

BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

In re: MILK IN THE NEW ENGLAND)	
AND OTHER MARKETING AREAS,)	
HEARING TO CONSIDER POSSIBLE)	Docket No. A0-14-A64, etc.;
CHANGES IN THE FEDERAL MILK)	DA-90-017
MARKETING PROGRAM)	

MOTION OF THE DEPARTMENT OF JUSTICE TO
SET ASIDE RULINGS OF THE PRESIDING OFFICER

Once again, the presiding officer has sought to restrict participation by the Department of Justice ("Department") in hearings initiated by USDA to consider possible changes in the milk marketing order program. On November 15, 1990, the Department finally was permitted to present the testimony of its expert witness, Dr. Sheldon Kimmel, concerning its proposals to modify the milk marketing orders. Following Dr. Kimmel's testimony, the presiding officer issued a number of extraordinary rulings designed to frustrate the effective presentation by the Department of its position. The presiding officer ruled (1) that testimony given by Dr. Kimmel may not be briefed or cited in this proceeding by the Department, or any other counsel or party; and (2) that Dr. Kimmel was not an expert witness.

The presiding officer also stated repeatedly that the Department was not a person or party in this proceeding and implied that it might not have authority to file a brief here at all. Each of these rulings is without factual or legal support and should swiftly be set aside.

I.

BACKGROUND

On May 31, 1990, the Department submitted four proposals to the United States Department of Agriculture ("USDA") for inclusion in the upcoming hearings to consider possible changes in the Federal milk marketing order program. Three of these proposals were included in the Notice of Public Hearing on Proposed Rulemaking ("hearing notice"). 55 Fed. Reg. 29035 (1990). The Department's witness, Dr. Kimmel, was scheduled to testify on September 17, 1990, at the Minneapolis session of the hearings. The Department scheduled its witness on that date to meet USDA's "expect[ation] that those witnesses representing . . . large government agencies will present the main thrust of their testimony at the longer sessions of the hearing" 55 Fed. Reg. at 29034 (1990).

The presiding officer barred the Department from participating when it appeared at the hearings on September 17. Ruling that the Department was not an "interested person" under Section 900.8(b)(1) of the USDA Rules of Practice, 7 CFR

§ 900.8(b)(1), the presiding officer prohibited the Department both from offering a witness in support of its proposals or cross-examining any witness offered by any other party. This first attempt by the presiding officer to restrict Department participation in the proceeding was certified to the USDA Judicial Officer for review.

Two days later, on September 19, 1990, the USDA issued a Decision and Order affirming the right of the Department to participate fully in the proceedings. The presiding officer certified the matter again, however, on September 25, 1990, claiming that USDA's decision did not resolve the question because it was a "sua sponte" decision unaccompanied by any motion or pleading. The USDA issued another Decision and Order on September 28. It reiterated that "federal agencies, including the Department of Justice, may participate fully in this proceeding" and stated that "the issue has been completely resolved." Finally, in its Decision and Order of November 13, 1990, the USDA reaffirmed its prior rulings, stating that the relevant rules of practice contain no restrictions on the type of "interested persons" that may participate at the hearings, and do not purport to prohibit the participation of governmental entities at the rulemaking hearing.

On November 15, 1990, the Department of Justice returned to present the testimony of its witness, Dr. Kimmel. Numerous

objections were again made with regard to the Department's right to participate in the proceedings. At the conclusion of Dr. Kimmel's testimony,^{1/} the presiding officer once again -- despite repeated USDA orders to the contrary -- sought to restrict the Department's participation in this proceeding by ruling that the testimony of Dr. Kimmel may not be briefed by the Department or by any other counsel or party. (November 16, 1990 Hearing Transcript ("Tr.") at 16.) Indeed, the presiding officer continued to assert that the Department was not a person or a party to this proceeding (Id.; November 15, 1990, Tr. at 81-82), and implied that the Department did not have the right to file a brief at all.^{2/} The presiding officer based his ruling that Dr. Kimmel's testimony may not be briefed on his erroneous conclusions that Dr. Kimmel was not an expert (November 15, 1990 Tr. at 140; November 16, 1990 Tr. at 16),

^{1/} Dr. Kimmel's direct testimony was marked as Exhibit 211 and made a part of the record. Cross examination on the substance of Dr. Kimmel's testimony followed more than two hours of voir dire examination concerning Dr. Kimmel's qualifications.

^{2/} The presiding officer asked counsel for the Department to "quote . . . the authority" supporting her assertion that the Department had the right to file a brief in the proceeding. He then said that the Department's authority to participate fully here "is found only in the decision and order. I do not see anything in here that says you have the right to brief." (November 15, 1990 Tr. at 78). At another point, the presiding officer stated that "Department of Justice counsel . . . are considered to be neither persons nor parties, but have stature to participate only pursuant to the decisions and orders which have been issued by the Deputy Administrator." Id. at 81-82.

and that his testimony revealed an apparent violation of USDA's ex parte rules (November 16, 1990 Tr. at 16). These rulings are neither supported by applicable law nor any fact.

II.

DOJ'S FULL PARTICIPATION IN THESE PROCEEDINGS INCLUDES THE RIGHT TO FILE A BRIEF AND OTHER APPROPRIATE FILINGS

The Department's right to fully participate in these proceedings has been resolved in three separate Orders decided by the USDA. Indeed, the presiding officer's statements calling into question the Department's right to file a brief and its status in this proceeding directly contravene USDA's express rulings in its first Decision and Order, issued on September 19, 1990:

[t]he Attorney General of the United States or other appropriate officials of the United States Department of Justice, and duly authorized officials of other Federal agencies, are interested persons within the meaning of the rules of practice governing this proceeding. (7 C.F.R. 900.1 et. seq.) Accordingly, these agencies may participate fully in this administrative rulemaking proceeding including, but not limited, to submitting proposals, presenting testimony and exhibits, cross-examining witnesses and filing written briefs and exceptions. (emphasis added)

USDA has twice reaffirmed this decision. On September 28, 1990, it stated that "the issue has been completely resolved and the Department of Justice . . . should be allowed to participate fully in the proceeding" Again, on November 13, 1990, USDA stated that the relevant rules of practice contain no

restrictions on the type of "interested persons" that may participate at the hearings, and do not purport to prohibit the participation of governmental entities at the rulemaking hearing.

Under USDA's Rules of Practice, 7 CFR § 900.9, interested persons in the proceeding, such as the Department, may file proposed findings and conclusions, and written arguments or briefs, at the close of the USDA hearings.

The Department's status as a full participant in these rulemaking proceedings is fully consistent with the Administrative Procedure Act ("APA"). An "agency" expressly can be a "party" under the APA, 5 U.S.C. 551(3), and as a party, DOJ is entitled to participate in a rulemaking or adjudicatory hearing. 5 U.S.C. 556(d). This participation, of course, includes the filing of proposed findings and conclusions, written arguments or briefs, or any other appropriate filings.

III.

TESTIMONY GIVEN BY DOJ'S WITNESS CAN BE FULLY CITED ON BRIEF BY ANY PARTY

There is no support, in either fact or law, for the presiding officer's ruling that Dr. Kimmel's testimony, while a part of the record, cannot be relied on or cited in the brief by the Department or any other party. Section 900.9 of USDA's

Rules of Practice states that interested persons may file with the hearing clerk proposed findings and conclusions, and written arguments or briefs, based upon the evidence received at the hearing. 7 CFR § 900.9. As evidence received in the hearing, Dr. Kimmel's testimony thus should be available for the Department and any other party to use on brief.

The presiding officer appeared to base his ruling on his "observations" that Dr. Kimmel did not apply "whatever expertise he may have had in the general field of economics" to the issues under debate in this hearing and that there was an apparent violation of USDA's ex parte rules.^{3/} That there is no violation of the ex parte rules is discussed in Part V below. (November 16, 1990 Tr. at 16.) As discussed below in Part IV, Dr. Kimmel's credentials are impressive and there is little doubt that he qualifies as an expert in this proceeding.

^{3/} The presiding officer also made numerous observations impugning, among other things, Dr. Kimmel's "inability to display knowledge of the industry," and the use in his testimony of "generalizations" and "incomplete excerpts from his source material." (November 15, 1990 Tr. at 413-14). A review of Dr. Kimmel's direct testimony and extensive cross-examination reveal these charges to be without basis. In any event, such considerations affect the weight to be given Dr. Kimmel's direct testimony and not its admissibility. See Brockton Taunton Gas Co. v. Securities and Exchange Commission, 396 F.2d 717, 721 (1st Cir. 1968). See also Stempel v. Chrysler Corporation, 495 F.2d 1247, 1248 (5th Cir. 1974).

Whether or not Dr. Kimmel has been qualified by the presiding officer as an expert, however, is not determinative of the admissibility of his testimony nor of the propriety of its citation in briefs. Evidence is liberally admitted in administrative proceedings. K. Davis, Administrative Law Text, § 14.01 (3rd ed. 1972); McCormick, Handbook of the Law of Evidence, § 350 (2nd ed. 1972). See Multi-Medical Convalescent and Nursing Center v. NLRB, 550 F.2d 974, 977 (4th Cir. 1977) (liberal admissibility of evidence required in nonjury district court trial or administrative proceeding to avoid reversible denial of due process). The traditional rule, requiring opinion testimony to be offered by experts only, does not apply in administrative proceedings. Brockton Taunton Gas Co. v. Securities and Exchange Commission, 396 F.2d 717, 721 (1st Cir. 1968).^{4/} The question in an administrative proceeding is, thus, not whether a witness is qualified as an expert, but

^{4/} The agency may only exclude evidence that is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. 556(d). Consistent with the APA standard, USDA's Rules of Practice provide that the judge shall exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely. 7 C.F.R. § 900.8(d)(iii). A review of Dr. Kimmel's testimony makes clear that no valid claim for exclusion could be made on this basis. His testimony is reliable, highly relevant, material, and not repetitious.

rather what weight to give his opinion testimony.

Administrative Law Text, supra, § 14.11 (3rd ed. 1972); Keller v. FTC, 132 F.2d 59, 61 (7th Cir. 1942).

IV.
DR. KIMMEL'S EXPERTISE AND
CREDENTIALS ENTITLE THAT HIS EXPERT
TESTIMONY BE GIVEN SUBSTANTIAL WEIGHT

An examination of Dr. Kimmel's qualifications, as set forth in his Curriculum Vitae (attached hereto as Appendix A), his direct testimony (attached as Appendix B), and his testimony during cross examination, make clear that the presiding officer's denigration of Dr. Kimmel's expertise is incorrect and unsupported by the facts.^{5/} USDA should flatly reject any ruling or finding by the presiding officer that is premised on a conclusion that Dr. Kimmel is less than fully qualified as an expert in these proceedings.

Dr. Kimmel's professional credentials and experience demonstrate that he would qualify as an expert under Rule 702 of the Federal Rules of Evidence. That Rule provides that a witness may be qualified as an expert (and thus be permitted to testify as to his or her opinions) because of his or her

^{5/} The presiding officer stated that Dr. Kimmel was not an expert and did not associate any economic expertise to the issues under debate and particularly to the Department's proposals. (November 15, 1990 Tr. at 140; November 16, 1990 Tr. at 16).

"knowledge, skill, experience, training or education" when that opinion will assist the trier of fact to understand the evidence or to determine a fact in issue. Dr. Kimmel's expert testimony in this administrative proceeding substantially will assist USDA in evaluating the proposals made by the Department and other parties.

The presiding officer's ruling and observations imply that Dr. Kimmel must know every detail of every milk marketing order and every specific of the day to day operations of a dairy farm to qualify as an expert in this proceeding. That is incorrect. The proposition that an expert need not be specially qualified in the narrow field about which he or she testifies in order to qualify as an expert and give testimony is well established. In Gardner v. General Motors Corp., 507 F.2d 525 (10th Cir. 1974) the court found that a mechanical engineer and a chemical engineer were properly qualified to express opinions pertinent to the question of a defect in a truck's design system, notwithstanding the defendant's claim that neither was an expert in the field of exhaust system design. *Id.* at 525, 528. The Tenth Circuit adopted as consistent with Rule 702 of the then proposed Federal Rules of Evidence, the trial court's ruling that:

[W]here an expert has the education or background to permit him to analyze a given set of circumstances, he can through reading, calculations, and reasoning

process from known scientific principles make himself very much expert in the particular product even though he has not had actual practical experience in its manufacture. Id. at 528.

Thus, under the Federal Rules of Evidence, Dr. Kimmel's educational and professional background would qualify him as an expert in this proceeding.

Dr. Kimmel's direct testimony fully sets forth the basis for the Department's three proposals to modify the milk marketing program. It first provides an explanation of regulation and markets in general, and then analyzes the effects of the specific reforms sought by the Department. The testimony demonstrates that Dr. Kimmel is, by reason of his knowledge, skill, experience, training and education, thoroughly familiar with, and well versed in, fundamental and advanced economic principles, and that he applied these principles to the milk marketing industry, its current regulatory system, and the Department's proposals for change. Dr. Kimmel's expertise lies in his analysis and interpretation of the effects of regulation in the milk marketing industry, and the impact of the Department's proposals. This analysis will assure that the record in this proceeding is complete, and will assist the USDA in its consideration of the many proposals that have been advanced in this hearing.

V.

THE RECORD DEMONSTRATES THAT THERE WAS
NO VIOLATION OF THE EX-PARTE RULES

The presiding officer's charge that Dr. Kimmel's testimony revealed an "apparent violation" of USDA's prohibition against ex parte communications with its decisionmakers (November 16, 1990 Tr. at 16) is unfounded and wholly inconsistent with the facts.^{6/} The presiding officer based this accusation on Dr. Kimmel's testimony that he disseminated his proposed testimony for review and comment to employees at USDA's Economic Research Service ("ERS"). (November 15, 1990 Tr. at 379 - 381.) However, none of these ERS employees -- and, indeed, no ERS employees -- are in any way involved in the decisional process of this proceeding.^{7/} At no time did Dr. Kimmel send to or discuss his testimony with anyone at the Agricultural Marketing Service, the USDA division charged with the decisionmaking

6/ USDA's prohibition against ex parte communications states:

At no stage of the proceeding following the issuance of a notice of hearing and prior to the issuance of the Secretary's decision therein shall an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding discuss ex parte the merits of the proceeding with any person having an interest in the proceeding or with any representative of such person 7 CFR § 900.16(a).

7/ Further, Dr. Kimmel testified that none of the ERS employees to whom he sent his proposed testimony provided him with any comments on his testimony prior to his appearance at the hearing. (November 15, 1990 Tr. at 384 - 85.)

responsibility in this hearing or with any representative of any other USDA organizational unit to which the ex parte prohibitions apply.^{8/} Finally, Dr. Kimmel did not allow the ERS employees to see his testimony before it was seen by participants in the hearing: Dr. Kimmel distributed his testimony to the ERS employees only after fifty copies of his proposed testimony were sent to the milk marketing hearings and made public on November 1, 1990, at the presiding officer's request.

VI.

CONCLUSION

For the reasons stated above, the Department respectfully requests that the USDA set aside any ruling by the presiding

^{8/} The hearing notice identified the following organizational units to which this ex parte prohibition applied: Office of the Secretary of Agriculture, Office of the Administrator, Agricultural Marketing Service (AMS), Office of the General Counsel, Dairy Division, AMS (Washington office only), Offices of all the Market Administrators. 55 Fed. Reg. 29035 (1990). At no time did Dr. Kimmel send his proposed testimony to any persons at any of these organizational units. Nor did anyone testify to any conversation between Dr. Kimmel and individuals at any of these organizational units concerning his testimony or the merits of this proceeding. Thus, Dr. Kimmel's actions were perfectly appropriate, and there is no basis for the presiding officer's finding of an apparent violation of the ex parte rules. Dr. Kimmel testified that he, along with counsel for the Department of Justice, attended a meeting with Richard Glandt and Gino Tossi of the Agricultural Marketing Service, during which Glandt and Tossi provided an explanation of the mechanics of the milk marketing order program. At no time during that meeting were any matters relating specifically to this proceeding discussed.

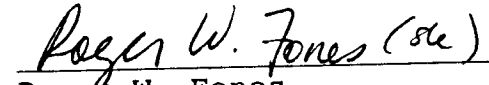
officer that (1) in any way limits the participation by the Department in this proceeding, (2) in any way limits the Department, or any other person or party in this proceeding, from relying upon Dr. Kimmel's testimony in its brief or other written filings, or (3) in any way limits the weight that should be afforded Dr. Kimmel's testimony as an expert witness.

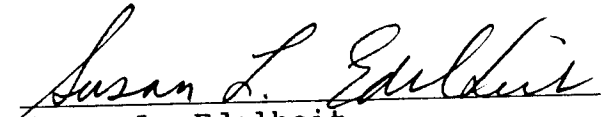
James F. Rill
Assistant Attorney General
Antitrust Division

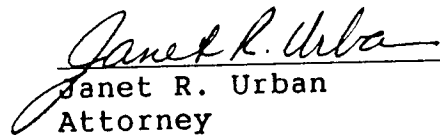
Alison L. Smith
Deputy Assistant Attorney
General
Antitrust Division

Respectfully submitted,


Mark C. Schechter
Chief


Roger W. Fones
Assistant Chief


Susan L. Edelheit
Attorney

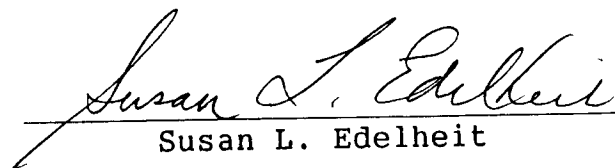

Janet R. Urban
Attorney

Transportation, Energy &
Agriculture Section
Antitrust Division
U.S. Department of Justice
555 4th St., N.W.
Washington, D.C. 20001
(202) 307-0898

February 4, 1991

CERTIFICATE OF SERVICE

I hereby certify that this 4th day of February, 1991, a copy of the foregoing Motion of the Department of Justice to Set Aside Rulings of the Presiding Officer was served, by first class mail, postage prepaid, upon all parties on the attached service list of this proceeding.


Susan L. Edelheit

Robert J. Williams
901 Moore St. Lot 28
Baraboo, WI 53913

Vincent C. Brockman
Borden, Inc.
180 East Broad Street
Columbus, Ohio 43215

Marvin Beshore, Esq.
P.O. Box 946
126 Locust Street
Harrisburg, PA 17108

David Beren
Morningstar Foods
5956 Sherry Lane #1100
Dallas, Texas 75243

Sheldon Weiss, Esq.
225 Millburn Avenue
Millburn, New Jersey 07041

Bill Coleman, Director
Minnesota Department of
Agriculture
90 West Plato Boulevard
St. Paul, MN 55107

Andrew I. Schoenholtz, Esq.
Covington & Burling
P.O. Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

William Tinklepaugh
888 16th Street, N.W.
Washington, D.C. 20006

A. J. Ortego, Dairymen, Inc.
10140 Linn Station Rd.
Louisville, Kentucky 40202

Edward T. Loughlin
National Milk Producers
1840 Wilson Blvd.
Arlington, VA 22201

Milk Marketing Inc.
P.O. Box 36050
Strongsville, Ohio 44136

Donald Ommodt
Cass Clay Creamery, Inc.
Box 2947
Fargo, North Dakota 58108

Glen Wagner, Esq.
3858 N. Cliff Road
Port Clinton, Ohio 43452

Steve Halbrook, Esq.
Suite 600
888 16th St., N.W.
Washington, D.C. 20006

James Purdy
Borden, Inc.
180 East Broad Street
Columbus, Ohio 43215

Donald F. Copeland, Esq.
One Meetinghouse Place
Norristown, Pennsylvania 19401

Charles M. English, Jr., Esq.
1200 18th Street, N.W.
Suite 710
Washington, D.C. 20026

George W. O'Brien
Box 55
N. Truro, MA 02652

Steve Rosenbaum
Covington & Burling
P.O. Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

James S. Fraher
Atlantic Dairy Cooperative
1225 Industrial Highway
P.O. Box 127
Southampton, PA 18966-0127

Neal R. Bjornson
AMPI
P.O. Box 790287
San Antonio, Texas 78279

Robert G. Thomas
Thomas & Thomas
6115 Brookbank
Downers Grove, IL 60515

Lynn A. Hayls
Farmers' Legal Action
1301 Minnesota Bldg.
46 East Fourth Street
St. Paul, Minnesota 55101

Christie L. Pittman
President, Dunn Co.
Farmers Union Milk Marketing
Cooperative, R5 Box 96
Menomonie, Wisconsin 54751

Bruce F. Wegmueller
Swiss Valley Farms
5910 Central Avenue
Dubuque, Iowa 52001

Robert Wellington
Agri-Mark, Inc.
P.O. Box 5800
Lawrence, Massachusetts 01842

Gary Gunderson
Agri News
801 34th Avenue, N.
St. Cloud, Minnesota 56303

Joe E. Paris
P.O. Box 419
Mountoursville, PA 17754

Rodney K. Carlson
Milk Marketing Inc.
P.O. Box 36050
Strongsville, Ohio 44136

D. Paul Alagia, Esq.
P.O. Box 1179
Louisville, Kentucky 40201

Joseph C. Mathis
Eastern Milk Producers
P.O. Box 6966
Syracuse, New York 13217

Robert Isaacson
U.S. GAO
562 Federal Building
Ft. Snelling, Minnesota 55111

Sue M. Taylor
Sorrento Cheese
2375 South Park Avenue
Buffalo, New York 14220

Dr. Ken Olson
225 Touhy Avenue
Parkridge, Illinois 60068

Clifford M. Carman
Dairylea Cooperative Inc.
831 James Street
Syracuse, New York 13203

James Kalkofen
Rt. 1, Box 38
Cecil, Wisconsin 54111

John H. Vetne, Esq.
Blodgett, Makechnie & Vetne
P.O. Box 574
Peterborough, NH 03458

Dennis Rosen
117 West Spring Street
Chippewa Falls, WI 54729

Elvin Hollon
AMPI-MGF
1375 E. Woodfield #350
Sch , Illinois 60173

P. A. Costello
Rose Hill Consultants
1475 Sunrise Camp Road
Minocqua, Wisconsin 54548

Bob Hall
Sorrento Cheese
2375 South Park Avenue
Buffalo, New York 14220

Don Huldeman
Wisconsin Farm Bureau
Federation
P.O. Box 5550
Madison, Wisconsin 53705

Roland Morris, Esq.
One Liberty Place
Philadelphia, PA 19103-7396

Denis Donohue
P.O. Box 1146
Manitowoc, WI 54221-1146

Virgil Roberts
State Representative,
Wisconsin
308 Park Lane
Holmen, Wisconsin 54636

Eric Hillan
W8032 Plant Road
Ladysmith, Wisconsin 54848

Carol DuBard
1301 Longworth Building
Washington, D.C. 20515

David Beren
9435 Hunters Creek
Dallas, Texas 75243

Kenneth Ackerman, Esq.
P.O. Box 4967
Syracuse, New York 13221

Edward J. Johnson, Jr.
New York State Department of
Agriculture & Markets
I Winners Circle
Albany, New York 12110

Gary G. Latta
Crowley Foods, Inc.
P.O. Box 549
Binghamton, New York 13902

John Hitchell
The Kroger Co.
1014 Vine Street
Cincinnati, Ohio 45202

Jim Dickrell
6205 Earle Brown Drive
Suite 100
Brooklyn Center, MN 55430

Sydney Berde, Esq.
2800 Minnesota World Trade
Center
St. Paul, Minnesota 55101

Gary G. Latta
Crowley Foods, Inc.
P.O. Box 549
Binghamton, New York 13902

William L. Oemichen
310 West Grove Road
Hudson, Wisconsin 54016

Joe Hylton
Farm Fresh
P.O. Box 31
Mountain Grove, MO 65711

Renn Nance
MID-AM Dairymen
3253 E. Chestnut Express
Springfield, MO 65802-2584

Curriculum Vitae

Sheldon Kimmel
555 Fourth St. NW
Washington, DC 20001
(202) 307-6371

Born: November 19, 1952

Current Position

Economist, Regulatory Economics Section, Antitrust Division,
U.S. Department of Justice, since 1980.

Education

Ph.D., University of Chicago, 1980
M.A., University of Chicago, 1977
B.A., University of California at San Diego, 1974

Testimony

U.S. v. Country Lake Foods Inc., et. al. (March 1990)
EPA Asbestos Proposal (May 1986)
USDA Egg Marketing Order Hearings (March 1986)
U.S. v. Rice Growers Association et. al. (January 1985)
Safeway application to Hawaii Board of Agriculture to sell
California Milk (October 1983)
USDA Orange Marketing Order Hearings (April 1983)

Papers and Publications

"Existence, Uniqueness and Efficiency of Auction Equilibria"
EAG Discussion Paper, June 1989
"Pareto Inferior Trade?" EAG Discussion Paper, September 1988
"Price Correlation and Market Definition." EAG Discussion Paper,
September 1987
"Marketing Orders and Stability: The Case of California-Arizona
Oranges." EAG Discussion Paper, July 1987
"Joint Production and Monopoly Extension through Tying" (Tim
Brennan, coauthor), Southern Economic Journal, (October 1986)
"A Note on Extraction with Nonconvex Costs", Journal of
Political Economy, December 1984

"Intransitive Choice and Dependence on 'Irrelevant' Alternatives", Economic Policy Office Working Paper, March 1983

"Quotas and Tariffs: The U.S. Sugar Program", Ph.D. dissertation
University of Chicago, December 1980

Regulatory Filings

USDJ comments on EPA Proposed rule on stratospheric ozone 1988

USDJ comments on EPA Proposed rule on stratospheric ozone 1987

USDJ comments on EPA Asbestos mining and import restrictions
6-30-86

USDJ comments on FCC Syndication and Financial Interest Rule
4-26-83

Filed Declarations or Affidavits

US v. ADM 1-9-87

Sheldon Kimmel is an economist with the Antitrust Division of the United States Department of Justice. He received his Doctorate in economics from the University of Chicago in 1980 and he has worked in the Division since then. His address is room 11-443, Antitrust Division, USDJ, 555 Fourth St. NW, Washington, DC 20001.

The Southern Economic Journal published an article written by Dr. Kimmel and a co-author on tie-ins in October 1986. He published an article on extraction of exhaustible resources in the Journal of Political Economy (December 1984). His dissertation was a study of some effects of the U.S. sugar quota.

His work at the Antitrust Division includes analyzing the effects of various legislative or regulatory policies and business practices on prices, production and welfare. He has also refereed articles for the Journal of Political Economy, the Journal of Industrial Economics, the Southern Journal of Economics, and Managerial and Decision Economics.

Testimony of Sheldon Kimmel November 15, 1990
USDA Hearings on Proposed Changes in Milk Marketing Orders

I am an economist in the Economic Analysis Group of the Antitrust Division of the U. S. Department of Justice. My educational background consists of 4 years of study at the University of California at San Diego, where I received a Bachelor of Arts Degree in economics and mathematics, and 6 years of study at the University of Chicago where I received a Master of Arts Degree and a Doctorate in economics. My dissertation was a study of the effects of USDA regulation of the sugar industry over a 40-year period. My duties at the Antitrust Division include analyzing the effects of various legislative or regulatory policies and business practices on prices, production, and the welfare of society.

I have worked on a number of agricultural matters in the ten years I have been at the Antitrust Division. I have testified at USDA hearings on orange marketing orders and a proposed marketing order for eggs. I testified at a State of Hawaii hearing on their milk regulations. My most recent testimony was in a federal court in Duluth, Minnesota in an antitrust case concerning the Country Lake Foods acquisition of Superior Dairy Fresh Milk Co. I have also analyzed various features of USDA milk marketing orders, beginning in 1980 with provisions affecting reconstituted milk.

I. Introduction

The economic analysis presented here on behalf of the U.S. Department of Justice has two parts. The first part considers regulation and markets in general, providing a basis for analyzing the effects of the specific reforms that are discussed in the second part.

Given the great costs of regulation and the general success of free markets, it is not advisable to regulate the production or exchange of a good without clear evidence of circumstances that greatly limit the efficiency of a free market for that good. It has been claimed that there are such exceptional circumstances that greatly limit the efficiency of a free market for milk and require an extensive regulatory system. However, such circumstances are not unique to milk, and are routinely dealt with by unregulated producers of other goods using methods that unregulated milk producers could also use. Indeed, the current regulatory system for milk makes these circumstances worse. Thus, rather than justifying milk market regulation, if anything the characteristics of milk markets that are given as justifications for regulation, argue against regulation.

Since there are no special circumstances requiring regulation of milk markets, USDA should institute reforms that reduce the effects of the unnecessary and costly regulation we now have, and ease a transition to a free market. The second part of this testimony deals with three such reforms proposed by the Department of Justice and set forth by USDA in its Federal Register notice for this hearing [7-17-90]. These

proposals are: 1) to eliminate the down allocation and compensatory payment provisions for the sale of reconstituted milk [C-1]; 2) to eliminate or reduce the distance differential [A-2]; and 3) to eliminate or reduce the Grade A differential [A-1]. These three proposals are worthwhile reforms that USDA should carry out as quickly as possible. They are also valuable steps toward introducing a free market, which is the most efficient way to organize the marketing of milk. The clear conclusion is that USDA should take these three steps now.

II. Markets and Regulation

Before discussing specific proposals, it is important to begin with an analysis of the appropriate uses of free markets and regulation. Recently, people in countries with centralized economies have discovered what has long been known in this country: free markets supply products to consumers in a wide variety of situations far more efficiently than central planning. There are, of course, some exceptional circumstances, known as market failures, in which markets do not perform efficiently. However, given the great costs of regulation and the general success of free markets, it is not advisable to regulate without clear evidence of some highly significant market failure.

Regulation of milk marketing has been defended for 50 years on the grounds that exceptional circumstances in the milk industry make unregulated milk markets unworkable. For

example, a recent USDA marketing bulletin [1] states that:

"The characteristics of milk cause an inherent instability in milk marketing.... Milk is bulky and perishable and must be moved promptly to market. Because milk is produced every day of the year, farmers must continue shipping it to market, even when market prices are not satisfactory. Milk production varies widely with the seasons.... The demand for fluid milk ... varies considerably measured day to day. Because of its perishable nature, milk cannot be stored to balance the peaks and troughs of supply. The industry, therefore, must continually produce an oversupply or reserve to make sure there will be enough fluid milk at all times for the day-to-day needs of consumers."
[The Federal Milk Marketing Order Program, 1989 p.7]

Thus, it is claimed that characteristics inherent in milk production make milk markets unstable and local, posing serious problems that require regulation. As discussed below, that claim is wrong, but the belief that milk markets have serious problems that require regulation is quite widespread.

A. The Regulatory Solution

The response to these conditions in the milk industry has been government regulation of milk ("milk marketing orders"). In each of 42 different geographic areas, regulators set the minimum prices at which milk that meets the sanitary requirements for fresh fluid consumption ("grade A milk") can be sold to firms that process milk ("handlers"). The regulators set different minimum prices for different milk uses. For example, milk that consumers will buy in fresh fluid form is in class I and sells at a high price, while milk that will become ice cream is in class II and sells at a lower price. For each class, each regulated handler is required to

multiply its marketing order's price for that class by the amount of milk it used in that class, and to pay that sum into a pool. Farmers receive a "blend price" from the pool that represents the average value of the milk that was pooled. Payments dairies may make above the minimum prices specified in the marketing orders, known as "over-order premiums", are not regulated.

The system as a whole is based on the Upper Midwest marketing order. In the Upper Midwest, the class I price is set equal to the market-determined price for milk that is not grade A, plus a differential that has been termed the "grade A differential." The class I price specified in the Upper Midwest marketing order is the lowest class I price in the system and the class I price set in other orders exceeds that price by a "distance differential." The milk regulatory system also has other regulations, far too numerous to mention here.

The result of the imposition of this regulatory system is generally to encourage excess production almost all of the time in most producing areas. This is wasteful since the excess production is used in relatively low valued ways. In addition, consumers of class I milk generally pay prices that are unnecessarily high.

Indeed, milk marketing regulation is one of the most extreme cases of government control in agriculture in this country and imposes very substantial net costs on society. A recent study [2] by USDA's Economic Research Service ("ERS") estimated that the costs of milk regulation outweigh its benefits, with a net waste of over \$1 billion each year

[Federal Milk Marketing Orders: An Analysis of Alternative Policies, 1988, p. 30]. The study found waste stemming from the following sources: reduction in fluid consumption because of the artificially high fluid price; additional surplus management problems because the artificially high blend price causes excessive production; and artificially raised production costs because reconstitution of concentrated fluid milk is, in effect, banned. In addition to these costs there are two types of costs the study did not attempt to quantify. First, while ERS only considered concentrated fluid milk, there are also costs to the restraint on the reconstitution of dry milk powder. This restraint limits the reconstitution of stored powder to stabilize the market and, since shipping powder costs less than shipping fluid milk, the restraint also increases transportation costs. Second, administering marketing orders imposes direct costs on taxpayers and the industry. The regulatory process is complex and there are costs to learning about and complying with current and new regulations.

Given the substantial costs that milk marketing regulation imposes upon American taxpayers, milk producers and consumers, and the significant changes that have occurred since that regulatory system was established in the 1930s, a reexamination of the regulatory system is called for. The analysis here examines the basic question of whether market forces are capable of providing adequate supplies of milk to consumers in all regions of the country. The conclusion is that they are and that the claimed justifications of the extensive regulatory system are now irrelevant or invalid.

B. Market Solutions

Regulation of milk has been justified on the grounds that milk is bulky and perishable and production and demand variability make unregulated markets local and unstable. These claims should be closely examined.

The perishability of milk seems to raise two issues. First, it suggests that variations in production or demand could be a problem. That issue will be discussed at length below. Second, it suggests that it may be necessary to make all the arrangements for the distribution of milk in a very short time, which might be difficult. In fact, that problem can easily be handled by long term contracts. For example, in the egg industry it is very common for farmers to buy a flock of chicks only after arranging for the sale of all the eggs that the flock will eventually produce.

Although milk production used to vary "widely with the seasons", the seasonal variability of milk production has declined sharply. Manchester reported [3] that while production in the peak month exceeded production in the low month by about 50% or more until 1955, this fraction has fallen sharply since then, and was only 12% by 1981. Federal Milk Order Market Statistics show [4] that from 1986 to 1988 no month's daily average milk production differed from the annual daily average by more than 10%. While this variation was much higher in 1989 than in the preceding years, even 1989 had only a fraction of the seasonality of the period before 1955. Still, there is some seasonality in milk production and demand, and unconcentrated fluid milk is bulky.

However, supply and demand fluctuations are not unique to milk. Many products are bulky and have demands that vary with the business cycle, falling in recessions and rising in booms. There are also many markets, (such as accounting, movies, tuna fish, education, transportation, and tourism, to name a few examples) where supplies or demands have strong seasonal components. Some of these industries include products that are "perishable" in that what is not sold today cannot be inventoried for later sale. Firms in these industries successfully use many approaches, such as price reductions off-peak, to deal with these conditions.

Indeed, these problems do not seem to be as serious for milk, a product that is produced in a wide area throughout the year, as they are for other agricultural products that have not been as highly regulated. Many crops are bulky and grow mostly in a few areas that cannot consume much of the crop. Many crops are harvested in only a small part of the year, with production varying far more widely with the seasons than milk production does. If crops had to be consumed close to the farm near harvest time, there would be periods with extremely low prices, followed by periods with extremely high prices. Further, the impact of unexpectedly bad weather in a region would cause shortages and price increases there even when large quantities were available in other regions at very low prices. As we will see, currently used technologies have reduced the importance of these problems for milk markets, and currently available technologies can further reduce or eliminate the significance of these problems.

Since the conditions that milk producers face are common throughout the economy, it should not be surprising that there are a number of common responses to them that do not require regulation. Two important responses are spreading output across time by storage, and spreading output geographically by shipping the crop. These responses are discussed in turn.

1. Storage

One very common way of spreading output is storing it in warehouses when farmers have a large amount to sell and using that stored output when farmers have little to sell. Storage stabilizes prices at harvest time in two ways. First, prices paid at warehouses reflect the future demand for the crop, which is far greater than any excess or shortfall in the current harvest. For example, a crop 50% higher than average might put enormous downward pressure on current prices if it all had to be consumed currently, but will have relatively little effect on prices if it is consumed over the next 10 years. A second way that storage stabilizes prices is that it allows future production and consumption to vary in response to current excesses or shortfalls, buffering the effects on price of the current harvest. For example, if disease or bad weather reduces harvests enough, inventories will be reduced below normal levels. As long as inventories remain below normal levels, prices will tend to be higher than they otherwise would be, thus increasing supply and decreasing demand until inventories have been built back up to normal levels.

Although fresh fluid milk cannot be stored, skim milk can be dehydrated, and the resulting nonfat dry milk powder can be stored for a year or longer and then reconstituted into fluid milk by a dairy or by consumers. However, the quality of milk reconstituted from powder by consumers is so low that very little is sold even though its price is substantially below the fresh fluid price. In this testimony, reconstitution generally refers only to commercial reconstitution.

It is possible to build up substantial stocks of dry milk powder during periods of peak milk production and, by rotating the inventory, maintain stockpiles permanently. Reconstitution of powder from such stocks when milk production is low would smooth out both seasonal and year-to-year fluctuations in prices and sales. This is particularly relevant since, even with marketing orders, there has been considerable variation in milk prices in the last two years. Such variations have been larger than they would have been if stocks of powder could have been reconstituted. Thus, much of the variation in the last two years was a result of the regulatory restraint on reconstitution of powder.

Reconstitution of dry milk powder is relatively rare now, but there is a well documented case of it in North Carolina, and consumers were willing to accept substantial quantities of reconstituted milk there. Indeed, USDA has analyzed the reconstitution of powder at dairies in the past and, in a 1980 request for public comments [5], USDA concluded that "the best evidence available indicates that a blended product containing 50 to 70 percent reconstituted milk is nearly indistinguishable from fresh fluid milk, either by taste or by chemical

analysis." [Federal Register p. 75960 11-17-80].

Thus, if regulation were modified to allow reconstitution of milk powder, storage would become a commercially viable response to the problems of variable production and demand in the dairy industry.

2. Shipping

A second very common way of spreading output is shipment among regions. There are two reasons why such shipments can stabilize prices. First, a shortage or excess in any one producing region has relatively little effect on price or the total marketed quantity in a broader geographic area. For example, a local dairy might shut down after an outbreak of listeria, but if milk were shipped in from more distant dairies, there might be little effect on price or sales.

There are important lessons for policy towards milk to be learned from experiences in egg markets, which have never been subjected to a regulatory system like marketing orders. USDA's comments on the problems associated with milk apply equally as well to eggs:

[eggs are] bulky and perishable and must be moved promptly to market. Because [eggs are] produced every day of the year, farmers must continue shipping [them] to market, even when market prices are not satisfactory.

Nevertheless, even massive variation in regional egg production should have little effect on price or sales because of the stabilizing effect of shipments. The 1983 outbreak of avian influenza in four middle Atlantic states provides a dramatic example. USDA reported [6] that over 11 million chickens were

"depopulated" and local egg production collapsed, but egg production in unaffected areas increased, eggs were shipped in from those areas, and price increases due to the outbreak were quite small [Economic Assessment of the 1983-84 Avian Influenza Eradication Program USDA, ERS, pp. 9, 16, and 22; U.S. Egg and Poultry Statistical Series 1960-89 USDA, ERS, pp.58-9]. The importance of these market mechanisms in egg markets raises doubts about a regulatory system that restrains these market mechanisms in milk markets.

The second reason why shipments stabilize prices is the so called "law of large numbers." The average production of a number of independent producing regions becomes more stable as the number of regions increases, because regions with excesses tend to balance regions with shortfalls. For example, suppose regions have either shortfalls or excesses, both situations being equally likely. In that case, the chance that there are at least twice as many shortfalls as there are excesses is 50% if there are only three regions, but only 25% if there are nine regions, and only 6% if there are 20 regions. Thus, as the potential for shipments links up otherwise isolated market areas into broader integrated market areas, expected shortfalls or excesses become less significant.

There are two key factors that make shipping milk a reasonable and economical response to the problems of unstable local markets. First, fluid milk can economically be shipped long distances because interstate highways and current refrigeration and insulation technology allow a substantial shelf life even after such trips. Indeed, "the increased mobility of milk" during the last 40 years is one of a number

of "dramatic changes" that USDA has pointed out [7] in a recent marketing bulletin [USDA, The Federal Milk Marketing Order Program, 1989 p.9]. Moreover, milk powder and concentrated fluid milk are even more economical to ship since much or all of the water is removed before shipment.

Second, farmers are well educated, well integrated into the national economy, and able to deal with distant markets. Their increased investments and increased scale of operations [USDA, The Federal Milk Marketing Order Program, 1989 p.9] have contributed to the increased sophistication of dairy farmers.

None of these factors that make storage and inter-regional shipment reasonable responses to milk market problems were present before regulations were imposed 50 years ago. Manchester reported [8] that in the 1930s milk traveled on bad roads, refrigeration and insulation technology were primitive where they were available at all, substantial amounts of milk were not even pasteurized, and farmers operated at a much smaller scale [Manchester pp. 25, 55, 137]. Thus, all of these factors are reasons to discount entirely the current significance of problems that existed in unregulated markets 50 years ago; the changes are so substantial that there is no reason to believe that these problems would recur if regulations were modified or eliminated.

C. Deregulation

Because free market solutions generally work well for goods that have much in common with milk, and there are no reasons to believe that milk markets have any characteristics that would

pose any special difficulties for a free market, unregulated milk markets are likely to work well. Moreover, the recent experience with deregulation in milk markets, while very limited, gives no reason to expect any problems from further and more extensive deregulation. Until 1981, Wyoming had a state marketing order, but the Wyoming State Board of Agriculture concluded [9]:

"A. The order is not maintaining prices because prices are being established by a free market system through service charges and discounts.....

D. Marketing is such that the beneficial future of any dairy products is beyond the realm of government's ability to provide such a future.

E. The free market provides an adequate supply."

[Record of Proceedings, 12-18-80, attachment 1, p. 22]

This state order was terminated on January 16, 1981. There is no available evidence of any problems they have had as a result of deregulation.

A second state that recently deregulated is South Carolina. The transcript from their recent hearings shows [10] that their state milk regulations were challenged in 1983, and eliminated by 1985 [South Carolina marketing order hearing transcript April 17, 1989 pp. 79-81]. Those regulations were not replaced by a federal marketing order until September 1990. Milk prices have historically been relatively high in the South and, as USDA's recent recommended decision on that order [11] shows, South Carolina is no exception [Fed. Reg. 3-28-90, p. 11509]. Consequently, as would be expected, fluid milk consumption is relatively low there. However, it is worth noting that per capita fluid sales in South Carolina rose by 12.3% from 156.8 pounds in 1983 to 176.1 pounds in 1988 (as

calculated from data on fluid sales in the South Carolina docket of hearing [12 ex. 7, p. 25], and population figures from the 1990 Statistical Abstract [13 p. 20]). In sharp contrast, over the same period, both in the United States as a whole and in the only Federal milk marketing order bordering South Carolina, the Georgia Marketing Order, per capita fluid sales were essentially constant: U.S. sales rose from 235.4 pounds in 1983 to 236.2 pounds in 1988 and Georgia marketing order sales rose from about 190.1 pounds in 1983 to 190.6 pounds in 1988 (as calculated from USDA's dairy background paper for the 1990 farm bill [p. 64], Federal Milk Order Market Statistics [tables 4 and 50], and the Statistical Abstract [p. 20] [14]). Thus, the available evidence suggests that the deregulation of milk in South Carolina allowed producers to sell more fresh fluid milk in that market.

Despite relatively rapid sales growth after deregulation, USDA concluded [15], in its recent recommended decision, that a Federal order was needed in South Carolina [Fed.Reg. vol.55, pp. 11508-10]. Some of USDA's reasons, such as providing better information and more uniform regulation, have some merit, although they are not relevant to the proposals I will be discussing. However, many of the asserted reasons for the marketing order have no merit. For example, even though all the cooperatives were paid prices that were within 6% of \$14.54 per hundredweight [p. 11509], USDA referred to testimony on the inequity of handlers not all paying the same prices, and producers not all receiving the same prices [p. 11508]. USDA then concluded that a Federal marketing order was needed to

assure "uniformly applicable" minimum prices and to provide "an equitable division among all producers of the proceeds obtained from the sale of their milk". [p.11510] However, the transcript of the South Carolina hearing [16] shows that the witness USDA relied on for testimony concerning price differences found price differences between cooperatives to be far less than price differences within cooperatives. He also found that price differences within cooperatives were caused by "the degree that producers mesh deliveries to the base plan" and by volume and quality incentives. [South Carolina marketing order hearing April 17, 1989 transcript pp. 90-1]. These factors that explain price differences within cooperatives could also explain the more minor price differences between cooperatives. Price differences based on timely delivery and quality promote efficiency and are extremely important in our economy. Policy based on the view that it is "inequitable" to pay or receive more for timely delivery of a better quality product is antithetical to the most powerful forces that drive our economy towards productivity and efficiency. USDA should not employ such a counterproductive standard and, under any reasonable standard, the experience of South Carolina suggests social gains rather than social harms from deregulation.

The recent experience with deregulation does not suggest that milk marketing has characteristics that justify regulation. Instead, it casts doubt on the claimed justifications for milk marketing orders and suggests that deregulation would produce net benefits to society.

II. Proposed regulatory reforms

Since there are no exceptional circumstances that limit the efficiency of unregulated milk markets, USDA should consider terminating its milk marketing orders. USDA should also implement the following regulatory reforms, both because they would improve the functioning of the current system and as useful steps towards deregulation.

A. Allowing Reconstitution Without Penalties

The first way that USDA should reform the system is by eliminating the down allocation and compensatory payment provisions for the sale of reconstituted milk. These provisions restrain the reconstitution of powder or fluid concentrated milk by artificially making reconstituted milk more expensive than locally produced fresh fluid milk. There are four main factors to consider in analyzing the effects of eliminating these provisions. First, the magnitude of the effects of allowing reconstitution depends on the extent to which consumers would accept reconstituted milk. The available evidence suggests that consumers would accept substantial amounts of reconstituted milk. A second factor to consider is that reconstitution would reduce shipping costs, with the additional benefit of leading to some reductions in production cost. Third, the stabilizing effects of reconstitution should be considered. Finally, we should consider how reducing the class I differential would substantially improve the regulatory reform of reconstitution.

1. Consumers would likely accept reconstituted milk

The first issue that must be addressed in analyzing the benefit of allowing reconstitution is whether consumers would accept reconstituted milk. If consumers will not buy reconstituted milk, there is little to be gained by allowing its production; however, there is also nothing to be lost in that case. The experience of Arcadia, a North Carolina dairy, suggests that consumers would be willing to accept substantial amounts of milk reconstituted from powder. A court [17] found that in the 1970s Arcadia made 6% of the fluid milk sales in its local area and that half of its sales were a blended product made of equal parts fresh fluid whole milk and reconstituted nonfat dry milk powder. [223 S.E. 2d 323.] Arcadia sold this reconstituted blend at a price 10¢ per gallon below the price of fresh fluid lowfat milk. Hammond, Buxton, and Thraen [18] stated that consumers in other areas have also accepted reconstituted powder. [Hammond, Buxton, and Thraen, Potential impacts of reconstituted milk on regional prices, utilization, and production, 1979 pp. 19-20.] Similarly, as mentioned above, USDA has concluded that consumers would accept powder in blends. Acceptance of reconstituted powder would likely be even greater in flavored milk products. Since USDA Federal Milk Order Market Statistics [19] show that sales of flavored products are over 5% of total fluid sales [table 50], substantial amounts of powder could be used in flavored products alone.

The available evidence suggests that reconstituted concentrated fluid milk is also an excellent substitute for fresh fluid milk, and would have substantial sales if marketing order barriers to reconstitution were removed.

2. Reconstitution would lower costs

The extent of the resulting cost savings is the second issue that must be addressed in analyzing the benefits of removing restraints on the sale of reconstituted milk. Reconstitution reduces shipping cost since only concentrated fluid or powder is shipped and no freight is paid on the water that is not shipped. Thus, reconstitution would reduce the cost of milk that is currently shipped from low-cost regions to high-cost regions. That reduction in shipping cost would lead to a shift in dairy farming from high-cost regions to low-cost regions that would further reduce total cost. The ERS study [20] mentioned earlier, estimates that allowing reconstitution of concentrated fluid milk would produce net gains to society of at least \$183 million per year [Federal Milk Marketing Orders: An Analysis of Alternative Policies, 1988 p. 30]. Allowing reconstitution of powder would produce even further gains.

If reconstituted milk were a perfect substitute for fresh fluid milk, the two products would sell at the same price. In that case, the price of fresh milk would fall to the cost of reconstituted milk and the cost savings from reconstituting milk would benefit all milk consumers.

Moreover, to the extent that consumers consider fresh fluid milk and reconstituted milks to be different, allowing reconstitution would provide them with one or more new milk products that are nutritionally equivalent to fresh fluid milk, but would be less expensive. Consumers that purchase reconstituted milk would save money, which they would value more than any perceived quality differences. Such savings could be particularly important to lower income consumers who spend a higher fraction of their income on basics like milk and who are especially likely to be benefitted by the availability of a cheaper source of milk.

3. Reconstitution would stabilize the market

As detailed earlier, storage and shipment stabilize prices and sales. Since powder is the way to store milk and powder and fluid concentrated milk are efficient ways to ship it, allowing reconstitution would increase the inherent stability of the milk industry. Since milk powder is much less perishable and bulky than fluid milk, allowing reconstitution of powder would mitigate the stability and bulkiness problems that USDA has identified. Allowing reconstitution of fluid concentrated milk would also mitigate the bulkiness problem, but since it is perishable it cannot increase market stability by smoothing out national supplies through storage. However, since fluid concentrate makes shipments cheaper, it would help integrate relatively unstable local markets into relatively stable broader markets. Thus, allowing reconstitution of fluid concentrated milk would also mitigate problems of instability.

In summary, reconstitution of either powder or concentrated milk would efficiently solve the very problems that marketing orders were designed to solve. The main difference between the free market approach that allows reconstitution and the current regulatory system is the substantial waste inherent in the current system. In addition, the substantial variations in prices over the last two years calls into question whether marketing orders even provide stability. If milk powder had been produced when milk supplies were high and if that powder had been reconstituted when milk supplies were low, the price variations would have been substantially reduced.

4. Other reforms to accompany reconstitution

Restrictions on reconstitution should be removed to reduce costs and stabilize the system. However, the benefits of reconstitution can best be achieved if the removal of restrictions on reconstitution is accompanied by other changes so that the system does not artificially encourage reconstitution. Distance differentials should be lowered to increase the net benefits of reconstitution (that differentials should also be lowered quite apart from impacts on reconstitution is discussed more fully later). The classification of powder and fluid concentrated milk that will be reconstituted must also be considered.

While allowing reconstitution would stabilize the market and reduce costs, allowing reconstitution without making other changes could artificially encourage reconstitution even in cases where reconstitution is inefficient. It is easiest to

see that possibility by assuming that consumers cannot distinguish between the taste of reconstituted and fresh fluid milk, and purchase whichever is cheaper. If a region's distance differential is high enough, milk reconstituted from shipped-in powder will be cheaper than the region's class I price and, by assumption, will displace all local class I sales. Clearly that can be inefficient since local milk producers may well have average production costs that are lower than the cost of reconstituted shipped-in powder. The problem identified here could arise because local producers are prevented from competing on price by the minimum-price regulations associated with differentials. USDA, in fact, concluded [21] that such inefficient reconstitution would happen when it considered proposals made by the Community Nutrition Institute in its 1980 request for public comments. [Federal Register 11-17-80 p. 75958.]

Such inefficient reconstitution would not occur if differentials were eliminated or reduced, as the Department of Justice proposes. In that case, local producers would be allowed to compete on price with milk reconstituted from powder. Even without considering consumer benefits from increased milk purchases and the reduction in farm costs due to reduction and reallocation of production, USDA's 1980 analysis [22] shows that allowing reconstitution with such adjusted differentials would produce substantial net benefits to society. [Federal Register 11-17-80 p. 75973.]

The proposal of the Department of Justice would allow reconstitution without any further regulation of powder that ultimately will be sold for fluid use. The Trade Association

of Proprietary Plants ("TAPP") has suggested a somewhat different proposal: reduce distance differentials and allow reconstitution, but when powder is reconstituted, re-price the milk that was dried at the higher class I price, passing that higher price back to the farmers that produced it. This proposal would raise the price of such powder and would inefficiently discourage reconstitution. Thus, TAPP's proposal would allow reconstitution at a restrained level, and result in less benefits and more regulatory costs than the Department of Justice's proposal. While TAPP's proposal is markedly inferior to eliminating all price regulation of reconstitution, it would still provide substantial benefits: lowering costs to the industry and the consumer and increasing market stability. This could be a significant improvement over the current system.

B. Lowering Differentials

This section elaborates the proposal of the Department of Justice to eliminate or lower distance differentials and the grade A differential. As discussed above, it is important to lower differentials to increase the net benefits of reconstitution. Moreover, lowering differentials would produce substantial additional net gains to society whether or not reconstitution is allowed. In analyzing the effects of lowering differentials, it should be noted that USDA Dairy Market Statistics [23] show that the regulated class prices are generally not the prices at which milk is sold. Typically, class I milk is sold at a premium over the class I price set by Federal orders. Thus, in considering the effects of changes in

class I prices it is important to consider the response of over-order premiums.

Lowering differentials would produce three categories of social benefits. First, lowering differentials would likely lower some artificially high prices and increase consumption to more efficient levels. Lowering the regulated differential in an area would likely lower actual market prices in some cases, may have no effects on market prices in other cases, but cannot cause such prices to rise. In markets where over-order premiums result from competition, lowering differentials would have no effect: supply and demand balanced at the old market price and if class I prices fall, then over-order premiums will rise to keep the market price constant and supply and demand in balance. However, where cooperatives receive an over-order premium due to an exercise of market power, cutting class I prices would tend to cut actual market prices. That would happen because the initial market prices could be maintained only if over-order premiums increased, but since over-order premiums in this case are an exercise of market power, the limits on the cooperatives' market power also limit these premiums. The filings in this proceeding show that it is widely believed that there are a number of areas where market prices will respond to changed differentials. In such cases, the standard result for the exercise of market power applies: lowering price would increase consumption and lower the "dead-weight loss"; i.e., lower the waste arising from consumption foregone due to the exercise of market power.

One might object that this analysis is incomplete since it ignores the possibility that lowering prices could lead to a shortage. However, that cannot happen. If lowering class I prices threatened some market with a shortage, local dairies would compete over the milk that was available and bid up its price. Thus, over-order premiums would increase until milk supplies increased enough to eliminate the shortage: cutting class I prices cannot cause a shortage. Despite the fact that there is a regulated minimum price in this market, over-order premiums allow supply to respond to demand the same way it does in other markets.

The second benefit from lowering differentials is that production would be more efficient after artificial incentives to produce milk in high-cost areas were removed and production in low-cost areas were stimulated. This benefit is most clearly understood with an example of two regions with substantially different prices that always produce some manufactured milk products. Farmers in both regions will have profit incentives to produce milk up to the point where the cost of producing additional milk equals the local blend price adjusted for the over-order premium. Thus, the difference in adjusted blend prices is the difference in the cost of producing additional milk. Ignoring the cost of shipping manufactured milk products, which is relatively low (per hundredweight of milk equivalent), reallocating a little production from the high-cost region to the low-cost region would reduce total costs by the difference in adjusted blend prices. Thus, the difference in adjusted blend prices is the benefit from reallocating production and is thus a measure of the

inefficiency of current production. In fact, adjusted blend prices vary substantially, even in regions with low class I utilization rates, indicating that the current system of differentials does in fact substantially elevate costs. Reducing differentials would stimulate low cost production and permit it to displace high cost production. The result would be more equalized adjusted blend prices, substantially reduced total production costs, lower prices, and more output.

Third, lowering the grade A differential would substantially benefit society. As already discussed, any lowering of differentials will, at least in some regions, likely lower retail fluid milk prices, raise consumption, and thus reduce the loss due to the exercise of market power. Moreover, lowering the grade A differential would reduce the wasteful utilization of relatively expensive grade A milk in non-fluid products that do not benefit from grade A standards. There would be less of this wasteful use since lowering the differential would reduce the incentive to produce grade A milk for such purposes.

USDA's dairy background paper for the 1990 farm bill [24] shows that only 40% of the milk produced in this country is consumed in fluid form [USDA, Dairy--Background for 1990 Farm Legislation p. 64], but USDA Agricultural Statistics 1989 [25] shows that 90% of the milk is produced to meet fluid grade standards [p.325]. Thus, half of the nation's milk is produced to meet grade A standards even though it is consumed in forms where grade A standards are unnecessary. Milk that is handled more expensively to meet the grade A standards, but is in fact consumed in ways that do not benefit from that special

handling, has been handled wastefully. The American Agricultural Economics Association Task Force on Dairy Marketing Orders reported [26] estimates of the extra cost of meeting grade A standards ranging from 0 to 50¢ per hundredweight and concluded that this cost is 15¢ per hundredweight or less [Occasional Paper #3 p. 19]. At annual milk sales of 1.42118 billion hundredweight, [USDA's Agricultural Statistics 1989 27 p.325], wasted costs of 15¢ per hundredweight on half of that milk is an annual waste of over \$100 million. As long as the grade A differential is higher than the additional cost of meeting the grade A standard, the regulation encourages wasteful over production of grade A milk.

While it is clear that such sudden government actions as immediate elimination of the differentials could be disruptive, it is even more clearly injurious to the public interest to maintain the status quo. The differentials should be reduced, and phased out, as rapidly as possible. Since USDA's Dairy Market Statistics [28] show that prices rose by \$1.90 per hundredweight last year [1989 Cooperative prices in USDA's "Selected Cities"], and since that was not considered unacceptably disruptive, it would be hard to argue that it would be unacceptably disruptive for USDA to lower differentials at half that rate (i.e., 95¢ per hundredweight per year). Such an adjustment path should begin immediately, both to reduce current impediments to competition, and to set the course towards elimination of the unnecessary and inefficient regulatory system.

III. Conclusion

The reforms proposed by the Department of Justice would quickly produce substantial benefits to society, and therefore should be instituted. An additional benefit of these reforms is that they are valuable steps away from an anachronistic regulatory system that is wasteful, expensive, and unnecessary, towards an efficient free market that would be in the public interest.

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Sheldon Kimmel

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