 AMA Docket No.M-4-3
	)	
COUNTRY CLASSIC DAIRIES, INC.	)	
	)	
Petitioner	)	
	)	

Decision

In this decision, I find that Petitioner has not met its burden of demonstrating that the interpretation of 7 C.F.R. § 1000.76 by the Market Administrator is not in accordance with the law. Accordingly, the petition is denied.

Procedural Background

Country Classic Dairies, Inc. (Petitioner) filed a "Petition Contesting Interpretation and Application of Certain Federal Milk Order Regulations and of Obligations Assessed to Petitioner Thereunder" pursuant to 7 U.S.C. § 608c (15) (A) on August 22, 2005. The Administrator of the Agricultural Marketing Service, United States Department of Agriculture (Respondent) filed an answer on October 11, 2005.

I conducted a hearing in this matter on July 12, 2006 in Bozeman, Montana. John H. Vetne, Esq. represented Petitioner and Sharlene Deskins, Esq. represented Respondent. At the hearing Charles English, Esq. requested that the Utah Dairymen's Association

(UDA) be allowed to participate in the case as an amicus pursuant to 7 C.F.R. § 900.57.[1] The motion was granted without opposition. At the hearing, Petitioner called four witnesses and three witnesses were called by Respondent.

Following the hearing, Petitioner filed its opening brief on September 8, 2006, Respondent and amicus filed separate briefs on November 3, 2006 and Petitioner filed its reply brief on December 1, 2006.

Statutory and Regulatory Background

The world of milk pricing is a byzantine one to say the least. Portions of the country are subject to federal milk orders which control the pricing of milk, while others are not. However, milk handlers who ship milk from a non-federal order area into a federal order area are subject to varying degrees of regulation depending on the volume and nature of the milk shipped. As one witness testified, one of Respondent's auditors told him, only semi-facetiously, "that the Federal Order is so complicated, that only five people know about it; four of them are dead, and one of them is in jail." Tr. 82.

Milk, among many other agricultural commodities, has been pervasively regulated for decades. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. (Act), laid the groundwork for a system to protect the interests of farmers against "the disruption of the orderly exchange of commodities in interstate commerce" by protecting farmers and the public against "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602 (4). With respect to milk, the Act and the regulations promulgated thereunder

[1] The rule provides: Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

authorize the Secretary to establish marketing orders regulating minimum prices of milk within a geographic area based on classifying the milk according to the purpose for which it is used. A market administrator establishes and maintains a fund into which producers and handlers of milk within the market order area pay assessments calculated pursuant to a complex formula. Each month accounts are settled so that there is a uniform milk price for each of the several classes of milk within the marketing order area.

Marketing orders only cover a portion of the country. In many cases, states have their own orders regulating the price of milk, while in other areas the price of milk is not subject to a marketing order. However, milk that is produced outside of a federal marketing order area but is sold in an area subject to a federal marketing order is also subject to the pricing controls of the marketing area in which it is sold. A handler who sells over 25% of its milk into a federal marketing order area is considered fully regulated and all of its milk is subject to the controls in that area. A handler who sells less than 25% of its milk into a marketing order area is considered partially regulated, and the milk it sells in the marketing order area is subject to that order.

The regulations at 7 C.F.R. § 1000.76 provide several different approaches to calculate the payments made by or to a handler who operates a partially regulated plant. Three options are made available, and the question of which applies is the central issue of this case. Petitioner contends that it should be allowed to use the methods provided in paragraphs (a) or (b) of 1000.76. However, 1000.76 provides that "A partially regulated distributing plant that is subject to marketwide pooling of producer returns under a State government's milk classification and pricing program shall pay the amount computed pursuant to paragraph (c) of this section."

The State of Montana, where Petitioner is located, unquestionably has a milk pooling and pricing program. The Montana program is similar in complexity to the Federal program,[2] although obviously on a smaller scale. Montana has three classifications for milk, rather than the four in the Federal marketing orders. Montana has a Milk Control Bureau under the Montana Department of Livestock, and the Bureau is responsible for pricing and pooling programs for milk produced and sold within the State.

Whether Montana's milk pooling and pricing program is a "marketwide" one is the key issue to be resolved in this case. Neither the Act nor the regulations defines "marketwide."

Facts

Petitioner Country Classic Dairies, Inc. is a non-profit association of dairy farmers that operates a milk processing and distributing plant in Bozeman, Montana. Petitioner employed 54 people as of the date of the hearing.[3] Beginning in 2002 Petitioner began selling some of its milk outside the State of Montana, including areas covered by one or more federal milk orders.[4] Petitioner was apparently unaware of the federal milk orders until it was visited on a number of occasions, beginning in 2002, by audit teams of the Milk Order Administrator. Tr. 76-80. At that time, Petitioner was apparently shipping over 25% of its milk to federal milk order areas, and was informed that it was fully regulated under the Act and regulations. Tr. 83. Shortly after receiving this information, and being informed of substantial payments it accordingly owed to the pool, Petitioner altered its milk

[2] One of Petitioner's witnesses testified that "approximately 56 linked spreadsheets" were utilized in Montana's pooling system. Tr. 133.
[3] Petitioner also operates a plant in Belgrade, Montana, but the operations of that plant are not relevant to this decision.
[4] The Pacific Northwest, Arizona-Nevada and Central orders.

distribution so as to sell less than 25% of its milk into areas covered by federal milk orders. Tr. 84-85. As such, Petitioner became a partially regulated handler of milk, subject to the provisions of 7 C.F.R. § 1000.76.[5]

Additionally, Petitioner now purchases milk from producers who are outside Montana and not governed by a federal milk order. The parties are in accord that Petitioner has the option of accounting for this portion of its milk under the provisions of 1076(a) or (b).

Several witnesses addressed the issue of whether the Montana pooling and pricing program was marketwide. Monte Nick, Chief of the Milk Control Bureau, Montana Department of Livestock, testified that Montana had a statewide pool, and not a marketwide one. P. Ex. 10. While he testified that Montana did not fix a regulated classified price for milk produced in Montana and shipped out of state, he also stated that "net revenues from such sales may be contributed to the pool for redistribution to Montana dairy farmers," Id. at paragraph 7. While he stated in his declaration that Montana did not fix a classified price for milk shipped out of state, he admitted on cross-examination that Montana puts a Class III value on milk shipped out of state. Tr. 58. Further, handlers receive transportation credits for milk they ship out of state. Tr. 64-65.

Jana Magee, an expert consultant for the dairy industry, also testified that Montana operated a statewide pool, because "[i]t only covers milk produced in Montana and sold in Montana." Tr. 215, but that it was not a marketwide pool. However, she also agreed that if a program had milk classification pricing and pooling then it could be a marketwide pooling program. Tr. 245-246.

[5] For a period of time not relevant to this decision, Petitioner's shipments of milk to areas under a federal marketing order exceeded 25% of its production, and for that period of time it was considered fully regulated.

Gary Jablonski, an assistant market administrator for USDA, testified that Montana did indeed have a marketwide pooling program. Tr. 260. Looking at the Montana pooling sheet attached to PX 7, he stated that it indicated that all the milk produced in Montana was classified and that the calculations of the combined totals were utilized in reaching producer pay prices. Tr. 263. He pointed out that Montana's own regulations included out-of-state sales of milk produced in the state in the calculations of the pool price. Tr. 270.

John Mykrantz, a marketing specialist with the Milk Market Administrator's Office also concluded that Montana operated a marketwide pool. Tr. 317.

Discussion

After all is said and done, this case boils down to one rather basic issue. Is Montana's milk pooling and pricing program a marketwide pool so that use of 1000.76(c) is mandated?[6] I conclude Respondent's determination answering that question in the affirmative is supported by the evidence, the Act and regulations, as well as the pertinent rules of statutory and regulatory construction.

Given that the concept of a "marketwide" pool is so pivotal to the application of 1000.76(c), it would have been nice if the statute or the regulations provided a definition of "marketwide." However, no such definition is provided. The courts and USDA, however, have applied the concept of "marketwide pool" for decades, and their interpretation is more consistent with the position of USDA (and the UDA) than with Petitioner. It has long been recognized that a pool can be marketwide without accounting for every drop of milk produced in the market. "It is customary in connection with milk orders for the Secretary to determine which milk handlers and handling of milk shall be included in a marketwide

[6] Petitioner concedes that "plants which are subject to a state milk pricing program that imposes marketwide pooling and classified pricing for the milk distributed in the federal order market" has no choice other than to be subject to section 1000.76(c). Pet. Br., p. 7.

pool, and which dairy farmers shall be included as 'producers' whose milk is to be pooled." County Line Cheese, 44 Ag. Dec. 63, 124 (1985). Thus, it is evident that not all milk produced in a given area need be included in the area's pool for the pool to be considered marketwide. "[T]he Secretary, in promulgating a milk marketing order, must determine which handling of milk shall be isolated for the purpose of regulation." Id., quoting In re Yadkin Valley Coop.[7] Failure to include every drop of every category of milk produced in a marketing area does not render the pool non-marketwide. This would render any pool that exempted any segment of producer groups, e.g., small producer-handlers, as non-marketwide. In fact, as Respondent points out, "milk orders have never been totally inclusive of all milk and all dairy farmers, since for example the orders only apply to Grade A milk and not to exempt plants with a route disposition of less than 150,000 pounds." Resp. Br. at 16-17. Since it appears that every milk marketing order exempts at least some milk from inclusion as part of a pool, the logic of Petitioner's argument would lead to a conclusion that there was no such thing as a marketwide pool—a conclusion clearly inconsistent with the Act and the regulations.

Thus, it would appear reasonable for USDA to consider Montana's pool to be marketwide even if some milk shipped out of state were not counted as part of the pool. While specific definitions in the regulations would obviously be preferable, there is nothing to indicate that USDA is subject to the type of limitation suggested by Petitioner in terms of the extent of the market necessary to be deemed marketwide. There is nothing in the Montana regulations that would appear to be inconsistent with the USDA interpretation that the Montana program is indeed marketwide.

[7] In re Yadkin Valley Dairy Coop., Inc., 22 Agric. Dec. 970, 978 (1963), decision on remand, 26 Agric. Dec. 218 (1967), aff'd sub nom. Yadkin Valley Dairy Coop., Inc. v. Freeman (M.D.N.C. Apr. 16, 1969), printed in 28 Agric. Dec. 398 (1969)

However, here it appears that Montana in fact does account for milk shipped out of state. While it appears that such milk is given a Class III classification rather than a value based on its actual end use, it appears that all fluid milk produced in Montana is in fact accounted for so that even under Petitioner's narrower suggested interpretation of "marketwide" it is reasonable to conclude that it is subject to a marketwide pool. While the milk was not categorized as Class I, all the milk produced in Montana is priced. Tr. 257. For a period of time relevant to this petition the price for milk shipped outside of the state was calculated at Class III plus $2. Tr. 276-278. Since it was the price used by the state, it was considered by the market order administrator to be a proper basis from which to calculate the compensatory payment due from Country Classic. (Tr. 286-289). The Milk Order Administrator's determination that Montana operated a marketwide pool as per 7 C.F.R. § 1000.76 appears totally valid on its face.

Petitioner's arguments in it reply brief that the plain meaning of a marketwide pool requires that such a pool must include all milk by all handlers is unpersuasive. The notion that a marketwide pool must include all milk is flatly contradicted by numerous portions of federal milk orders, including provisions that only include Grade A milk, exempt small producer-handlers, etc. Since there is a great deal of leeway in describing what a market is, the fact that the term is not totally inclusive is not inconsistent with its common usage or definition.

The rules of statutory and regulatory construction likewise support the position of Respondent. This is just the type of situation where the agency's interpretation of its own regulations must be accorded deference. That was not the case in In re. HP Hood, LLC, 64 Agric. Dec. 1282 (2005), where I held that the specific language of the regulation in

question as to what constituted a fluid milk product was inconsistent with the interpretation advanced by the Agency, and that the Agency was not entitled to deference because of the absence of ambiguity and the fact that the Agency had consistently interpreted the regulation in a manner contrary to what it was advocating in that case. Here, there is no specific definition of "marketwide pool" and the Agency is adhering to its consistent, long-term interpretation. Thus, to the extent that the regulation may be ambiguous, the Agency's interpretation must be accorded deference. Lawson Milk Co. v. Freeman, 358 F. 2d 647, 650 (C.A. 6, 1966); Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994). Where, unlike in the HP Hood case, the Agency's interpretation has been consistent over a period of decades, the interpretation is particularly entitled to deference, and must be given controlling weight unless plainly erroneous or inconsistent with the regulation. Id., Stone Forest Industries , Inc. v. Robertson, 936 F. 2d 1072, 1074 (C.A. 9, 1991). "This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.' Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991)." Thomas Jefferson University, 512 U.S. at 512.[8]

Thus, I conclude that the Milk Market Administrator's determination that the State of Montana operates a marketwide pool is reasonable and should be accorded deference, and that therefore the payment provisions of 7 C.F.R. § 1000.76(c) apply to Petitioner.

Petitioner further contends that the Market Administrator's interpretation of 1000.76(c) constitutes an unlawful trade barrier under the Agricultural Marketing

[8] See also White Eagle Cooperative Association, et al v. USDA, 396 F. Supp. 2d 954, 64 Agric. Dec. 1227, 1233 (2005) ". . .the court's deference to administrator's expertise rises to a zenith in connection with the intricate complex of regulation of milk marketing."

Agreement Act and/or violates the Petitioner's constitutional rights to Due Process and Equal Protection. I find this argument to be without merit.

Petitioner has essentially presented no evidence to support this argument. The mere fact that the application of the Market Administrator's interpretation of "marketwide pool" has the potential of costing Petitioner more than Petitioner's interpretation is no basis for concluding that an unlawful trade barrier exists or that constitutional rights have been violated. Early in the hearing, Petitioner suggested it was going to introduce direct evidence of economic harm, which it requested be kept confidential, to the extent that it contended that counsel for the UDA should not be present when the information was discussed, and that the record concerning this information be sealed. Counsel for both Respondent and the UDA vigorously opposed this request, noting that 7 C.F.R. § 900.210(e)(2) specifically exempted information, in cases brought under 15(A) challenging the validity of a marketing order, that would normally be considered confidential, from the protections against disclosure that would normally apply. While I initially indicated I thought Petitioner's position meritorious, a review of the cited regulation convinced me otherwise. Apparently counsel for Petitioner felt the same way as he indicated, after we had taken a short break, that the interpretation of counsel for UDA and Respondent was correct. Tr. 39. However, rather than introducing pertinent evidence to document financial losses sustained by Petitioner as a result of Respondent's interpretation, Petitioner elected to introduced a few spread sheets to illustrate the differences between applying various combinations of 1000.76(a), (b) and (c) would apply to various *hypothetical* situations. There is not a shred of evidence introduced by Petitioner which would show the actual impact of the decisions of the Market Administrator on Petitioner's operations, let alone

whether such decisions resulted in an unlawful trade barrier or unconstitutional denial of due process and equal protection rights.

Petitioner cites Lehigh Valley Cooperative v. United States, 370 U.S. 76 (1962) to support its claim that the Market Administrator's interpretation would constitute an unlawful trade barrier. Lehigh Valley presents a far different scenario, however. In that case the petitioners, as milk handlers, put on specific evidence clearly demonstrating the economic impact of the compensatory costs being imposed on their milk, and showed that the assessment the Secretary was trying to exact would result in them paying far more for milk sold within the market order than the producers located within the market order. The Court held that this approach imposed "unnecessary hardships, virtual 'trade barriers.'" 370 U.S. at 86-87.

Here, the only hard economic facts presented demonstrated that Petitioner, if its position would be sustained, appeared to be on the receiving end of substantial economic benefits vis-à-vis Meadow Gold—the only other handler subject to the Montana Pool. Exhibits RX1 and RX3 demonstrated that for most months Petitioner received payments from the Montana pool, and that this result was favorably impacted by its shipping milk from Montana into the federal milk market order areas. Adopting the Market Order Administrator's conclusion that Montana operates a marketwide pool would apparently result in a situation where Petitioner's compensatory payments would put it in an economic position comparable to Meadow Gold for the months where it was a partially regulated handler, a result which appears consistent with the aims of the Act, and one which is significantly different from that the Supreme Court declared constituted a trade barrier in Lehigh Valley. On this record, I have no basis to find that the Market Administrator's

interpretation that 1000.76(c) establishes an unlawful trade barrier or violates the due process or equal protection clauses of the constitution.

Findings and Conclusions

1. Petitioner Country Classic Dairies, Inc., is a cooperative association of dairy farmers which operates milk distributing plants in Bozeman and Belgrade, Montana. As of the date of the hearing, it employed 54 people.

2. Petitioner ships fluid milk to areas outside of Montana that are governed by a federal milk marketing order. During the time period relevant to this case, Petitioner shipped less than 25% of its production to areas governed by a federal milk marketing order.

3. During the time period relevant to this decision, Petitioner operated a partially regulated plant in Bozeman.

4. The State of Montana operates a statewide pooling order for milk produced in Montana. All fluid milk produced in Montana is accounted for in this pool.

5. The pool operated by the State of Montana is a marketwide pool.

6. Even if the State of Montana did not account for all milk shipped out of state, Respondent's conclusion that Montana operates a marketwide pool is a reasonable one, which should be deferred to.

7. The methodology contained in 7 C.F.R. 1000.76(c) governs the calculations of payments to the pool by Petitioner.

8. The Market Administrator's application of 7 C.F.R. 1000.76(c) to Petitioner does not constitute an illegal trade barrier, nor does it violate Petitioner's due process or equal protection rights.

Wherefore, the relief requested by Petitioner is denied and the petition is dismissed.[9]

The provisions of this order shall become effective on the first day after this decision becomes final. This is my final decision on the merits of this case. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 30th day of March, 2007

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MARC R. HILLSON
Chief Administrative Law Judge

[9] On March 12, 2007 the Hearing Clerk received a Motion to Amend Petition and to Reopen Hearing. Since I had virtually completed the writing of this decision, and since delaying the issuance of this decision would serve no good purpose, the motion is denied. Petitioner should file a new petition if it wishes to pursue the claims presented in its Motion to Amend.