

Vermont Milk Commission
Proposed Order to Establish a Retail Fluid Milk Premium

Preliminary Formalities

Statement of Statutory Authority and Jurisdiction

This proposed Order is issued under authority of 6 V.S.A. §§ 2924(e) and 2925(b-f), and 6 V.S.A. Chapters 151 and 161, passim, and pursuant to the emergency rule establishing the procedural rules for the issuance of an Order adopted in accordance with 6 V.S.A. § 2929.

Summary Statement of the Matters at Issue

The proposed Order would establish a retail fluid milk premium for fluid or beverage milk products sold at retail within the state of Vermont, subject to certain exemptions. The proposed premium is primarily intended to interrupt the upward “ratcheting effect” on Vermont retail milk prices caused by the volatility in federally regulated minimum fluid milk prices. The proposed premium is further intended to signal the wholesale and retail sectors of the Vermont fluid milk marketplace to return to Vermont producers a portion of the surplus profit margin present in at least the dominant, chain store segment of the retail sector. The proposed Order’s correction of the present “ratcheting effect” in the Vermont milk marketplace is thus intended to combine long-term stabilization of consumer prices and marginal enhancement of producer prices, without increase in consumer prices.

Procedural Notice of Hearing; Right to Provide Written Comment Independent of the Hearing; Invitation for Comment

The Commission will hold a public hearing on the proposed Order on September 9, 2008, beginning at 9:00 am. The location of the hearing is Room 11 of the Vermont State House, Montpelier, Vermont. Any person shall have the right to testify personally and to present written testimony at the hearing, and the right to provide written comment as part of the hearing, independent of oral testimony.

To accommodate witness travel schedules, the Commission is providing a procedure for pre-registration. Any person wishing to pre-register should provide

notification of travel scheduling requirements to Bridgette Hutchinson, Vermont Agency of Agriculture, (802) 828-2430; Bridgette.Hutchinson@state.vt.us.

Any person shall also have the right to provide written comment independent of the hearing for up to 30 days after publication of this notice. August 25, 2008 constitutes the notice date of publication.

Written comment must thereby be postmarked by September 24, 2008.

The Commission invites factual comment and data with regard to the proposed Order's assessments of market conditions, and the proposed findings and conclusions. In particular, the Commission invites comment with regard to how the proposed Order might work an adverse discriminatory or burdensome impact on out-of-state business interests that participate in the Vermont retail fluid milk marketplace, or otherwise unduly burden the New England, Northeast or national milk markets.

The Commission's procedural rules contained in Section 4 provide further guidance for witness presentation and the submission of comment. See pages 47-53.

Introduction

Section 1 of the proposed Order summarizes the provisions of the proposed retail fluid milk premium. The effective date for the proposed Order is set forth at the conclusion of Section 1. Section 2 provides the Commission's market-wide assessments and proposed findings and conclusions required by 6 V.S.A. §§ 2925 and the Commission's procedural rules. Section 3 provides draft regulatory provisions to implement the proposed retail fluid milk premium. Section 4 presents the Commission's procedural rules.

Section 1. Summary Description of the Proposed Retail Fluid Milk Premium

Consistent with 6 V.S.A. § 2924(e), the proposed retail fluid milk premium would establish an assessment on the delivery for retail sale of all Class I fluid milk products within the state of Vermont, subject to the exemptions identified below. The rate of this assessment, calculated monthly, would be the difference between \$27.00 per hundredweight and the Class I price for federal Milk Market Order No. 1, per hundredweight, announced each month for Suffolk County Massachusetts.

Milk provided by operation of the Women, Infants and Children Special Supplemental Nutrition Program of the United States Child Nutrition Act of 1966 would be exempt. Milk delivered to schools, hospitals and government institutions would also be exempt. Organic milk would also be exempt from regulation.

All milk processors or “handlers” that provide fluid milk products subject to the regulation would pay the “premium over-order obligation”. No distinction would be made between in-state and out-of-state handlers. Each handler would make a monthly payment to the Commission in an aggregate amount reflecting application of the over-order obligation to the total quantity of regulated milk supplied by the handler.

Also in accordance with 6 V.S.A. § 2924(e) the Commission would disburse the proceeds of the over-order obligation to dairy producers. These “premium blend price” payments to producers would be made by two methods. First, disbursement would be made to all Vermont producers for each producer’s share per hundredweight of the total volume of Vermont raw milk production.

Second, the Commission would make disbursement for non-Vermont producer raw milk utilized by a handler for fluid milk product deliveries in Vermont. A handler will be deemed to utilize non-Vermont producer milk for any quantity of regulated milk delivered in Vermont from a processing facility that exceeds the supply of raw milk received at the facility from Vermont producers. This disbursement would be distributed in proportionate amounts to all of the non-Vermont producers who provide raw product supply to the processing facility.¹

The incremental amount of the premium blend price payment, per hundredweight, would be uniform for both disbursement methods. The incremental, per hundredweight, amount would reflect the computation of the combined quantity of the two volumes of Vermont producer and non-Vermont producer milk involved, measured against the total

¹ With the assessment on all retail sales of milk in Vermont, including sales of packaged milk processed outside of Vermont, and with disbursement of the proceeds to all Vermont producers as well as to non-Vermont producers that provide raw product supply for the Vermont market, the retail fluid milk premium is distinct from the retail price regulation considered by the milk commission as part of its prior hearing process. See A Final Decision and Report on the Proceedings of the Vermont Milk Commission, January 15, 2008, page 17.

amount of the over-order obligation collected from all handlers for their regulated Vermont deliveries.

The Commission would announce the amount of the premium over-order obligation each month concurrent with announcement of the applicable federal Order One Class 1 price. Milk handlers subject to the regulation would make reports to the Commission of all regulated milk deliveries and other relevant data necessary for administration of the retail fluid milk premium. Handlers would make payment in a timeframe consistent with the payment schedule established for the federal milk market order program.

The premium producer blend price payments would also be made on a monthly basis in accordance with the federal program's schedule for producer payments. The Commission would make disbursements in aggregate to handlers, which would then make individual payments to producers. Producers would receive the total amount of the retail fluid milk premium payments disbursed by the Commission; handlers would not be entitled to make any kind of deduction.

The Vermont Agency of Agriculture, Food & Markets would provide staff support for administration of the premium regulation, including the conduct of timely audits to ensure compliance. An administrative assessment is established in an amount not to exceed \$0.075 per hundredweight, to provide for the necessary administrative support.

This proposed Order is subject to notice and comment, including a formal hearing, in accordance with the Commission's procedural rules adopted under 6 V.S.A. § 2929. In addition, before the Commission may act to administer the regulatory provisions of the Order in final form, the proposed retail fluid milk premium must be approved by producer referendum, to be held also in accordance with the Commission's procedural rules. As provided in the procedural rules, statutory provisions also allow for interested persons to petition the Commission for reconsideration, and for appeal of the Commission's final decisions to the Vermont Supreme Court.

Accounting for these many, intervening, required procedural steps, the **EFFECTIVE DATE for the proposed Order is November 1, 2008.**

Section 2. Required Market-wide “Assessment” and “Proposed Findings and Conclusions”.

In addition to the “short and plain statement of the matters at issue” set forth in the Introduction to the proposed Order, Section 2 of the Commission’s procedural rules for the implementation of a retail fluid milk premium requires the Commission to provide the following:

(vi) the Commission’s assessment of reasonable costs and charges for producing, hauling, handling, processing and any other services performed with respect to fluid dairy products, taking into consideration the balance between production and consumption of fluid milk, the costs of production and distribution, the purchasing power of the public and the price necessary to yield a reasonable return to producers, handlers and distributors. The summary shall also specifically account for (1) actual producer prices prevailing in federal market order I, (2) producer costs of production in Vermont, as accurately as possible, (3) subject to constitutional limitations, the competitive position of Vermont producers within the market order, (4) the actual rate of return received by distributors or handlers, whichever is greater, as determined by the Commission, and (5) the lowest price milk purchased from producers can be received, processed, packaged and distributed by handlers and distributors at a just and reasonable return in Vermont.

The Commission is further required to make

- (vii) proposed findings and conclusions regarding
- (1) the adequacy of the federal milk marketing order minimum price to ensure that the price paid to dairy producers will cover the costs of milk production and provide a reasonable economic return to dairy producers sufficient to ensure a stable milk production and distribution system in Vermont.
 - (2) the competitive position of producers and their costs, handler and distributor costs and reasonable rates of return, and actual handler and distributor rates of return.

Market-wide Assessment

The Commission’s required assessment of market conditions, including all associated factors, is largely summarized in the following table. The “Calculated Retail Price of Vermont Fluid Milk, Reflecting Raw Product, Processing and Retail Costs and Returns, Per Gallon, Chain Supermarkets, Private Label Milk” provides a calculation of incremental costs and returns for each of the raw product, processing and retail sectors.

The table further provides the Commission’s summary assessment of the price necessary to yield a reasonable return to processors and retailers for approximately two-thirds of all fluid milk products sold in Vermont, and about seventy-five percent of the milk sold at retail in Vermont.²

**Calculated Retail Price of Vermont Fluid Milk,
Reflecting Raw Product, Processing and Retail
Costs and Returns, Per Gallon
Chain Supermarkets, Private Label Milk**

	Sept 2007	May 2008	Nov 2008
<u>Raw Product</u>			
Regulated, Minimum Class I Price	\$2.11 ³	\$1.71	\$2.27 ⁴
Co-op charges/producer premiums ⁵	\$0.15	\$0.15	\$0.15
<u>Processing</u>			
Processor bottling ⁶	\$0.53	\$0.56	\$0.56
Distribution ⁷	\$0.32	\$0.35	\$0.35
Profit ⁸	\$0.10	\$0.10	\$0.10
<u>Retail</u>			
Direct costs ⁹	\$0.13	\$0.13	\$0.13
Indirect costs ¹⁰	\$0.24	\$0.24	\$0.24
Profit ¹¹	<u>\$0.01</u>	<u>\$0.01</u>	<u>\$0.01</u>
Calculated Retail Price, Per Gallon ¹²	\$3.58	\$3.24	\$3.80
Observed Retail Price, Per Gallon	\$3.85	\$3.78	

² The Commission construes statutory inclusion of “processors” and “retailers” for this review.

³ Reflects announced Class I price for Middlebury, Vermont. This is the federally regulated minimum price Vermont processors are required to pay for producer milk, to be distinguished from the regulated minimum “blend” price received by producers.

⁴ Reflects imposition of proposed retail fluid milk premium over-order obligation of \$27.00 per hundredweight, with Vermont processor location adjustment.

⁵ Estimated from GAO, “Dairy Industry Information on Milk Prices and Changing Market Structure” GAO-01-561, June 2001.

⁶ Dr. George Criner, Communication with Reenie DeGeus, Agricultural Research Chief, Vermont Agency of Agriculture. (Update of Maine Milk Commission Ch. 29 Dealer Margins, adopted May 9, 2007.)

⁷ See footnote 6.

⁸ Estimated industry average return on investment.

⁹ Maine Milk Commission Ch. 27 Retail Margins, adopted February 27, 2008, based on retail cost study conducted by Dr. George Criner, University of Maine.

¹⁰ See footnote 9.

¹¹ Estimate based on expert opinion of Dr. Criner regarding industry norm. See footnote 6.

¹² Totals reflect rounding.

In summary, it may be seen from the citations for the table that the component values are drawn from calculations utilized by the Maine Milk Commission for its regulatory program. With assistance from Dr. Criner, the primary expert relied upon by the Maine Milk Commission, these values have been marginally adjusted to reflect the larger scale processing facilities supplying the majority of fluid milk products in the Vermont market. Further adjustments were made to update the values affected by recent increases in the price of oil and petroleum products. The 2007-2008 increase of \$0.03 per gallon in the value for bottling reflects increased fuel and resin costs, and the 2007-2008 increase of \$0.03 in processor distribution costs reflects increased fuel costs.

As may be seen from the table, the “Raw Product” sector is the first of the three sectors of the commercial channel for Vermont fluid milk. Detailed discussion of this sector is now provided, in terms of return to producers. (As indicated in footnote 3 for the table, the regulated minimum blend price and additional market return to producers must be analyzed separately from the minimum Class I procurement price charged to processors. The latter is assessed in the subsequent discussions of the downstream processing and retail sectors.)

Price Necessary to Yield a Reasonable Return to the Producer:

- *reasonable costs and charges for producing, hauling and handling...performed with respect to fluid dairy products*
- *actual producer prices prevailing in federal market order I*
- *producer costs of production in Vermont*

The Commission determines that the statutory and procedural directives with regard to assessment of “hauling and handling of producer milk” and “actual producer prices prevailing in federal market order 1” refer to the variety of market-based producer payments that yield gross producer return above federally established minimum blend prices. This over-order portion of the calculation of producer pay prices is separated out and identified in the second line of the summary table, labeled “Co-op charges/producer premiums. “ The Commission adopts the GAO valuation there represented, and determines that producer payments are about \$0.15 cents per gallon, or about \$1.75 per hundredweight above blend prices in the northeast and Vermont markets.

The following table provides a variety of relevant data for assessing actual, total producer prices and comparing them with costs of production. The table is a summary comparison of reported producer “mail box prices” and three different computations of producer costs of production, for the period 2000 – 2008. This period was selected because it represents the relevant pricing environment, contemplated by the statutory review, following comprehensive reform of the federal milk market order system in 2000.

**Producer Pay Prices Compared with Cost of Production,
2000-2008**

	Northeast Mailbox Price ¹³ \$/cwt	Farm Credit Breakeven Price ¹⁴ \$/cwt	Farm Credit VT COP \$/cwt	Farm Credit NE COP ¹⁵ \$/cwt
2000	\$12.49	\$12.75	\$13.47	\$13.16
2001	\$14.95	\$14.21	\$14.15	\$14.51
2002	\$11.89	\$12.61	\$12.68	\$12.89
2003	\$12.48	\$12.83	\$12.87	\$13.13
2004	\$16.29	\$14.51	\$14.66	\$14.75
2005	\$15.39	\$14.38	\$14.83	\$14.99
2006	\$13.44	\$14.13	\$14.79	\$14.79
2007	\$20.12	\$16.38	\$16.87	\$16.87
2008			\$18.50	\$18.50

“Mail Box Prices” represent the combined calculation of the regulated minimum producer blend price plus all the cooperative charges for hauling and handling, cooperative assessments upon producer members and additional cooperative premium or “over-order” payments to producers captured by the GAO figure of \$1.75 per hundredweight.¹⁶ As such, they can be compared with the reported “breakeven prices” and the two estimates of costs of production.

¹³ Federal Milk Market Administrator One.

¹⁴ 2007 Northeast Dairy Farm Summary, Northeast Farm Credit; same citation for other years.

¹⁵ Region includes New England, New York, New Jersey and Pennsylvania.

¹⁶ The Commission has conducted a separate and exhaustive hearing into the reasonableness of these current market hauling costs. See A Final Decision and Report on the Proceedings of the Vermont Milk Commission, January 15, 2008.

With regard to the primary statutory concern with measurement of a reasonable producer return against costs of production, it may be seen that dairy farming in Vermont and the Northeast has continued to be at best a break even proposition since federal order reform in 2000. This characterization holds even with the dramatic jump in producer pay prices of last year. Producers have been under, near or just over the break even point most years, and able to absorb cost of production increases in their operation with the upswings in price in a few years. In total, they can make business plans based only on some at best uncertain hope that the upward swings will in fact be sustained and sufficient, overall and over time, to cover their increased costs.

Processing and Retailing Costs Of Production and Distribution.

Processing and retailing costs of production and distribution, per gallon, are presented as part of the basic summary table, above. Here are the parts of the table itemizing these processing and retailing costs.

	Sept 2007	May 2008
<u>Processing</u>		
Class I Raw Product Price	\$2.11	\$1.71
Co-op charges/producer premiums	\$0.15	\$0.15
Processor bottling	\$0.53	\$0.56
Distribution	\$0.32	\$0.35
Total Processing Cost	\$3.11	\$2.77
 <u>Retail</u>		
Direct costs	\$0.13	\$0.13
Indirect costs	\$0.24	\$0.24
Total Retailing Cost	\$0.37	\$0.37

As noted above, these calculations are drawn from the findings of the Maine Milk Commission. The two months of September 2007 and May, 2008 are presented to account for the marginal adjustments in processors costs that were made to reflect recent increases in the price of oil. As may be seen, these adjustments total \$0.06.

Actual Rate of Return Received By Processors and Retailers

Processors

Determining precise returns received by processors is elusive at best. Nonetheless, it is determined that the two large-scale processing firms supplying the Vermont marketplace, which combine to provide almost all the milk sold in Vermont, are able to achieve at least usual and customary returns on capital investments. As presented in the summary table, this amount is estimated to be in the range of \$0.10 per gallon.

Moreover, the Commission determines that these two firms are able to recover all increases in procurement cost attributable to increases in federally established minimums either by contractual pass-through to their Vermont retail customers or by virtue of their entrenched market position.

Retailers – Chain Supermarket/Superstore Segment

With regard to Vermont retailer returns, the economic literature is replete with analysis indicating that supermarket chain retailers operating in the New England marketplace achieve a return that reflects substantial “surplus” profit.¹⁷ The Commission’s determination of supermarket chain retail return is drawn from this analysis, as presented in the summary table, above.

Here is the table’s presentation of the surplus retail margin in this segment:

	Sept 2007	May 2008
Calculated Retail Price, Per Gallon	\$3.58	\$3.24
Observed Retail Price, Per Gallon	\$3.85	\$3.78

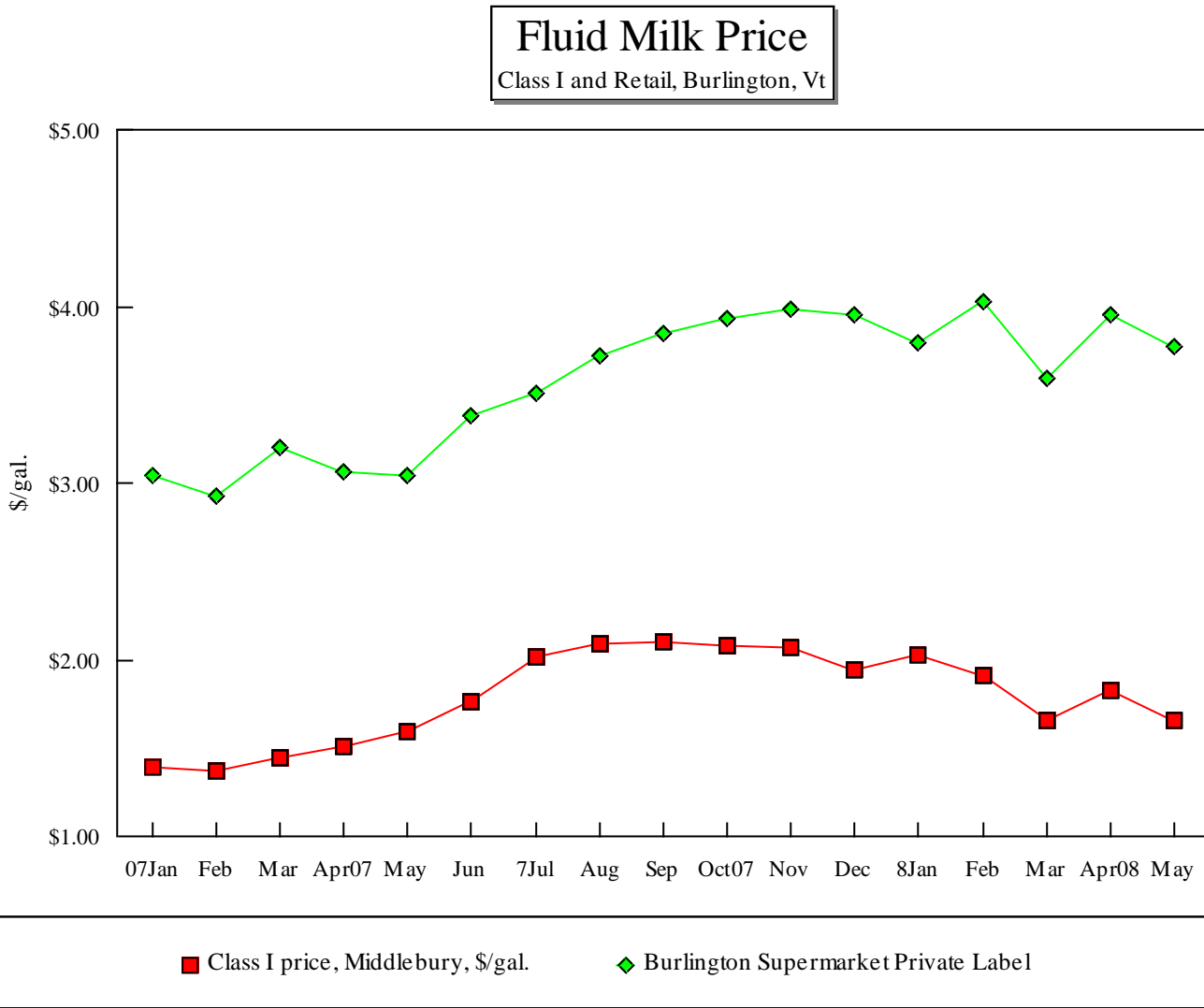
The two months shown were chosen because they reflect the most recent iteration of the recurrent pattern of retail pricing and, again, because they also account for the recent spike in oil prices. As may be seen from the cost calculation table, during the intervening seven months between September, 2007 and May, 2008 the regulated Class I

¹⁷ See e.g. R. Cotterill et al *Toward Reform of Fluid Milk Pricing in Southern New England: Farm Level, Wholesale and Retail Prices in the Fluid Milk Marketing Channel: 2003 – 2006* Food Marketing Policy Center, University of Connecticut, Storrs, CT, February 122, 2007.

See also D. Lass, *Asymmetric Response of Retail Milk Prices in the Northeast Revisited*, 21 *Agribusiness* (4) 493–508 (2005) and citations contained therein.

price dropped \$0.40 per gallon. During the period, there also occurred a \$0.06 processor cost increase attributable to the spike in oil prices. Yet despite the net reduction in cost of \$0.34 per gallon, retail prices dropped only \$0.07. As a result, the calculated surplus profit margin has increased from \$0.27 per gallon to \$0.54 per gallon.

This pattern of an increasing spread between farm and retail prices, and a drift upward over time in net retail prices may be seen in the following graph for 2007 - 2008:

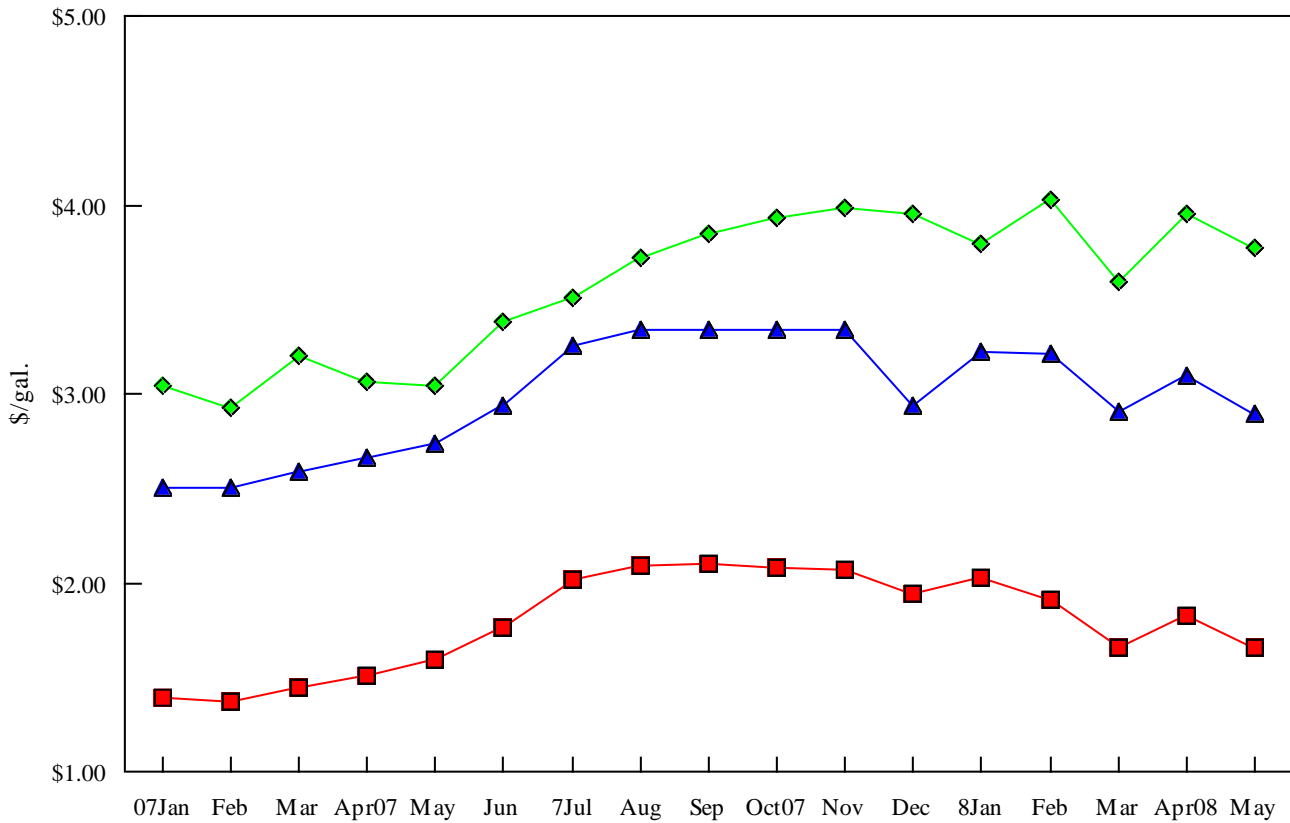


Sources: Cl. I price, Mkt Admin. Retail price, Vt. Agency of Agr.

The observed price charged by the three dominant chain supermarket stores has also increased as compared to that charged by a large discount superstore, located in the Burlington market. Milk for this store is packaged at the same plant that also packages

private label milk for two of the three supermarket chain stores operating in the Burlington market area. Here is the pricing pattern for the superstore over the past two years, as compared with the pricing pattern for private label milk by the three dominant chain supermarket stores.

Fluid Milk Price
Class I and Retail, Burlington, Vt



■ Class I price, Boston, \$/gal. ▲ Superstore, gallon avg.
◆ Burlington Supermarket Private Label

Sources: Cl. I price, Mkt Admin. Retail price, Vt. Agency of Agr.

The national chain superstore may enjoy some cost advantages as compared to the chain supermarket. Still, it is unlikely that these advantages fully explain the increased relative margin of the chain supermarkets for the period following September, 2007.

It is estimated that this pricing pattern signifying substantial surplus retail margin applies to at least two-thirds of the total fluid milk market in Vermont and about 70 percent of all milk subject to the retail fluid milk premium. These market segment calculations were determined as follows.

Reference is first made to the USDA/ERS report of the percentages of milk sales in the different segments of the market, for all federal orders, as follows:¹⁸

Percentage of Fluid Milk Products Sold By Total Retail, Institutional and Other Outlets, In Marketing Areas Regulated Under Federal Milk Market Orders, November, 2005 (Reconfigured “Retail” and “Other” Segments)								
2005	Total				Total			
	Retail	Super Markets	Stores Stores	Conven. Stores	Institutions	Military	Schools	Other
Appalachian	80.4	49.5	20.3	10.6	7.1	0.4	6.7	12.6
Central	72.9	49.6	19.2	4.1	7.9	0.7	7.2	19.2
Florida	73.3	51.4	16.4	5.5	6.6	1.3	5.4	20.1
Mideast	69.2	42	19	8.2	6.4	0.1	6.3	24.4
Northeast	74.2	50.8	5.5	17.9	7.3	2	5.3	18.4
Pac NW	71.4	44.6	15.7	5.5	3.7	1	2.7	30.4
Southeast	78.5	57.7	17.1	3.7	9.1	1.9	7.2	12.5
Southwest	70.5	45.4	18.3	6.8	9.7	1.1	8.6	19.9
Upper MW	49	36.1	7.5	5.4	5.2		5.1	44.7
All	72.1	48.1	14.9	9.1	7.2	1	6.1	20.4

Using the total sales volume of 137 million pounds as reported to the Vermont Agency of Agriculture¹⁹, Food and Markets, and with adjustments made to reflect its estimated positioning within the marketing area of the northeast federal order as shown above, a further table may be drawn for the Vermont submarket. Adjustments are made to reflect the estimates that Vermont supermarkets account for a marginally greater market share in their segment, and that chain convenience stores account for a marginally smaller share, than in the greater northeast marketing area. Further adjustments are made

¹⁸ This table is drawn from from USDA, AMS, Dairy Programs, *Packaged Fluid Milk Sales in Federal Milk Order Markets: By Size and Type of Container and Distribution Method During November 2005, December, 2006*. Sales in “superstore” categories are reported separately, and are combined in this Table.

¹⁹ See 6 V.S.A. § 2981(b)

in the “Institutional” and “Other sales” category. Military use is reduced and school use increased. Finally, the combined use/sales attributable to the “other” category, such as hospitals, and restaurant and vending machines, is estimated at a fixed 7 percent.²⁰ The latter adjustments allowed for a clearer itemization of the non-chain, or independent, convenience store retail market segment.

With these adjustments, the following table may be drawn of the Vermont retail market for fluid milk products. The table describes a total regulated volume of about 100 - 117 million pounds of milk, accounting for about 75 - 85 percent of the total market for fluid milk products in Vermont.²¹ As may also be seen, chain supermarkets and superstores account for about 63 percent of the total market and about 70 of the regulated portion of the market.

**Percentage of Fluid Milk Products Sold by Total Retail,
Institutional and Other Outlets in Vermont, 2007**

	Retail						Institutional		Other
	All Milk 1,000 LBS	Total Retail	Super markets	Super Stores	Chain Conven	Indep Mkt/Conv Gas Sta	Mil	Schools	Hospitals hotels, rest
Percent	100	84.8	58.6	4	10.8	11.4	0.2	8	7
LBS	137,700	116,770	80,692	5,508	14,872	15,698	275	11,016	9,639

Retailers – Convenience Store Segment

As may be seen from the table, chain and independent convenience stores combine to account for about 22 percent of the total fluid market, and about 25 percent of the regulated, retail market. The cost analysis and pricing pattern and hence the calculation of retail returns for this niche segment is less straightforward than the pattern for the dominant, supermarket segment. This is because of the myriad of store types in the marketplace and the variety of market circumstances in the various regional

²⁰ The Commission acknowledges the estimated value of this calculation and invites comment. The Commission nonetheless determines that the figure is not likely to be so far different in any event as to alter the dependent analysis to any material degree.

²¹ Range reflects exemption of WIC and organic milk otherwise included in these figures.

submarkets of the state as they related to convenience stores. In addition, until recently, the Vermont Agency of Agriculture has not collected price data for these stores. The Commission makes the follow estimate of an average retail margin for convenience stores, as follows:

**Calculated Retail Price of Vermont Fluid Milk,
Reflecting Raw Product, Processing and Retail
Retail Costs and Returns, Per Gallon
Convenience Stores**

	Sept 2007	May 2008	Nov 2008
<u>Raw Product</u>			
Regulated, Minimum Class I Price	\$2.11	\$1.71	\$2.27
Co-op charges/producer premiums	\$0.15	\$0.15	\$0.15
<u>Processing</u>			
Processor bottling	\$0.53	\$0.56	\$0.56
Distribution	\$0.35	\$0.40	\$0.40
Profit	\$0.10	\$0.10	\$0.10
<u>Retail</u>			
Direct costs	\$0.20	\$0.20	\$0.20
Indirect costs	\$0.24	\$0.24	\$0.24
Profit	<u>\$0.10</u>	<u>\$0.10</u>	<u>\$0.10</u>
 Calculated Retail Price, Per Gallon	 \$3.78	 \$3.46	 \$4.02

It may be seen that adjustments are made to the previous calculations for processing and retail costs, with increases made to the estimated processor distribution costs and retail direct costs. Substantial increased allowance is also made for store profit.

The Agency of Agriculture has begun to gather data of observed or actual convenience store prices. Data gathered for May, 2008 indicates that most convenience stores charge at least the resulting calculated or expected retail price, although some stores do charge substantially less.

Balance Between Vermont Production and Consumption

As seen from the table identifying market segment percentages, approximately 137 million pounds of raw milk equivalent, or about 16 million gallons of fluid milk, is

consumed in Vermont. Vermont dairy farmers produce about 2.6 billion pounds of milk, or about 300 million gallons. Viewed in strict terms of raw product supply for the fluid market, Vermont dairy farmers produce fully 19 times the supply needed to provide for the consumption of staple fluid dairy products in the Vermont marketplace.

When this unique, marginal demand/overwhelming supply feature of the Vermont marketplace is combined with the characteristics of consolidation and concentration that have occurred across all three sectors of the Vermont retail marketplace, the net outcome is that virtually all of the fluid milk products consumed in Vermont are processed from raw milk produced in Vermont.

Competitive Position of Vermont Producers Within the Market Order

Given the imbalance between supply and demand in the domestic market, Vermont producers are thus totally dependent on their competitive position as suppliers for the overall regional market. It is commonly understood, of course, that Vermont raw milk production has historically served as the anchor of raw product supply for the New England dairy marketplace. Vermont's net or surplus production of 2.5 billion pounds, or 385 million gallons, can in fact provide the entire fluid requirements for the entire New England region.

With the significant changes wrought by the 2000 reforms to the federal program, Vermont's fluid milk market, and the competitive position of Vermont producers, is now further absorbed within the even larger, more encompassing northeast marketing area. With the 2000 reform, Federal Order No.1, which long defined the marketing area for New England, was consolidated with Orders 2 and 4, creating a common regulated marketing area encompassing all of or part of the eleven northeast states, plus parts of Virginia and West Virginia.

Class I or fluid milk utilization in this common marketing area of federal milk market order 1, since 2000, has averaged over 10.5 billion pounds, or about 1.2 billion gallons. Vermont's consumption of 16 million gallons is dwarfed almost out of existence within this larger market construct.

Vermont's positioning as a source of supply for this newly devised marketing area has also been diminished as compared with its supply position for the older, former New

England federal order. Shown below is Vermont's positioning in the older, former New England milk marketplace, dating back to 1930, when the marketplace began to be subject to federal and state milk market regulation, and as compared with total producer receipts for the new, northeast federal milk market order.

It may be seen that Vermont producers supplied upwards of 60 percent of New England's total production as of federal order reform in 2000. By contrast, Vermont now supplies a marginal 11 percent of the total supply for the newly devised federal Milk Market Order One.

**Milk Production, New England and United States,
1930 – 2006; Northeast Order, 2000 and 2006 (Million Pounds)**

	1930	1950	1970	1980	1990	1995	2000	2006	'06/'80
CT	594	697	661	612	515	526	480	367	60%
ME	661	620	619	665	614	641	668	574	86%
MA	767	780	658	570	461	448	376	278	49%
NH	382	344	356	347	302	326	312	293	84%
RI	133	137	75	47	34	33	28	19	40%
VT	1,300	1,500	2,000	2,300	2,400	2,500	2,700	2,600	113%
NE	3,837	4,078	4,369	4,541	4,326	4,474	4,564	4,131	91%
VT/NE	34%	37%	46%	51%	55%	56%	59%	63%	
NY(NE)			1,370		1,460		1,790		
FMMO One							23,957	23,562	
VT/Order One							11%	11%	
US	100,000	116,000	117,000	128,000	148,000	155,000	167,000	182,000	142%

Source: http://www.nass.usda.gov/Data_and_Statistics/Quick_Stats/

“NY/NE” reflects additional NY producer receipts in old FMMO 1, 1970, 1990, 1999;

“FMMO One” reflects new federal milk market order established 2000.

Notwithstanding absorption of New England within the larger marketing area of the northeast order, Vermont raw milk production remains as the base of supply for the New England fluid milk market. Vermont raw milk continues to supply the substantial majority of raw product utilized by fluid milk plants for the Boston/Rhode Island markets, and continues to provide a pivotal portion of the Connecticut retail market. This

submarket supply configuration, as presented in the above table, thus remains pivotal to an understanding of the competitive positioning of Vermont producers in the northeast federal order.

One final feature of market structure must be detailed to complete the picture of the competitive positioning of Vermont producers. Corresponding with concentration and consolidation in the in-state and regional milk markets' processing sectors, Vermont's raw milk product sector has also been substantially consolidated. Presently, virtually all Vermont producer milk is marketed and supplied to dairy processors through two marketing agencies. With only two dominant fluid milk processors in the New England marketplace, virtually all transactions for the procurement of the tremendous volume of raw milk utilized for fluid milk occur as a function of commercial interchange with but two market participants on either side of the exchange.

Within this context, the market power and positioning of the Vermont dairy industry within the greater New England marketplace, in aggregate, remains significant. On the other hand, the impact of incidental transactions involving individual producers, such as the marginal producer payments that would occur with disbursements of the proceeds of the proposed premium payments, is largely diminished by this new market dynamic

Purchasing Power of the Public

It is commonly understood that fluid milk is highly price inelastic, meaning that consumers will buy milk as a staple product without much regard for the price charged. Even discounting this defining feature of market structure, concern with the purchasing power of the public is minimized in this proposed Order, based on the expectation that consumer prices will not be affected in any material way by the Commission's action.

At the same time, it is understood that even marginal price increases for milk as a staple product have significant adverse impact on lower and low income communities. It is for this reason that child nutrition programs are made exempt by statute from operation of the retail fluid milk premium.

The Lowest Price Milk Purchased From Producers Can Be Received, Processed, Packaged and Distributed By Handlers and Distributors At a Just and Reasonable Return In Vermont.

As noted previously, the Commission has ascertained that there are two calculations of the “lowest price” that Vermont producer milk may be marketed as milk at retail in Vermont, accounting for the two, supermarket chain and convenience store, segments of the market. Both calculations, in turn, are largely dependent on the prevailing procurement price as determined by federal regulation. To repeat, here are the representative calculations of expected and actual retail prices.

	Sept 2007	May 2008	Nov 2008
Calculated Retail Price, Per Gallon, Supermarket	\$3.58	\$3.24	\$3.80
Observed Retail Price, Per Gallon	\$3.85	\$3.78	
Expected Retail Price, Per Gallon, Conv. Store	\$3.78	\$3.46	\$4.02

As this table indicates, and as described previously, there is evidence of substantial surplus margin in at least the dominant chain supermarket/superstore segment of the market. As indicated there is evidence of upwards of at least \$0.25 - \$0.55 surplus profit margin in this segment.

Accordingly, it is determined that Vermont producer milk may be marketed in the supermarket segment of the Vermont market with “a just and reasonable return” to producers at both a lower retail price than is currently charged and with a greater return to producers. As indicated, the proposed over-obligation for November milk would yield an expected retail price less than the actual, prevailing retail price in September.

The Commission also determines that the margin in of the convenience store segment of the market could also likely absorb the proposed increase in the minimum procurement cost. As indicated, the expected price for November would be \$4.02, or also well within the range of prices currently charged across the convenience store segment, according to the Agency’s May, 2008 market survey.

Required Findings and Conclusions

As noted at the outset, in accordance with 6 V.S.A. §2925 and consistent with Section 2 of its procedural rules, the Commission is further required to make

- (b) proposed findings and conclusions regarding
 - (1) the adequacy of the federal milk marketing order minimum price to ensure that the price paid to dairy producers will cover the costs of milk production and provide a reasonable economic return to dairy producers sufficient to ensure a stable milk production and distribution system in Vermont.
 - (2) the competitive position of producers and their costs, handler and distributor costs and reasonable rates of return, and actual handler and distributor rates of return.

“(1) The adequacy of the federal milk marketing order minimum price to ensure that the price paid to dairy producers will cover the costs of milk production and provide a reasonable economic return to dairy producers sufficient to ensure a stable milk production and distribution system in Vermont.”

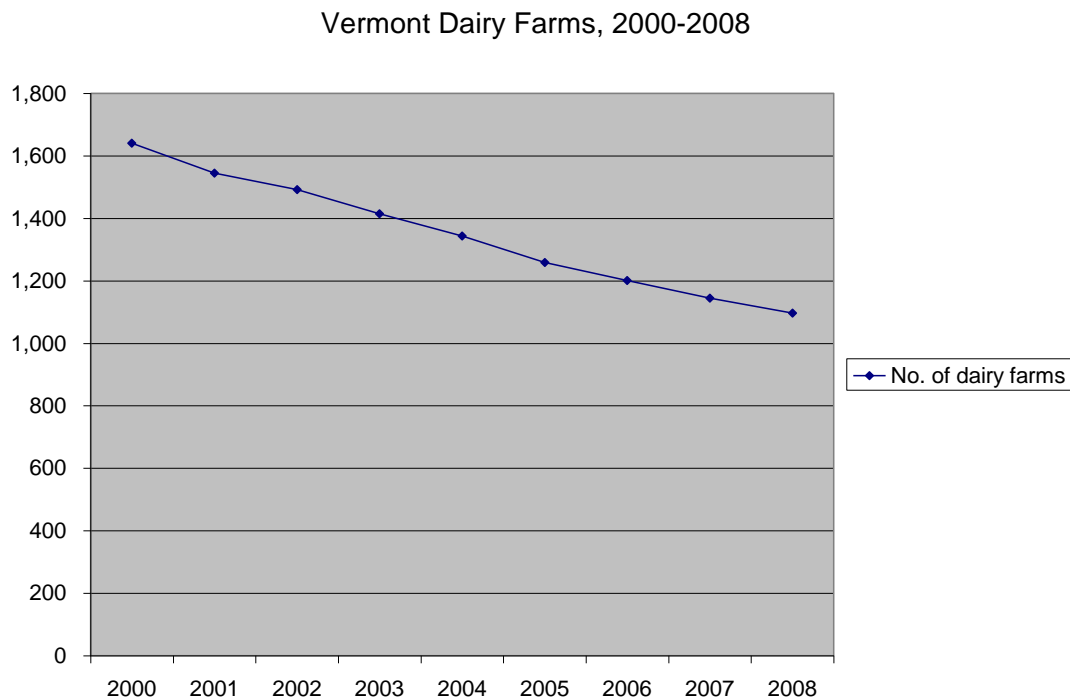
Based on the assessment of the continued and chronic deficiency in producer pay prices as compared with costs of production, the Commission finds and concludes that the federal milk market order system is not working to ensure “a stable milk production and distribution system in Vermont.” Producers are at best able to cover costs of production, but continue to be unable to show reasonable rates of return sufficient to guarantee the long-term viability of a broad base of farming operations in Vermont. Most problematically, current rates of return provide little sense of certainty that succeeding generations of young farmers will either remain on the farm to replace their parents or be attracted as new farmers to start up operations.

The Commission further finds that the additional concern with producer pay price volatility has only been exacerbated with the 2000 reform of the federal milk market order system. Producer pay prices are expected to stay near or above \$20 per hundredweight through 2009. Assuming these estimates are reliable, this would provide a welcome measure of price stability not seen in many years.²²

²²Price volatility was identified in the 1991 findings of the legislature under 6 V.S.A. § 2921 as even then an additional chronic problem with operation of the federal milk market order system.

At the same time that producer pay prices are achieving these historic highs, however, so have producer costs escalated exponentially. Despite the historic high producer prices, the weight of the evidence suggests that producers will manage at best to stay slightly ahead of production costs.²³

Here is a graph²⁴ of the numbers of farming operations in Vermont, January 1, 2000 –January 1, 2008. The graph identifies that fully one-third of Vermont’s dairy farms ceased operation during this period.



Based on these accumulated findings and conclusion with regard to current operation of the federal market order system, and operation of market-based over-order pricing, the Commission concludes that state over price regulation, subject to “constitutional limitations”, is necessary and required “*to ensure a stable milk production and distribution system in Vermont*” as well as to ensure Vermont’s capability to

²³ The feed price ratio instituted as part of the MILC program is direct evidence of this fact.

²⁴ Source: Vermont Agency of Agriculture, Dairy Division (As of January 1, each year)

continue to provide the raw product supplies for the southern New England fluid milk marketplace.

“The competitive position of producers and their costs, processor costs and reasonable rates of return, and actual processor and retailer rates of return.”

As described previously, based on its assessment of surplus retail margins, the Commission finds and concludes that producers are not receiving a proportionate rate of return from the Vermont retail marketplace as compared with the other sector participants – processor and retailer. The Commission further finds and concludes that this increasingly disproportionate competitive position of Vermont producers in the local market is attributable in part to rational defensive pricing behavior by the other, downstream, processor and retail market participants in response to the erratic swings in their regulated procurement prices, and in part to the exercise of market power by these same, other firms.

Technical economic analysis may further be relied upon to identify the varying respective degrees of causation.²⁵ In any instance, the literature establishes an “asymmetry” in the relationship between the raw product procurement price and net retail price. The literature further establishes that the precipitating cause continues to be the volatile, erratic fluctuation of the federal minimum pricing series for raw product procurement.

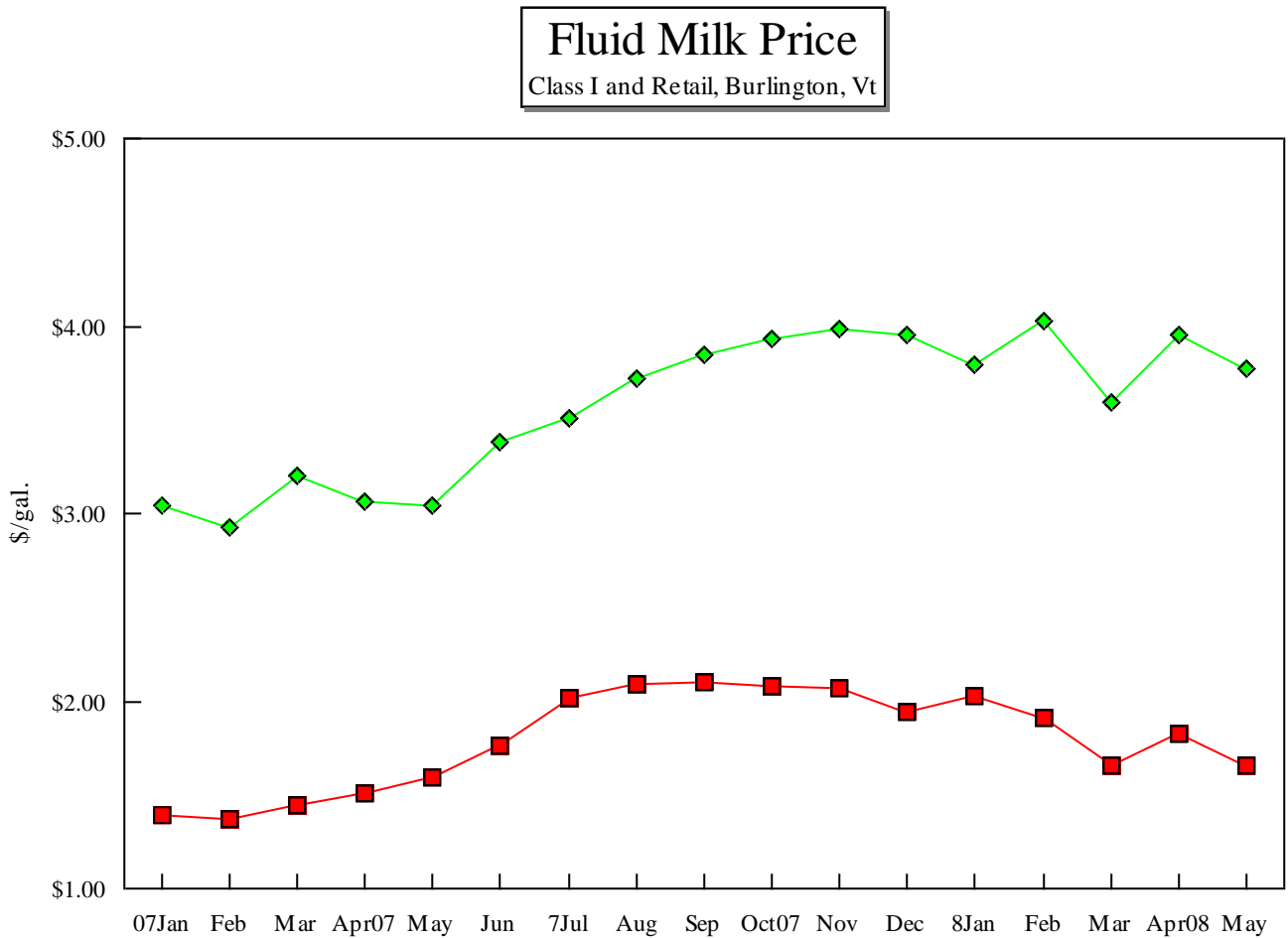
Between 2003 and today, the federally established minimum Class I prices paid by milk processors for producer milk utilized for fluid or beverage sales in the Vermont marketplace have twice fluctuated between \$13.00 - \$14.00 per hundredweight and \$24.00 - \$25.00 per hundredweight. During one eleven month period in 2003-2004, the Class I price climbed \$11.00 per hundredweight, an almost 50 percent change in the raw product procurement cost for milk processors.

As the literature well documents, the net impact of this volatile market dynamic is an asymmetrical, upward “ratcheting” effect on consumer milk prices. By operation of this asymmetrical pricing pattern, increases in federally regulated raw milk procurement

²⁵ See citations at footnote 17-, supra

prices result in almost immediate and equivalent increases in downstream wholesale and retail prices, as processors and then retailers pass along the mandatory pricing increases to their customers. On the other hand, decreases in the federally established minimums for the procurement pricing point are not passed along to consumers as quickly or anywhere near to the same degree as they are absorbed by producers.

Operation of this ratcheting effect is evidenced by the graph of federally regulated Class I prices and retail prices for the Burlington market, previously presented:



■ Class I price, Middlebury, \$/gal. ◆ Burlington Supermarket Private Label

Sources: Cl. I price, Mkt Admin. Retail price, Vt. Agency of Agr.

The Commission further concludes that the upward, “ratcheting effect” on consumer prices caused by the persistent volatility in federally regulated minimum Class

I prices may be interrupted and even corrected by imposition of a flat, benchmark procurement price. The new, known benchmark price should dampen if not remove the volatility in the procurement price for raw milk.²⁶ This dampening should interrupt if not eliminate the ratcheting effect of the past pattern of price volatility, and allow the underlying price inelasticities at work in the staple fluid milk product marketplace to settle out the market's pricing patterns. This should provide some measure of price stability for processors and retailers and thereby stabilize the consumer price of fluid milk, going forward.

Impact on Consumer Prices

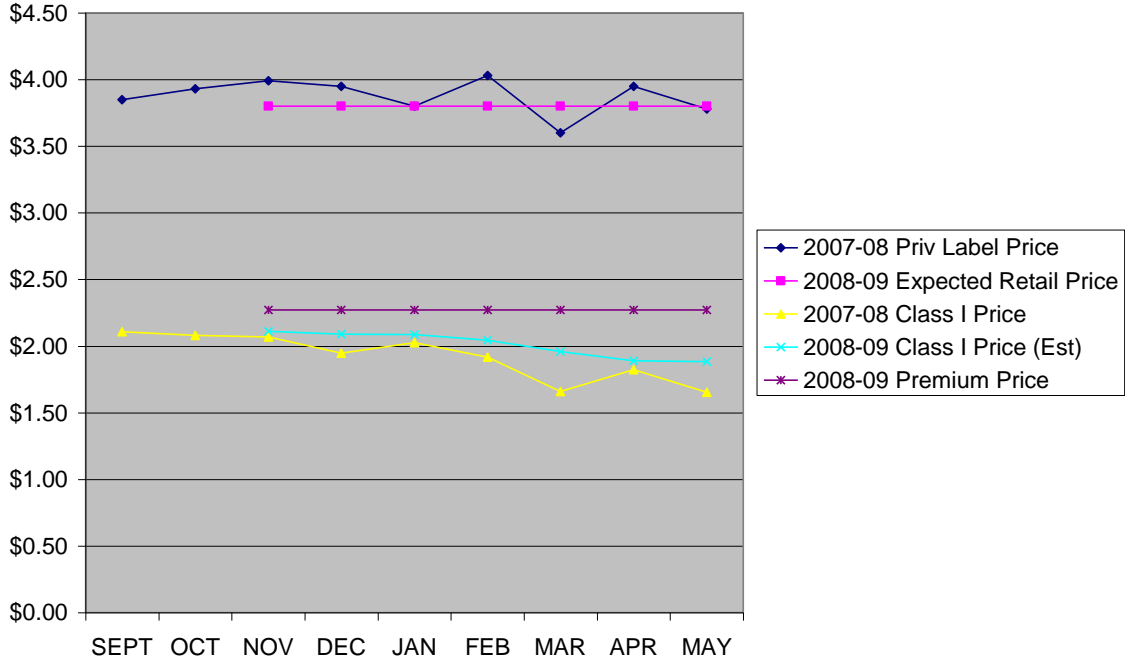
With further regard to the associated, critical issue of the proposed Order's potential impact on consumer prices, the Commission expressly concludes that establishment of the new benchmark procurement price should not result in any increase in consumer prices, at least in the 70 percent share of the regulated market controlled by the dominant supermarket chains. As assessed previously, the current retail margin in at least this segment of the Vermont marketplace reflects substantial surplus profit. Again, the proposed, flat \$27.00 per hundredweight pricing point, or \$2.33 per gallon, is anticipated to be only \$2.00, or \$0.17 per gallon, above the Class I price projected to be in effect in November when the proposed Order would be implemented, if finally approved. This \$0.17 increase may be absorbed in the surplus retail margin of the dominant supermarket chains without any net increase in consumer prices.

The following graph provides a comparison of actual Class I and retail prices for 2007-2008 with expected retail prices for 2008-2009, with imposition of the proposed retail fluid milk premium. It may be seen that the proposed increase in Class I prices may be fully absorbed at its inception by current prevailing retail prices. It may also be seen that there is no basis for the proposed increase in the Class I price to result in higher retail

²⁶ In this regard, 6 V.S.A. § 2671(5) declares that it is essential that consumers and others be adequately informed as to...the economics resulting from the use of milk and dairy products, and to command for milk and dairy products, consumer attention and demand consistent with their importance and value....This statement of purpose is incorporated by reference into Chapter 161. See Section 2921.

prices. In fact, as shown, the expected retail price could well be lower, over time, even with the proposed increase in the Class I procurement price.

Class I - Retail Price Comparisions, with Imposition of Retail Fluid Milk Premium



The Commission further determines that establishment of this new flat benchmark price may and should serve to promote price stability for retailers and processors. As seen from the initial table and this graph, the procurement cost of milk well accounts for over half of total cost to the retailer. Particularly with a demand inelastic, staple consumer good such as milk, stability in end-pricing should follow stabilization of this predominant raw product procurement cost.

As noted at the outset of this discussion, the relevant technical literature allows for some discussion as to whether the current surplus margin in supermarket pricing is the result of rational defensive pricing or the exercise of market power, or both. In view of the data and analysis provided above, should the dominant supermarket chain outlets raise their prices in response to imposition of the retail fluid milk premium established by the proposed Order, such action could only be understood as an exercise of unrestrained market power.

Impact on Producer Prices

The Commission further concludes that with the proposed Order's correction of the ratcheting may and should be the basis for causing a measure of reallocation of the consumer dollar paid for milk so as to provide some measure of incidental, enhanced producer income for Vermont dairy farmers. In short, the Commission is signaling the retail sector to pass the initial and any subsequent net increase in procurement prices solely back to producers, without any increase to consumers as in the past, and thereby to reallocate the value of the Vermont consumer dollar paid for milk.

Given the marginal positioning of the Vermont submarket, the proposed increase in producer prices is marginal with regard to the overall working of the larger, regional fluid milk market. At the same time, particularly given the limited profitability of Vermont dairy farming, the proposed increase is not insubstantial with regard to Vermont on-farm income. It is expected that the Class I price will remain at historic highs through 2009, averaging about \$22.50 per hundredweight.²⁷ This means that, on average, the Vermont retail fluid milk premium obligation would be about \$4.50 per hundredweight for the period. (Premium Over-order Price of \$27.00 - \$22.50).

As seen in the prior table itemizing the quantities of fluid milk products sold in the different segments of the retail market, with exemption of school and WIC program milk, approximately 110 million pounds of regulated milk deliveries would be subject to the over-order obligation. The anticipated, average over-order obligation may thus be expected to generate approximately \$5 million per year (1.1 mil cwt x \$4.50/cwt).

As described earlier, Vermont dairy farmers produce about 2.6 billion pounds of milk each year. Combined with the marginal amount of non-Vermont producer milk sourcing retail Vermont deliveries, and exempting the estimated 5 percent of organic milk production, the pool of milk eligible to receive payment of the premium blend price would thus be about 2.4 billion pounds. The resulting calculation indicates that the amount of the producer blend price, per hundredweight, would be about \$0.21 cents. (\$5 million/24 million cwt).

It may be seen from the table identifying the number of Vermont producers, over time, that there are currently about 1050 Vermont dairy farmers. Of these, approximately

²⁷ Northeast Agricultural Economists price forecast, May 15, 2008.

200 are exempt organic producers. This means that about 850 conventional Vermont farms are producing about 2.4 billion pounds of conventional milk, total, or an average of 2.82 million pounds, per farm. The average payment per farm, annually, would thus be about \$5,900 per farm (28,200 cwt/farm x \$0.21/cwt).

WIC Program Exemption

The Commission adopts by reference the applicable findings and procedures relied upon for administration of the WIC Program exemption by the Northeast Dairy Compact Commission.

Organic Milk

The Commission takes note of the fact that, approximately ten years ago, the Northeast Dairy Compact Commission rejected a petition for exemption for organic milk. The Commission determined then, when organic milk was essentially first being broadly introduced to the market, that the record presented did not support a finding that the market would be unaffected by establishment of an exemption.

Despite tremendous annual percentage growth in production and sales since that time, retail organic milk sales in Vermont continue to occupy a limited niche and to represent a miniscule percentage of the state's total retail sales of packaged fluid milk products. In addition, organic milk production continues to represent only a small percentage of the whole of Vermont's milk production, estimated to be about 150 – 200 million pounds out of the total 2.6 billion pounds of production, or about 6 percent.

The Commission determines at this time that establishment of an exemption for organic milk would thus have only marginal impact on the overall operation of the proposed retail fluid milk premium. Accordingly, the Commission proposes that organic milk be exempt from imposition of the retail fluid milk premium, and requests comment.

This exemption also provides that the 200 Vermont organic farms would be ineligible to receive premium producer blend price payments. In this regard, the Commission notes that the petition for exemption from operation of the Compact price regulation was supported by most organic producers at the time. Accordingly,

establishment of an exemption from operation of the proposed fluid milk premium would appear to be consistent with producer preference as well as market circumstances.

Conclusion

The Commission expressly acknowledges the “constitutional limitations” identified by the Legislature in 6 V.S.A. § 2921 as circumscribing the Commission’s regulatory authority. These “limitations”, defined by operation of the Commerce Clause of the United States Constitution, require that the retail fluid milk premium regulation operate without discriminatory commercial advantage to local participants in the Vermont milk market – producers, processors and retailers - at the expense of out of state market participants, either by intent or in effect, and, in any event, that its operation be without undue burden on interstate commerce, as measured against its intended promotion of local benefits.

Recognizing the central concern with these “constitutional limitations”, the introductory part of the proposed Order expressly invites comment on the impact of the price regulation on out-of-state market participants in the Vermont retail market place and the surrounding regional and national dairy marketplaces.

With further due consideration for the impact of these constitutional limitations, the Commission has structured the proposed Order such that its primary effect will be upon the retail price structure in the Vermont marketplace, and that the impact on producer prices will be only a secondary if not incidental result. Again, the primary function of the proposed Order is to provide price stability for Vermont consumers, by correction of the downstream dislocation in the wholesale and retail sectors of the market caused by the ratcheting effect of the federal pricing series in the procurement or farm sector.

Marginal enhancement of producer income is intended as a secondary or incidental impact of the Order’s correction of the ratcheting effect. This enhancement of producer income, however marginal, is nonetheless expected to have some positive impact on the long-term sustainability of the Vermont dairy industry, consistent with the statutory intent of 6 V.S.A. Chapter 161.

While perhaps counterintuitive given the primacy of the dairy industry in Vermont, the respective primary consumer and secondary producer welfare functions of the proposed Order are a necessary consequence of the positioning of the Vermont retail submarket, and the positioning of Vermont producers, in the greater regional marketplace. In this sense, market realities as well as constitutional requirements have served to limit the regulatory reach of the proposed Order.

Section 3. Vermont Retail Fluid Milk Premium Regulation - Technical Provisions

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PART 1. DEFINITIONS

1.1. General Definitions

- (a) “Commission” means the Vermont Milk Commission.
- (b) “Federal Order No. 1” means the United States Department of Agriculture, Agricultural Marketing Service, Dairy Division, Federal Milk Market Order No. 1.
- (c) “Person” means any individual, partnership, corporation, association, or other business unit.
- (d) “Premium regulation” means the provisions of the “Vermont Retail Fluid Milk Premium Regulation”, and any amendment thereto, as established by Order of the Vermont Commission and set forth in this instrument.

1.2. Regulated area

“Regulated area” means all territory within the boundaries of the state of Vermont.

1.3. Route Disposition

(a) “Route disposition” means a delivery to a retail or wholesale outlet of a fluid milk product in consumer-type packages or dispenser units classified as Class I milk. A regulated delivery may be made directly or through a distribution facility, including disposition from a plant store, vendor, or vending machine.

(b) Route disposition shall not include fluid milk products distributed:

- (1) To schools.
- (2) To hospitals or government institutions.
- (3) As organic fluid milk products.

1.4. Plant

“Plant” means the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products are received, processed, or packaged. The term plant shall not include a separate building used only as a distribution point for storing packaged fluid milk products in transit for route disposition.

1.5. Regulated Plant

“Regulated plant” means a plant that has Class I route disposition in the regulated area.

1.6. Reserved

1.7. Exempt Plant

- (a) A plant that has route disposition and packaged sales of fluid milk products to other plants of 150,000 pounds or less during the month.
- (b) A plant that otherwise qualifies as a producer handler.
- (c) A plant that is operated by a duly accredited college or university disposing of fluid milk products in the regulated area only through the operation of its own facilities with no route disposition in commercial channels.
- (d) A plant that is operated by a governmental agency disposing of fluid milk products in the regulated area but that has no route disposition in commercial channels.
- (e) A plant with total route disposition for individuals or institutions for charitable purposes without remuneration.

1.8. Reserved.

1.9. Handler

- (a) Any person who operates a regulated plant or an exempt plant.
- (b) Any person who receives packaged fluid milk products from a plant for resale and distribution to retail or wholesale outlets, any person who as a broker negotiates a purchase or sale of fluid milk products from or to any regulated plant, and any person who by purchase or direction causes milk of producers to be picked up at the farm and/or moved to a plant. Persons who qualify as handlers only under this paragraph are not subject to the payments provisions of this regulation.
- (c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer and delivers to a regulated or exempt plant. The operator of a plant receiving milk from a cooperative association may be the handler for such milk if both parties notify the Commission of this agreement prior to the time that the milk is delivered to the plant and the plant operator purchases the milk on the basis of farm bulk tank weights and samples.

1.10. Producer-handler

“Producer handler” means any person who qualifies as a producer-handler under the provisions of Federal Order No. 1.

1.11. Milk

- (a) Milk” means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation or any other process and as defined pursuant to prevailing standards of identity.
- (b) For purpose of this regulation, “milk” does not include organic milk.

1.12. Producer

- (a) “Vermont producer”. Any person who produces milk on a dairy farm that is located in the State of Vermont and whose milk is moved to a plant.
- (b) “Non-Vermont producer”. Any person who produces milk on a dairy farm located outside the regulated area and whose milk is moved to a regulated plant.

(c) Any Vermont producer or non-Vermont producer whose milk is received by a handler described in section 1.9(c).

(d) Producer shall not include:

- (1) A producer handler.
- (2) A person operating a dairy farm whose milk is received at an exempt plant, except for producer milk diverted to the exempt plant.
- (3) A governmental agency operating a dairy farm to supply an exempt plant.
- (4) A producer of organic milk.

1.13. Producer milk

- (a) Milk of a producer that is received at a regulated plant.
- (b) Milk that is received by a handler described in section 1.9(c).
- (c) Milk that is diverted by the operator of a regulated plant or by a handler described in section 1.9(c).

1.14. Reserved.

1.15. Fluid Milk Product

The definition of fluid milk products under this section expressly incorporates the provisions of 7 CFR 1000.15. This section will be automatically amended by reference to conform to any changes in that regulation.

(a) Except as provided in paragraph (b) of this section, “fluid milk product” means any milk products in fluid or frozen form containing less than 9 percent butterfat that are intended to be used as beverages. Such products include, but are not limited to: Milk, fat-free milk, low-fat milk, light milk, reduced fat milk, milk drinks, eggnog and cultured buttermilk, including any such beverage products that are flavored, cultured, modified with added nonfat milk solids, sterilized, concentrated, or reconstituted. As used in this paragraph, the term “concentrated milk” means milk that contains not less than 25.5 percent, and not more than 50 percent, total milk solids.

(b) “Fluid milk product” shall not include:

- (1) Plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and
- (2) The quantity of skim milk equivalent in any modified product specified in paragraph (a) of this section that is greater than an equal volume of an unmodified product of the same nature and butterfat content.
- (3) Organic fluid milk.

1.16. Class I Milk

“Class I milk” means all skim milk and butterfat disposed of in the form of fluid milk products.

1.17. Cooperative Association

“Cooperative association” means any cooperative marketing association of producers that the Secretary of Agriculture of the United States determines is qualified under the provisions of the Capper-Volstead Act, has full authority in the sale of milk of its members and is engaged in marketing milk or milk products for its members. A federation of two or more cooperatives incorporated under the laws of any state will be considered a cooperative association if all member cooperatives meet the requirements of this section.

PART 2 - HANDLER REPORTS

2.1. Reports of Producer Receipts and Route Disposition

- (a) Each handler shall report monthly to the Commission on prescribed forms, as follows:
- (1) All route disposition of fluid milk products within the regulated area.
 - (2) All receipts from producers.
 - (3) Such other information with respect to the receipts and utilization of all fluid milk products as the Commission may prescribe.
- (b) Handlers shall submit these reports to be received by the Commission on or before the 10th day after the end of the month.

2.2. Reports Regarding Individual Producers.

- (a) Each handler shall submit to the Commission the handler’s producer payroll for the month, which shall show for each producer:
- (1) The daily and total pounds of milk delivered.
 - (2) The net amount of the handler’s payments to each producer, with the prices, deductions, and charges involved.
- (b) Handlers shall submit these reports to be received within ten (10) days after the Commission’s request for them, which shall be made by the Commission not earlier than twenty (20) days after the end of the month.

2.3 Other Reports.

In addition to the reports required under this Part, each handler shall report any information the Commission deems necessary to verify or establish each handler’s obligation under the premium regulation.

PART 3 – CLASS I PREMIUM OVER-ORDER PRICE AND PREMIUM OVER-ORDER RATE

3.1. Class I Premium Over-order Price

- (a) The Class I premium over-order price is hereby established as the amount to be paid by a handler for each of its regulated plants for all Class I route disposition in the regulated area. This amount is established above, or over-order, the Class I price announced each month under Federal Order No. 1.
- (b) The Class I premium over-order price shall be \$27.00 per hundredweight, for each and every month.

3.2. Calculation of Premium Over-Order Rate

(a) The premium over-order rate per hundredweight shall be computed and established for each month, as follows:

Class I premium over-order price (\$27.00)
- Federal Order No. 1 Class I Price for Suffolk County, Massachusetts
Remainder equals the premium over-order rate.

(b) In no case shall the premium over-order rate be less than zero.

PART 4 – CALCULATION AND PAYMENT OF OVER-ORDER OBLIGATION

4.1. Calculation and Payment of the Over-order Obligation Due Each Month

Handlers shall determine and make payment of the over-order obligation for each of the handler's regulated plants. The monthly obligation for each regulated plant shall be calculated by multiplying the quantity of Class I route disposition in the regulated area by the premium over-order rate as determined in section 3.2.

4.2 Payment Date

Monthly payments to the Commission shall be made on or before the payment date required under section 1001.71 of Federal Order No. 1.

4.3. Charges on Overdue Accounts.

(a) Any unpaid amount due the Commission from a handler pursuant to this Part shall be increased 1.0 percent each month beginning with the day following the date such payment was due. Any remaining amount due shall be increased at the same rate on the corresponding day of each succeeding month until paid. The amounts payable pursuant to this section shall be computed monthly on each unpaid amount and shall include any unpaid charges previously computed pursuant to this section.

(b) For the purpose of this section, any payment delinquency resulting from a handler's failure to submit a timely report to the Commission shall be deemed payable on the due date that would have resulted from the timely filing of the report.

(c) Late charges and interest collected under this section shall accrue to the Vermont milk commission fund.

PART 5 - PREMIUM PRODUCER BLEND PRICE

5.1. Producer Milk Eligible for Receipt of the Premium Producer Blend Price

(a) All Vermont producer milk shall be eligible for receipt of the premium producer blend price.

(b) The quantity of Class I route disposition in the regulated area by a regulated plant that exceeds the plant's receipts of Vermont producer milk shall be eligible for receipt of the premium producer blend price.

5.2. Computation of Premium Producer Blend Price

For each month, the Commission shall compute the premium producer blend price per hundredweight. The monthly computation shall be as follows:

- (a) Based on timely reports received under section 2.1, combine into one total the value of all anticipated payments to be made by handlers in accordance with section 4.1.
- (b) Subtract 3% of the total value computed pursuant to paragraph (a) above for the purpose of retaining a reserve for WIC pursuant to the Formal Agreement for reimbursement of WIC Program costs entered into between the Commission and the State of Vermont WIC Program Director, as approved by the Food and Consumer Service of the United States Department of Agriculture (USDA).
- (c) Add an amount equal to not less than one-half of the un-obligated balance of the Vermont milk commission fund established under paragraph (e) of this section.
- (d) Divide the resulting amount by the total volume of producer milk eligible for receipt of the premium producer blend price as defined by section 5.1. The Commission shall determine the total volume of eligible producer milk based on all reports timely received under section 2.1.
- (e) Subtract not less than one half cent (.005) nor more than one and one half cents (.015) from the price computed pursuant to paragraph (d) of this section.
- (f) The result, rounded to the nearest cent, shall be the premium producer blend price for the month.
- (g) The report of any handler who has not made payments required pursuant to section 4.1 for the preceding month shall not be included in the computation of the premium producer blend price, and such handler's report shall not be included in the computation for succeeding months until the handler has made full payment of outstanding monthly obligations.

5.3. Announcement of Retail Fluid Milk Premium Producer Blend Price

The Commission shall announce publicly on or before the 14th day after the end of each month the premium producer blend price for such month, as computed under Section 5.2.

PART 6 - COMMISSION DISBURSEMENT TO HANDLERS OF PRO RATA PREMIUM PRODUCER BLEND PRICE PAYMENTS

6.1. Disbursements to Handlers for Vermont Producer Milk

(a) The Commission shall make disbursement to each handler with receipts of Vermont producer milk an amount equal to the total volume of such receipts multiplied by the premium producer blend price for the month computed under section 5.2.

6.2. Disbursements to Handlers for Non-Vermont Producer Milk

The Commission shall make disbursement to each handler with receipts of eligible non-Vermont producer milk, as determined under Section 5.1(2), an amount equal to the total volume of such receipts multiplied by the premium producer blend price for the month computed under section 5.2.

6.3. Payment Date

The Commission shall make disbursements to handlers on or before the payment date required under section 1001.72 of Federal Order No. 1.

6.4 Pro Rated Payments for Insufficient Funds

If the un-obligated balance in the Vermont milk commission fund is insufficient to make up for any deficiency in the amount of total handler payment required under this part, the Commission shall reduce the payments uniformly and complete them as soon as the funds are available.

PART 7 – HANDLER PAYMENTS TO PRODUCERS

7.1. Handler Calculation and Payment to Vermont Producers of Total Premium Producer Blend Price

Each handler shall calculate and make payment to each Vermont producer the total amount of the premium producer blend price due for all milk received from the producer for the month. Payment of the total premium producer blend price due and owing shall be in addition to any other monies due the producer.

7.2 Handler Calculation and Payment to Non-Vermont Producers of Premium Producer Blend Price

(a) Each handler receiving a disbursement from the Commission for non-Vermont producer milk shall calculate and make payment of the premium producer blend price to the non-Vermont producers from whom the plant receives milk, on a pro rata basis. The rate per hundredweight for these payments shall be determined by dividing the total disbursement received from the Commission for such purpose by the total amount of non-Vermont producer milk received by the handler.

(b) Payments made under this section are to be made separate from any payments also made by the handler to Vermont producers under section 7.1.

7.4. Payment Date

Payment shall be made so that it is received by each producer on the same date as required under section 1001.73(a)(2) of Federal Order No. 1.

7.5. Pro Rated Payments

If the handler has not received full disbursement from the Commission by the date payments are due producers under this part, the handler may reduce pro rata the payments to producers by an amount not to exceed such underpayment. Such payments shall be completed after receipt of the balance due from the Commission by the next following date for making payments under this part.

7.6. Statements to Producers.

When making payments to producers as required by this part, each handler shall furnish each producer with a supporting statement, in such form acceptable to the Commission, which specifically identifies the Commission's announced premium producer blend price and the total amount of the premium producer price payment due to the producer. This supporting statement shall be furnished in addition to any information required under Federal and State regulations.

7.7. Miscellaneous Provisions Relating to Underpayment or Non-payment to Producers

(a) If the handler's net payment to a producer is for an amount less than the total amount due the producer under the premium regulation, the burden shall rest upon the handler to prove to the Commission that each deduction from the total amount due is properly authorized and properly chargeable to the producer.

(b) If a handler claims that the required payment cannot be made because the producer is deceased or cannot be located, such payment shall be made to the Vermont milk commission fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the handler no longer exists and a lawful claim is later established, the Commission shall make such payment from the fund to the handler or to the lawful claimant, as the case may be.

PART 8 – ADJUSTMENT OF DATES

8.1. Adjustment of Dates

If a date required for disbursements or payments under these regulations falls on a Saturday, Sunday, or national holiday, the disbursement or payment will be due on the next day that the Commission office is open for public business.

PART 9 – VERMONT MILK COMMISSION FUND AND WIC RESERVE FUND

9.1. Vermont Milk Commission Fund

(a) In accordance with 6 V.S.A. § 2938, the Commission shall establish and maintain a separate fund known as the Vermont milk commission fund.

(b) The Commission shall deposit into the fund all amounts received from handlers. The Commission shall also make handler disbursements from the fund.

(c) The Commission shall retain in the fund the monies subtracted under Section 5.2(e).

(d) Monies retained in the Vermont milk commission fund under subsection (c) and retained in the WIC reserve fund under section 9.2 shall be placed in interest-bearing bank accounts in a bank or banks duly approved as a Federal depository for such monies, or invested in short-term United States Government securities

9.2 WIC Reserve fund

The Commission shall establish and maintain a separate fund known as the WIC reserve fund, and place in this fund the monies subtracted under Section 5.2(c).

PART 10 - ADMINISTRATION

10.2. Commission's Authority and Duties; Audit Function

(a) The Commission shall perform all the duties necessary to administer the terms and provisions of the premium regulation, including, but not limited to the following:

- (1) Keep records that clearly reflect all transactions provided for in the premium regulation.
- (2) Prescribe reports required of each handler under the premium regulation.

- (3) Verify such reports and the payments required by the premium regulation by reviewing the reasonableness of all reports submitted each month.
- (4) Prepare and publish for the benefit of producers, handlers and consumers relevant statistics and other information concerning operation of the premium regulation as do not reveal confidential information.
- (5) Employ and fix the compensation of persons necessary to enable them to exercise their powers and perform their duties.
- (6) Pay out of funds provided by the administrative assessment all expenses necessarily incurred in the maintenance and functioning of the Commission's office and in the performance of employee duties.

(b) At its discretion, the Commission may announce publicly the name of any handler who, after the date upon which the handler is required to perform such act, has not:

- (1) Made reports required by the premium regulation.
- (2) Made payments required by the premium regulation.
- (3) Made available records and facilities as required under this part.

10.2 Annual Audits

The Commission shall conduct audits of handlers at least on an annual basis. The audit may include the examination of records of the handler, including such papers as copies of income tax reports, fiscal and product accounts, correspondence, contracts, documents or memoranda, and the records of any other person relevant to the handler's obligations under the premium regulation. The audit may also include the examination of the handler's milk handling facilities, and any other investigation as the Commission deems necessary for the purpose of ascertaining the correctness of any report or any obligation under the premium regulation.

10.3. Adjustment of Accounts.

Whenever verification by the Commission discloses an error in any transaction required by this premium regulation, the Commission shall promptly notify the handler of any amount due, and payment thereof shall be made on or before the next date for making payments as set forth in the provisions under which the error occurred.

PART 11 – HANDLER RESPONSIBILITY FOR RECORDS AND FACILITIES

11.1. Handler responsibility for records and facilities.

Each handler shall maintain and retain records, and make facilities available to the Commission. If adequate records of a handler, or of any other person relevant to the obligation of such handler, are not maintained and made available, the Commission may initiate any action necessary to enforce compliance.

(a) Records to be maintained.

- (1) Each handler shall maintain records of operations, including, but not limited to, records of purchases, sales, processing, packaging and disposition, as are necessary to verify whether the handler has any obligation under the premium regulation and if so, the amount of the obligation. The records shall be sufficient to establish for each plant or other receiving point for each month:

- (i) The quantities of fluid milk product contained in, or represented by, products received in any form, including inventories on hand at the beginning of the month, according to form, time and source of each receipt;
- (ii) The utilization of all fluid milk product showing the respective quantities of such fluid milk product in each form disposed of or on hand at the end of the month; and
- (iii) Payments to producers and cooperative associations, including the amount and nature of any deductions and the disbursement of money so deducted.

(2) Each handler shall keep all other specific records as the Commission deems necessary to verify or establish the handler's obligation under the premium regulation.

(b) Availability of records and facilities. Each handler shall make available all records pertaining to the handler's operation and all facilities the Vermont Commission finds are necessary to verify the information required to be reported by the premium regulation and/or to ascertain the handler's reporting, monetary or other obligation under the premium regulation. Each handler shall permit the Commission to observe plant operations and equipment and make available to the Commission such facilities as are necessary to carry out their duties.

(c) Retention of records. All records required under the premium regulation to be made available to the Commission shall be retained by the handler for a period of three years, to begin at the end of the month to which such records pertain. If, within the three year period, the Commission notifies the handler in writing that the retention of all records, or of specified records, is necessary in connection with a proceeding or court action specified in the notice, the handler shall retain the noticed records until further written notification is received from the Commission. The Commission shall give further written notification to the handler promptly upon the termination of the litigation or when retention of the records is otherwise no longer necessary.

PART 12 - ENFORCEMENT

The provisions of 6 V.S.A. § 2935, as follows, are incorporated by reference.

6 V.S.A. § 2935. Prohibition; administrative penalty; injunctive relief

(a) Any handler or distributor that buys, offers to buy, sells or transfers ownership of milk in any form at any price or for any consideration which is less than the price or prices set by rule of the commission may be assessed an administrative penalty by the secretary, in accordance with the standards and procedures set forth in sections 15, 16 and 17 of this title, in an amount not to exceed \$10,000.00 for each violation and not to exceed \$50,000.00 per day for multiple violations in a single transaction or a series of related transactions.

(b) The commission, through the secretary, may seek appropriate injunctive relief to enforce the provisions of this chapter.

PART 13 - TERMINATION AND CONTINUATION OF OBLIGATIONS

13.1 Termination Continuation of Obligations, Generally

- (a) The premium regulation may be suspended or terminated at the election of the Commission, and shall terminate if the enabling statutory provisions are repealed.
- (b) Upon suspension or termination of the premium regulation, all outstanding handler obligations arising as of the date of the regulation's suspension or termination shall continue until performed, and the Commission shall retain all necessary authority to assure performance of such outstanding handler obligations.

13.2. Time Limitations for Continuation of Obligations for the Payment of Money

- (a) Except as provided in paragraphs (b) and (c) of this section, the obligation of any handler to pay money shall terminate two years after the last day of the month during which the Commission receives the handler's report of receipts and utilization on which the obligation is based. If, within the two-year period the Commission notifies the handler in writing that the money is due and payable, then the payment obligation shall not terminate until fully satisfied. Service of this written notice shall be complete upon mailing to the handler's last known address and it shall contain but need not be limited to the following information:
 - (1) The amount of the obligation;
 - (2) The month or months on which the obligation is based; and
 - (3) Whether the obligation is payable to one or more producers or to a cooperative association, the name of the producer(s) or the cooperative association, or if the obligation is payable to the Commission, the account for which it is to be paid;
- (b) If a handler fails or refuses to make available to the Commission all records required by the premium regulation, the Commission may so notify the handler. The notice shall be made within two years of the delinquency and be provided in accordance with paragraph one of this section. In such instance, the payment obligation shall terminate two years after the last day of the month during which the Commission receives the requested handler's records.
- (c) Notwithstanding the provisions of section 13.1, a handler's obligation under the premium regulation to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a material fact by the handler; and
- (d) The obligation of the Commission to pay a handler any money which the handler claims to be due him under the terms of the premium regulation shall terminate two years after the end of the month during which the fluid milk product involved in the claim were received.
- (e) The obligation of the Commission to refund any payment made by a handler, including a deduction or offset by the Commission, shall terminate two years after the end of the month during which payment was made by the handler.
- (f) The payment limitation time periods defined by paragraphs (d) and (e) shall not apply if the handler moves for rehearing or commences litigation within the applicable two-year period.

PART 14 - REHEARING

The provisions of 6 V.S.A. §§ 2931 - 2932, as follows, are incorporated by reference.

6 V.S.A. § 2931. Rehearing of orders and decisions

(a) Within 20 days after any final order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor. The commission may grant such rehearing if in its opinion good reason therefore is stated in such motion.

(b) The motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided. When the application has been made, no ground not set forth therein shall be urged, relied on or given any consideration by the court, unless the court for good cause shown allows the appellant to specify additional grounds

6 V.S.A. § 2932. Determination of motion for rehearing

Upon the filing of a motion for rehearing, the commission shall within ten days, either grant or deny the motion, or suspend the order or decision complained of pending further consideration.

PART 15 - RIGHT OF APPEAL

The provisions of 6 V.S.A. § 2933, as follows, are incorporated by reference:

6 V.S.A. § 2933. Appeal to Supreme Court

When any application for a rehearing is denied, or if the applicant is aggrieved at the decision on rehearing, the applicant may appeal to the Supreme Court.

PART 16 – ADMINISTRATIVE ASSESSMENT

16.1. Application of Administration Assessment

The administrative assessment shall be paid by handlers based on their route disposition in the regulated area.

16.2. Assessment Rate

(a) The Commission shall determine the rate of the administrative assessment as necessary to maintain an operating reserve in the range of 80% to 120% of four months operating expenses, as determined in the budget approved by the Commission.

(b) The rate of the administrative assessment shall be not more than 7.5 cent per hundredweight.

16.3. Payment Date

Payment of the administrative assessment shall be made simultaneously with and according to the payment date specified for the total over-order obligation under part 4.

PART 17 – EFFECTIVE DATE

The premium regulation shall take effect 20 days after certification by the referendum agent of the regulation’s approval by producer referendum, in accordance with part III of the Commission’s procedure for “Development and Issuance of an Order to Establish a Retail Fluid Milk Premium, Or Amendment of Such Order”.

Section 4. Vermont Milk Commission Procedure

- Development and Issuance of an Order to Establish a Retail Fluid Milk Premium, Or Amendment of Such Order

Authority: 6 V.S.A. Chapter 161

PART I. APPLICABILITY

PART II. PROCEDURE FOR DEVELOPMENT, CONSIDERATION AND ISSUANCE OF AN ORDER BY THE COMMISSION

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PART III. PRODUCER REFERENDUM

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PART I. APPLICABILITY

The procedural rules are adopted pursuant to 6 V.S.A. § 2929. They apply to the issuance by the Vermont Milk Commission of an order establishing a retail fluid milk premium, or amendment of such order, pursuant to 6 V.S.A. § 2924(e) and 6 V.S.A. Chapter 161, passim. The rules also apply to a subjects and issues administrative process initiated by the Commission relating to the issuance of an order establishing a retail fluid milk premium or a proposed amendment to such an order.

PART II. PROCEDURE FOR DEVELOPMENT, CONSIDERATION AND ISSUANCE OF AN ORDER BY THE COMMISSION

Section 1. Commencement of Proceedings

(a) Upon the Commission's initiative. The Commission may commence a proceeding to establish a retail fluid milk premium on its own initiative, upon the recommendation of the Chair or at the request of another Commission member.

(b) Upon petition of any person or organization. In its sole discretion, the Commission may commence a proceeding upon petition of any person or organization. These may include individual milk producers or handlers, any organization of milk producers or handlers, general farm organizations, consumer or public interest groups, as well as local, state or federal officials.

(1) A person or organization petitioning for commencement of a proceeding shall submit to the Commission a statement in support of the petition. This statement shall include a brief written explanation of how the proposal will promote the purposes of the Commission's statutory responsibilities under 6 V.S.A. Chapter 161 and the function of a retail fluid milk premium as authorized by 6 V.S.A. § 2924(e). The Commission may conduct additional inquiry into the basis of the petition and explanatory statement, in its discretion, before ruling on the petition.

(2) If the Commission determines not to grant the petition, the Chair shall promptly notify the petitioner of the Commission's decision. Notice of denial shall include a brief statement of the grounds for the denial. Upon the request of the petitioner, the Commission may in its discretion allow for a responsive submission by the petitioner and further review by the Commission.

(d) Commencement of proceedings. The Chair shall commence a proceeding by serving notice in accordance with Section 2.

Section 2. Notice

Pursuant to 6 V.S.A. § 2929(b)(1), notice of a proceeding to adopt a fluid milk premium shall be adopted in accordance with the applicable provisions of 3.S.A. § 809(b), as follows:

(a) Contents of the notice - subject matter.

(1) The notice for a proposed milk price order, or proposed amendment to an existing order, shall include:

(i) A statement of the Milk Commission's legal authority and jurisdiction to conduct the hearing under 6 V.S.A. §§ 2929.

(ii) A statement of the governing legal authority of 6 V.S.A. chapter 161, and 6 V.S.A. §§ 2924(e), 2925 and 2929.

(iii) The technical, regulatory provisions of the proposed order or amendment;

(iv) The proposed effective date;

(v) A short and plain statement of the matters at issue;

(vi) the Commission's assessment of reasonable costs and charges for producing, hauling, handling, processing and any other services performed with respect to fluid dairy products, taking into consideration the balance between production and consumption of fluid milk, the costs of production and distribution, the purchasing power of the public and the price necessary to yield a reasonable return to producers, handlers and distributors. The summary shall also specifically account for (1) actual producer prices prevailing in federal market order I, (2) producer costs of production in Vermont, as accurately as possible, (3) subject to constitutional limitations, the competitive position of Vermont producers within the market order, (4) the actual rate of return received by distributors or handlers, whichever is greater, as determined by the Commission, and (5) the lowest price milk purchased from producers can be received, processed, packaged and distributed by handlers and distributors at a just and reasonable return in Vermont.

(vii) proposed findings and conclusions regarding

(3) the adequacy of the federal milk marketing order minimum price to ensure that the price paid to dairy producers will cover the costs of milk production and provide a reasonable economic return to dairy producers sufficient to ensure a stable milk production and distribution system in Vermont.

(4) the competitive position of producers and their costs, handler and distributor costs and reasonable rates of return, and actual handler and distributor rates of return.

(2) The notice for a subjects and issues proceeding shall include a concise summary of the matter at issue, and may include specific questions or any other material the Commission deems relevant or useful.

(b) Contents of the notice – time, date and place of hearing; nature of hearing. Notice shall be given of the time, date and place of at least one public hearing to be held by the Commission. The date of the hearing shall be at least 15 days after the publication of notice. The notice shall also describe the nature of the hearing by providing a copy of these rules.

(c) Right to provide comment. The notice shall identify the right of any person to testify personally at the hearing, or to participate otherwise in the proceeding by the submission of written comment, either as part of, or independent of, the hearing. In the latter instance, the notice shall identify the right of any person to provide comment for up to 30 days after publication of the notice.

(d) Publication of notice and supplemental publicity. The Chair shall give notice under this section as follows:

(1) By publication in the newspapers of record approved by the secretary of state under 3 V.S.A. § 839(d), and any additional newspaper the Chair concludes will further tend to bring the notice to the attention of interested persons.

(2) By correspondence to interested persons in accordance with a list of such persons compiled by the Commission. Any interested person may have his or her name added to the list by making a written request to the Commission;

(3) By correspondence with the appropriate officials of the other New England states, New York and Pennsylvania; and.

(4) Such other notice as directed by the Commission.

Section 3. Conduct of the Hearing

The hearing shall be held in accordance with the applicable provisions of 3 V.S.A. § 840 (c) and (d), and with additional procedural requirements, as follows:

(a) Presiding Officer--The Chair of the Commission shall be the presiding officer. In the absence of the Chair, the Commission shall elect a presiding officer from those members present at the hearing or retain a qualified member of the public to serve as presiding officer.

(b) Authority of the Presiding Officer--The presiding officer shall have the authority to:

(1) Regulate the course of the hearing;

(2) Administer oaths and affirmations;

(3) Rule upon issues of evidence and procedure and receive affidavits; and

(4) Present questions to the Commission for its determination.

(c) Recording of Notice. At the opening of the hearing, the presiding officer shall certify for the record the provision of notice under Section 2.

(d) Certified record; transcript and evidentiary exhibits. The Commission shall cause a complete, certified record to be kept of the hearing proceeding, including a certified transcript of all sworn testimony and evidence received, matters officially noticed, questions and offers of proof submitted by interested persons, and any proposed findings presented.

(e) Witness appearance; right to appear as a witness. Any person shall be given an opportunity to appear as a witness, either in person or through a representative. Witnesses shall provide their names, addresses and occupations for the record before proceeding to testify. A person acting as representative on behalf of another shall so identify himself or herself, provide his or her name, address and occupation for the record, and shall provide any other information as required by the presiding officer.

(f) Testimony. Persons shall be sworn or make affirmation before testifying. Any member of the Commission or designated staff may ask questions of a person giving testimony. At the discretion of the presiding officer, questions submitted in written form from other witnesses or the public at large may also be posed to a witness. Submission of such written questions shall include identification of the question's author, which shall be noted for the record.

(g) Evidence. Evidence which is relevant and material to the subject matter of the hearing and is of a type commonly relied upon by reasonably prudent persons shall be admissible. Evidence that is irrelevant, immaterial or unduly repetitious shall be excluded. As possible, the relevancy of evidence shall be determined by reference to the statutory purposes of the Commission under 6 V.S.A. Chapter 161 and with specific regard to the statutory intent for establishment of a retail fluid milk premium.

- (1) Exclusion of evidence. The presiding officer may act to exclude evidence on his or her own or upon a request by any Commission member.
- (2) Objections and offers of proof; rulings by the presiding officer. A witness may object to a ruling to exclude evidence. The person shall state the reasons for the objection and provide an offer of proof, consisting of a statement of the substance of the testimony or that which is expected to be shown by the answer. The presiding officer may limit the length of time allowed for the offer of proof. The record shall reflect the objection, the stated basis for the objection and the offer of proof. The presiding officer may rule on the objection when made, either denying the objection or granting it and allowing the witness to proceed with the contested testimony. The presiding officer may also stay a ruling for decision at a future time. In this instance, if the objection is granted, the record shall be reopened to reflect the testimony as provided in the offer of proof. The witness shall be notified within three days of the ruling on the objection.
- (3) Exhibits, Documentary and Real Evidence. All written statements, charts, tabulations or similar data offered in evidence at the hearing shall be made part of the record upon identification by the witness and upon satisfactory showing of its authenticity, relevance and materiality. At the discretion of the presiding officer, any part of an exhibit that is irrelevant or immaterial may be excluded and the remainder admitted.
- (4) Cost Conclusions. Conclusory statements regarding costs shall be admissible only if supported by actual cost data based on actual operations of producers, handlers or retailers, as appropriate. Projections or estimates of costs shall be considered only where the actual costs or other data upon which such projections or estimates are provided as part of the analysis.
- (5) Commission Evidence. The Commission may introduce the results and data of any inquiry or investigation conducted by the Commission, or any other evidence it deems appropriate. The Commission may also designate as evidence all or part of the record of prior hearings before the Commission.
- (6) Official notice. The Commission may take official notice of such matters as are judicially noticed by the courts of the United States and any other matter of technical, scientific or commercial fact of established character. Matters taken by official notice shall be so designated in the record. Interested persons shall be given adequate notice of this action, at the hearing or afterward, and opportunity to provide comment.

Section 4. Availability and Copies of the Transcript and Record

A copy of the hearing transcript and record shall be available for review at the Vermont Agency of Agriculture during its official business hours, within forty-eight hours of the completion of the hearing, unless otherwise specified by the presiding officer at the close of the hearing. A copy of the transcript and record may be obtained upon written request and payment of reasonable cost per page.

Section 5. Additional Comment and Proposed Findings By Interested Persons.

At the conclusion of the hearing, the presiding officer shall announce that persons who participated in the hearing may submit additional comment and proposed findings of fact. The comment or findings, or both, shall be received within fourteen calendar days of the conclusion of the hearing, unless otherwise specified in the published notice for the proposed order. Proposed findings shall address the issues identified in the finding requirements of Section 7(b), and shall be based solely on evidence included in the record. Page numbers of the transcript, where supporting evidence appears, shall be cited whenever possible.

Section 6. Submission of Written Comment and Exhibits Independent of the Hearing

Consistent with 6 V.S.A. § 2929(b), any person may submit to the Commission written comment and exhibits independent of the hearing for inclusion in the record. Such comment and exhibits shall identify the author's name, address and occupation and a sworn, notarized statement indicating that the comment is presented based upon the author's personal knowledge or belief. Comment and exhibits may be submitted until the latter of the closing date of the post-hearing comment period established under Section 5 or 30 days after publication of the notice of the proceeding.

Section 7. Final Order; Commission deliberation and decision; Statutory Findings

(a) Commission deliberation and decision--The Commission shall convene a formal, deliberative meeting as soon as is practicable after the close of the post-hearing comment period, to determine whether to issue a final order to establish a retail fluid milk premium pursuant to 6 V.S.A. § 2929(c), or an amendment to an existing order. The affirmative vote of six members of the Commission shall be required to approve a final order.

(b) Summary Assessment; Findings and Conclusions. Consistent with 6 V.S.A. §§ 2925 and 2929, as part of its deliberations and issuance of a final order or amendment, the Commission shall reconsider and restate its summary assessment, and separate findings and conclusions, as previously described in Section 2(a) and 3(b) of these rules.

Section 8. Issuance of Final Order; Effective Date.

(a) A final order adopted pursuant to these rules shall be issued in accordance with the publication notice provisions of Section 2(d). The Commission shall ensure actual notice by certified mail, return receipt requested, to all milk processors who will be subject to the terms of the order on the effective date.

(b) The effective date shall be not less than 20 days after the date of issuance.

Section 9. Right to Petition For Rehearing

In accordance with 6 V.S.A. §§ 2931-33, a party or person affected by a final order or amendment may petition the Commission for rehearing, within 20 days of the order or amendment's issuance, with appeal to the Vermont Supreme Court.

Section 10. Ex Parte Communications

In accordance with 6 V.S.A. § 2929(c) the Commission shall adhere to limitations on ex parte communications consistent with the applicable provisions of 3 V.S.A. § 813, as follows:

(a) After issuance of a notice of a proceeding pursuant to Section 2 and until final decision by the Commission, or final action by the Vermont Supreme Court in the case of an appeal, Commission members, special hearing counsel, and Agency of Agriculture staff shall not discuss ex parte any issue of fact or law, or the merits of the proceeding in any other manner, with any person or representative of such person having an interest in the proceeding. Similarly Commission members shall not discuss ex parte among themselves, or with Agency employees, except as part of the formal meeting of the Commission convened for this purpose under Section 7. The Chair, in his or her capacity as Secretary of the Agency of Agriculture, may consult with Agency employees who will not otherwise be involved with the Commission's deliberations or decision-making process.

(b) In the event the Commission Chair causes the development of a draft, proposed equitable, minimum, fluid milk handler price order, or amendment, for the Commission's consideration, the Chair shall notify the Commission of such action in timely fashion. In such instance, the Chair's notification shall constitute initiation of the period during which the prohibition of ex parte communication applies, as provided in subsection (a).

(c) A Commission member, special hearing counsel, or Agency employee who receives a written or oral communication prohibited by this section shall disclose the substance of such communication on the record. As necessary and appropriate, the Commission may act accordingly to nullify the effect of the prohibited communication.

(d) This section shall not be construed to apply to requests for status reports or requests on other procedural matters.

PART III. PRODUCER REFERENDUM

Section 1 Definitions.

1. "Approved by producers" means that at least two-thirds of the eligible producers who cast a vote approve the proposed order or amendment.

2. "Eligible producer" means a producer who, during the representative period determined by the Commission, has been engaged in the production of milk, the price of which would be regulated under the proposed order or amendment.

3. "Producer referendum" means the balloting process by which the Commission determines whether a proposed order or amendment is approved by eligible producers.

4. "Qualified cooperative" means a cooperative association of producers, qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the Capper-Volstead Act, bona fide engaged in marketing milk, or in rendering services for or advancing the interests of producers of milk, but shall not include any cooperative which has been formed to act as a common marketing agency for both cooperatives and individual producers.

5. "Representative period" means that period of time designated by the Commission for the purpose of determining who is a producer eligible to participate in a producer referendum.

6. "Representative vote" means a vote of approval or disapproval of a proposed order or amendment, cast in a producer referendum, by a qualified cooperative on behalf of its members or stockholders who are eligible producers.

Section 2 Purpose.

Prior to issuing, or amending, any order to establish a retail fluid milk premium, or amendment of such order, the Commission shall conduct a producer referendum for the purpose of ascertaining whether the issuance or amendment of the order is approved by producers.

Section 3 Referendum procedure.

The Commission shall certify the referendum procedure at the time it approves a final order. The referendum procedure shall include:

- (a) A designated representative period for determining eligible producers;
- (b) The date by which the ballots will be distributed to eligible producers and qualified cooperatives;
- (c) The date by which all qualified cooperatives must mail notices to eligible producer members as required by Section 9(b) and (c);
- (d) The date by which all ballots must be returned;
- (e) A designated referendum agent; and
- (f) Any other procedures necessary for the conduct of the particular producer referendum.

Section 4 Referendum agent.

The Chair shall designate the referendum agent, who shall:

- (a) Verify all ballots, cast individually or by representative vote, with respect to timeliness, producer eligibility, cooperative identification, authenticity and other steps taken to avoid duplication of ballots.
- (b) Mark ballots determined to be invalid "disqualified" with a notation of the reason for disqualification. Disqualified ballots shall not be considered in determining approval or disapproval of the regulation.
- (c) Compute and certify the following:
 - (1) The total number of ballots cast;
 - (2) The total number of ballots disqualified;
 - (3) The total number of verified ballots cast in favor of the regulation or amendment;
 - (4) The total number of verified ballots cast in opposition to the regulation or amendment;
 - (5) Whether two-thirds of all verified ballots were cast in the affirmative.
- (d) Report to the Commission Chair the certified computations and results of the referendum under Section (c); and
- (e) At the completion of his or her work, seal all ballots, including the disqualified ballots, and submit a final report to the Chair stating all actions taken in connection with the referendum. The final report shall include all ballots cast and all other information furnished to or compiled by the Referendum Agent.

Section 5 Confidentiality of ballots.

The ballots cast, the identity of any person or cooperative, or the manner in which any person or cooperative voted, and all information furnished to or compiled by the referendum agent shall be regarded as confidential.

Section 6 Publication of referendum results.

The Chair shall ensure notice of the certified results of the referendum in accordance with Section 3 of these rules.

Section 7 Ballots.

(a) The Commission shall prepare and ensure the prompt distribution of a ballot to all eligible producers consistent with the dates prescribed in the referendum procedure under Section 3.

(b) The ballot shall describe the terms and conditions of the referendum and be accompanied by an official copy of the proposed regulation or amendment. The ballot shall provide notice that a producer may register his or her approval or disapproval with the Commission either directly or through his or her cooperative. The ballot shall indicate that any qualified cooperative eligible to representative vote must provide written notice to each eligible producer as to whether and how it intends to cast its vote. The notice shall also identify the final due date for the Commission's receipt of the completed ballot.

Section 8 Qualified cooperative representative vote.

(a) Qualified cooperatives may representative vote on behalf of their eligible producer members. The Commission shall ensure that each qualified cooperative is notified of its right to cast a representative vote on behalf of eligible members in each producer referendum by the date prescribed pursuant to Section 3(b).

(b) A qualified cooperative shall, before casting its ballot in any referendum, give prior written notice to each of its eligible producers of how it intends to cast its vote. The notice and ballot shall be on the form provided by the Commission and shall be mailed by the cooperative to eligible producer members as prescribed in the producer referendum procedure pursuant to Section 3. The notice shall make express reference to the ballot documentation provided by the Commission, and may include a copy of such documentation.

(c) Any qualified cooperative that does not intend to representative vote shall give written notice to each of its members on a form approved by the Commission. The notice shall be mailed by the cooperative to eligible producer members as prescribed in the producer referendum procedure pursuant to Section 3. The notice shall make express reference to the ballot documentation provided by the Commission, and may include a copy of such documentation.

(d) Each qualified cooperative shall certify to the Commission, on the form provided by the Commission, that it is qualified to representative vote and that it has provided proper and timely notice of either the ballot cast or of the decision that the cooperative is not casting a representative vote. The cooperative shall mail a copy of the notice to the Commission no later than two days after mailing of notice to members. Cooperatives that are voting shall also submit the original executed ballot in a separate envelope marked

``Referendum Ballot," or as otherwise provided in the referendum procedure pursuant to Section 3.

(e) If the ballot submitted to the Commission by a qualified cooperative differs in any significant way from the notice of its ballot sent to member producers, then the Commission may take appropriate remedial action.

(f) A producer who is a member of a cooperative that has provided notice of its intent to cast a representative vote to approve or not to approve a proposed order or not to cast a representative vote and who by ballot expresses his approval or disapproval of the proposed order, shall

notify the Commission as to the name of the cooperative of which he or she is a member, and the Commission shall remove such producer's name from the list certified by such cooperative with its corporate vote. If the producer lists the name of a cooperative that is different from the cooperative identified by the ballot number, as determined by the representative period for the referendum, the latter will control.

DATED: August 20, 2008



Roger N. Allbee, Chair
Vermont Milk Commission



Daniel Smith, Special Hearing Counsel
Vermont Milk Commission