UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	98 AMA Docket No. M 4-1
	)	
Kreider Dairy Farms, Inc.,	)	
	)	
	)	
Petitioner	)	**Decision and Order**

PROCEDURAL HISTORY

Kreider I (A Related Proceeding)

On December 28, 1993, Kreider Dairy Farms, Inc. [hereinafter Petitioner], instituted a proceeding, *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 [hereinafter *Kreider I*], under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the former marketing order regulating milk in the New York-New Jersey Marketing Area (7 C.F.R. pt. 1002 (1999)) [hereinafter former Milk Marketing Order No. 2];[1] and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

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[1]Former Milk Marketing Order No. 2, which is the subject of the instant proceeding and was the subject of *Kreider I*, ceased to be effective January 1, 2000. 64 Fed. Reg. 70,868 (Dec. 17, 1999). The area to which former Milk Marketing Order No. 2 was applicable is now encompassed by the Northeast Milk Marketing Order (7 C.F.R. pt. 1001).

In *Kreider I*, Petitioner: (1) challenged the determination by the Market Administrator for former Milk Marketing Order No. 2 [hereinafter the Market Administrator] that, beginning in November 1991, Petitioner was a handler regulated under former Milk Marketing Order No. 2; (2) asserted it was a producer-handler under former Milk Marketing Order No. 2 exempt from the obligation under former Milk Marketing Order No. 2 to pay into the producer-settlement fund; and (3) sought a refund, with interest, of the money it paid into the producer-settlement fund (*Kreider I* Pet. ¶¶ 13-14).

The Judicial Officer dismissed the *Kreider I* Petition concluding the Market Administrator correctly determined Petitioner was a handler and Petitioner was not a producer-handler exempt from the obligation under former Milk Marketing Order No. 2 to pay into the producer-settlement fund. The Judicial Officer held the producer-handler exemption in former Milk Marketing Order No. 2 requires that, in order to be a producer-handler, a person must exercise complete and exclusive control over all facilities and resources used for the production, processing, and distribution of milk. The Judicial Officer found Petitioner relinquished the complete and exclusive control of milk distribution necessary for designation as a producer-handler under former Milk Marketing Order No. 2 when Petitioner delivered milk to two subdealers, Ahava Dairy Products, Inc. [hereinafter Ahava], and The Foundation for the Propagation and Preservation of Torah

Laws and Customs [hereinafter FPPTLC], which milk was subsequently distributed by Ahava and FPPTLC to their retail and wholesale customers.[2]

Petitioner appealed *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995). The United States District Court for the Eastern District of Pennsylvania found that neither the plain language of the producer-handler exemption in former Milk Marketing Order No. 2 nor the rulemaking proceeding applicable to the producer-handler exemption in former Milk Marketing Order No. 2 supports a finding that Petitioner should be denied designation as a producer-handler without further factual findings that Petitioner was "riding the pool."[3] The United States District Court for the Eastern District of Pennsylvania remanded the action to the Secretary of Agriculture for further factual findings and a decision regarding whether Petitioner was "riding the pool." The Court explained the purpose of its remand order, as follows:

> The [Judicial Officer] and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind [Milk Marketing] Order [No.] 2's producer-handler exemption. The [Judicial Officer] explains the economic purpose as follows:
>
> > "[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a

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[2]*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995).

[3]*Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, slip op. at 24, 1996 WL 472414, at *11 (E.D. Pa. Aug. 15, 1996).

> self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated . . . ."

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

> [Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n.2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.

> If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of [Milk Marketing] Order [No.] 2 is ambiguous and the [Market Administrator's] action is not clearly supported by the promulgation history of [Milk Marketing] Order [No.] 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, No. Civ. A. 95-6648, slip op. at 18-21 (footnote omitted), 1996 WL 472414, at *8-9 (E.D. Pa. Aug. 15, 1996).

On December 30, 1996, Administrative Law Judge Edwin S. Bernstein issued a notice of hearing stating:

> In a December 30, 1996, telephone conference with Denise Hansberry and Marvin Beshore, counsel for the parties, the following were agreed and/or decided:
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> I reviewed with counsel that the remand was triggered by the following language in the Judicial Officer's September 28, 1995, Decision:
>
> > Respondent is arguing that Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution functions to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production. [*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. at 847-48.]

Based upon this language, the United States District Court for the Eastern District of Pennsylvania stated in its August 15, 1996, Decision:

> Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [p. 19]
>
> . . . .
>
> Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is 'riding the pool.' To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production. p[p. 20-21]

. . . .

The issue is, during the Ahava and Kreider dealings going back to November 1990, were there any instances of short production by Kreider when Ahava acquired kosher milk from other handlers from the pool? This includes the following questions:

> Are there seasonal periods of shortages in milk production from Kreider and other similar producer-handlers?
>
> What are the patterns as to whether and how regularly Kreider maintains a surplus?

Summary of Telephone Conference--Notice of Hearing, filed in *Kreider I*, December 30, 1996.

On April 23, 1997, Judge Bernstein conducted a hearing in Washington, DC, to receive evidence on the remand issue. On August 12, 1997, Judge Bernstein issued a Decision and Order [hereinafter Decision and Order on Remand]: (1) finding it was feasible for Ahava to obtain fluid milk products from other handlers in periods of

Petitioner's short production; (2) finding Ahava was supplied with fluid milk products by at least one producer other than Petitioner during the period January 1991 through December 1996; (3) finding an inference can be made that Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs; (4) finding Petitioner was "riding the pool" and receiving an unearned economic benefit; (5) concluding the decision of the Market Administrator to deny Petitioner producer-handler status under former Milk Marketing Order No. 2 must be upheld; and (6) dismissing Petitioner's *Kreider I* Petition.[4] Petitioner failed to file a timely appeal, and the *Kreider I* Decision and Order on Remand became final.[5]

Kreider II (The Instant Proceeding)

On February 17, 1998, Petitioner instituted the instant proceeding, *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1 [hereinafter *Kreider II*], by filing a "Petition Pursuant to 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 900.50 - 900.71" [hereinafter the *Kreider II* Petition].

On March 12, 1998, the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss" stating the doctrine of res judicata requires dismissal of the *Kreider II* Petition. On June 20, 2000, the Hearing Clerk received Petitioner's opposition to Respondent's Motion to Dismiss. On June 29,

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[4]*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

[5]*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 397 (1998) (Order Denying Late Appeal), *aff'd*, 190 F.3d 113 (3d Cir. 1999), *reprinted in* 58 Agric. Dec. 719 (1999).

2000, Respondent filed "Respondent's Reply to Petitioner's Opposition to Motion to Dismiss." Petitioner filed "Final Reply Brief of Petitioner Kreider Dairy Farms, Inc. in Opposition to Respondent's Motion to Dismiss." On September 15, 2000, Administrative Law Judge Dorothea A. Baker denied Respondent's Motion to Dismiss stating neither the factual nor the legal issues raised in the *Kreider II* Petition were decided in *Kreider I* (*Kreider II* Ruling on Motion to Dismiss).

On September 7, 2000, Petitioner filed an "Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 900.50 - 900.71" [hereinafter Amended Petition]. Petitioner: (1) challenges the determination by the Market Administrator that Petitioner was a handler regulated under former Milk Marketing Order No. 2 during the period December 1995 through December 1999; (2) asserts it was a producer-handler under former Milk Marketing Order No. 2 exempt from the obligation under former Milk Marketing Order No. 2 to pay into the producer-settlement fund during the period December 1995 through December 1999; and (3) seeks a refund, with interest, of the money it paid into the producer-settlement fund during the period December 1995 through December 1999 (Amended Pet. ¶¶ 13-16).

Petitioner alleges the six former Milk Marketing Order No. 2 customers to which Petitioner distributed fluid milk products during the period December 1995 through December 1999 were Ahava, FPPTLC, Jersey Lynn Farms, Parmalat Farmland Dairies, D.B. Brown, Inc., and Readington Farms, Inc. Further, Petitioner identifies which of its six former Milk Marketing Order No. 2 customers paid for fluid milk products in each month

during the period December 1995 through December 1999. Petitioner alleges Ahava paid for fluid milk products in each month during the period December 1995 through April 1997. (Amended Pet. ¶ 14-15.)

On September 29, 2000, Respondent filed "Respondent's Motion to Dismiss Amended Petition II; Motion for Reconsideration; Motion to Certify Question for the Judicial Officer; and Answer to Petition II and Amended Petition II" [hereinafter Motion to Dismiss Amended Petition]. On October 23, 2000, the Hearing Clerk received "Petitioner's Opposition to Motion to Dismiss Amended Petition II; Opposition to Respondent's Motion for Reconsideration; and Opposition to Motion to Certify Question for Judicial Officer." On October 24, 2000, Administrative Law Judge Dorothea A. Baker certified the following question to the Judicial Officer:[6]

> I am hereby certifying to the Judicial Officer the question of whether or not the Amended Petition filed September 7, 2000, should be dismissed for the reasons stated by Respondent, including collateral estoppel and res judicata.

Certification to Judicial Officer.

On December 21, 2000, I issued a ruling stating Petitioner is not barred by collateral estoppel or res judicata from litigating in *Kreider II* its status under former Milk Marketing Order No. 2 during the period after Petitioner ceased distributing fluid milk products to Ahava, viz., during the period from May 1997 through December 1999.[7]

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[6]Section 900.59(b) of the Rules of Practice (7 C.F.R. § 900.59(b)) authorizes administrative law judges to certify questions to the Judicial Officer.

[7]*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 779, 786-87 (2000) (Ruling on

(continued...)

On June 15, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided over a hearing in Washington, DC. Marvin Beshore, Milspaw & Beshore Law Offices, Harrisburg, Pennsylvania, represented Petitioner. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On August 17, 2001, Petitioner filed "Post Hearing Brief of Petitioner, Kreider Dairy Farms, Inc." [hereinafter Petitioner's Brief]. On September 26, 2001, Respondent filed "The Respondent's Proposed Findings of Fact, Conclusions of Law and Brief in Support Thereof" [hereinafter Respondent's Brief]. On October 9, 2001, Petitioner filed "Reply Brief of Petitioner, Kreider Dairy Farms, Inc." [hereinafter Petitioner's Response Brief].

On May 31, 2002, the ALJ issued a "Decision" [hereinafter Initial Decision and Order] in which she: (1) concluded Petitioner's January 1991 application to the Market Administrator for designation as a producer-handler did not constitute an application for designation as a producer-handler for the period May 1997 through December 1999; (2) concluded the Market Administrator's interpretation of complete and exclusive control over fluid milk distribution was not contrary to law; and (3) denied Petitioner's Amended Petition[8] (Initial Decision and Order at 27-28).

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[7](...continued)
Certified Question).

[8]The ALJ states "[t]he Petition is denied." (Initial Decision and Order at 28.) Petitioner filed a Petition on February 17, 1998, and an Amended Petition on September 7, 2000. Section 900.52b of the Rules of Practice (7 C.F.R. § 900.52b) authorizes parties to

(continued...)

On August 6, 2002, Petitioner appealed to the Judicial Officer. On September 18, 2002, Respondent filed "The Respondent's Opposition to the Petitioner's Appeal Petition." On September 23, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's denying Petitioner's Amended Petition. However, I do not agree with the ALJ's finding that Petitioner was not "riding the pool" with respect to its distribution of fluid milk products to FPPTLC. Therefore, while I retain most of the ALJ's Initial Decision and Order, I do not adopt the ALJ's Initial Decision and Order as the final Decision and Order.

Petitioner's nine exhibits admitted into evidence at the hearing are referred to as "PX 1" through "PX 9." Respondent's one exhibit admitted into evidence at the hearing is referred to as "RX 1." Transcript references are designated by "Tr." Attached to Petitioner's Brief are Exhibits A through F, which the ALJ admitted into evidence pursuant to her instructions to the parties to identify evidence from *Kreider I* that should be considered in the instant proceeding (Tr. 206). These exhibits are referred to as "PX A" through "PX F."

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[8](...continued)
amend their pleadings. Therefore, I find the operative pleading in the instant proceeding is Petitioner's Amended Petition, not Petitioner's Petition. Based on the record before me, I infer the ALJ denied Petitioner's Amended Petition.

APPLICABLE STATUTES AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of

proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(15).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK), DEPARTMENT OF AGRICULTURE

. . . .

PART 1002—MILK IN NEW YORK-NEW JERSEY MARKETING AREA

Subpart–Order Regulating Handling

GENERAL PROVISIONS AND DEFINITIONS

. . . .

§ 1002.12 Producer-handler.

Producer-handler means a handler who, following the filing of an application pursuant to paragraph (a) of this section, has been so designated by the market administrator upon determination that the requirements of paragraph (b) of this section have been met. Such designation shall be

effective on the first of the month after receipt by the market administrator of an application containing complete information on the basis of which the market administrator determines that the requirements of paragraph (b) of this section are being met. The effective date of designation shall be governed by the date of filing new applications in instances where applications previously filed have been denied. All designations shall remain in effect until cancelled pursuant to paragraph (c) of this section.

(a) *Application*. Any handler claiming to meet the requirements of paragraph (b) of this section may file with the market administrator, on forms prescribed by the market administrator, an application for designation as a producer-handler. The application shall contain the following information:

(1) A listing and description of all resources and facilities used for the production of milk which are owned or directly or indirectly operated or controlled by the applicant.

(2) A listing and description of all resources and facilities used for the processing or distribution of milk or milk products which are owned, or directly or indirectly operated or controlled by the applicant.

(3) A description of any other resources and facilities used in the production, handling, or processing of milk or milk products in which the applicant in any way has an interest, including any contractual arrangement, and the names of any other persons having or exercising any degree of ownership, management, or control in, or with whom there exists any contractual arrangement with respect to, the applicant's operation either in his capacity as a handler or in his capacity as a dairy farmer.

(4) A listing and description of the resources and facilities used in the production, processing, and distribution of milk or milk products which the applicant desires to be determined as his milk production, processing, and distribution unit in connection with his designation as a producer-handler: *Provided*, That all milk production resources and facilities owned, operated, or controlled by the applicant either directly or indirectly shall be considered as constituting a part of the applicant's milk production unit in the absence of proof satisfactory to the market administrator that some portion of such facilities or resources do not constitute an actual or potential source of milk supply for the applicant's operation as a producer-handler.

(5) Such other information as may be required by the market administrator.

(b) *Requirements.* (1) The handler has and exercises (in his capacity as a handler) complete and exclusive control over the operation and management of a plant at which he handles milk received from production facilities and resources (milking herd, buildings housing such herd, and the land on which such buildings are located) the operation and management of

which also are under the complete and exclusive control of the handler (in his capacity as a dairy farmer), all of which facilities and resources for the production, processing, and distribution of milk and milk products constitute an integrated operation over which the handler (in his capacity as a producer-handler) has and exercises complete and exclusive control.

(2) The handler, in his capacity as a handler, handles no fluid milk products other than those derived from the milk production facilities and resources designated as constituting the applicant's operation as a producer-handler.

(3) The handler is not, either directly or indirectly, associated with control or management of the operation of another plant or another handler, nor is another handler so associated with his operation.

(4) The handler sells more than an average of 100 quarts per day of Class I-A milk to persons in the marketing area other than to other plants.

(5) In case the plant of the applicant was operated by a handler whose designation as a producer-handler previously had been cancelled pursuant to paragraph (c) of this section, the quantity of fluid milk products handled during the 12 months preceding the application which was derived from sources other than the designated milk production facilities and resources constituting the applicant's operation as a producer-handler is less than the volume set forth for cancellation pursuant to paragraph (c)(3) or (4) of this section.

(c) *Cancellation*. The designation as a producer-handler shall be cancelled under conditions set forth in paragraphs (c)(1) and (2) of this section or, except as specified in paragraphs (c)(3) and (4) of this section, upon determination by the market administrator that any of the requirements of paragraph (b) of this section are not continuing to be met, such cancellation to be effective on the first day of the month following the month in which the requirements were not met.

(1) Milk from the designated production facilities and resources of the producer-handler is delivered in the name of another person as pool milk to another handler or except in the months of June through November with prior notice to the market administrator, a dairy herd, cattle barn, or milking parlor is transferred to another person who uses such facilities or resources for producing milk which is delivered as pool milk to another handler. This provision, however, shall not be deemed to preclude the occasional sale of individual cows from the herd.

(2) A dairy herd, cattle barn, or milking parlor, previously used for the production of milk delivered as pool milk to another handler, is added to the designated milk production facilities and resources of the producer-handler, except in the months of December through May, with prior notice to the

market administrator, or if such facilities and resources were a part of the designated production facilities and resources during any of the preceding 12 months. This provision, however, shall not be deemed to preclude the occasional purchase of individual cows for the herd.

(3) If the producer-handler handles an average of more than 150 product pounds per day of fluid milk products which are derived from sources other than the designated milk production facilities and resources, the cancellation of designation shall be effective the first of the month in which he handled such fluid milk products.

(4) If the producer-handler handles fluid milk products derived from sources other than the designated milk production facilities and resources in a volume less than specified in paragraph (c)(3) of this section, the designation shall be cancelled effective on the first of the month following the third month in any six-month period in which the producer-handler handled such fluid milk products: *Provided*, That the receipt of up to an average of ten pounds per day of packaged fluid milk products in the form of fluid skim milk, or of any volume of other packaged fluid milk products (except milk) from pool plants, shall not be counted for purposes of this paragraph (c)(4).

(d) *Public announcement*. The market administrator shall publicly announce the name, plant, and farm location of persons designated as producer-handlers, and those whose designations have been canceled. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from such producer-handler on and after the first of the month following the date of such announcement.

(e) *Burden of establishing and maintaining producer-handler status*. The burden rests upon the handler who is designated as a producer-handler (and upon the applicant for such designation) to establish through records required pursuant to § 1000.5 that the requirements set forth in paragraph (b) of this section have been and are continuing to be met and that the conditions set forth in paragraph (c) of this section for cancellation of designation do not exist.

7 C.F.R. § 1002.12 (1999).

DECISION

Decision Summary

The Market Administrator's failure to designate Petitioner a producer-handler under former Milk Marketing Order 2, for each month during the period December 1995 through

December 1999, was not contrary to law. A handler seeking designation as a producer-handler under former Milk Marketing Order No. 2, in order to be exempt from paying into the producer-settlement fund, must file an application with the Market Administrator and must be designated by the Market Administrator as a producer-handler pursuant to 7 C.F.R. § 1002.12 (1999). Petitioner's January 1991 "Application for Designation as Producer-Handler" (PX C) did not constitute an application for designation as a producer-handler for the period December 1995 through December 1999.

Did the Market Administrator unlawfully fail to designate Petitioner a producer-handler for each month during the period December 1995 through December 1999, under former Milk Marketing Order 2?

Discussion

Petitioner's Operation

Petitioner, a Pennsylvania corporation, has its place of business in Manheim, Lancaster County, Pennsylvania. Petitioner produces, processes, and distributes fluid milk products. During the period December 1995 through December 1999, Petitioner produced milk on its own dairy farm, processed that milk in its own processing plant on its farm, and distributed that milk in its own trucks to the various customers. (Amended Pet. ¶¶ 1-2; Tr. 106-07.) Petitioner asserts each month, during the period December 1995 through

December 1999, it met the former Milk Marketing Order No. 2 requirements for designation as a producer-handler (Amended Pet. ¶¶ 15-15[9]).

Application Required

In 1990, the Market Administrator became aware that Petitioner was distributing fluid milk products into the area covered by former Milk Marketing Order No. 2. In a letter dated December 19, 1990, the Market Administrator informed Petitioner that it must pay into the producer-settlement fund or apply for and obtain designation as a producer-handler, as follows:

> It has come to the attention of this office that you are supplying packaged fluid milk products to Ahava Dairy Products, Inc., 120 Third Street, Brooklyn, NY 11231 for distribution in the New York-New Jersey Milk Marketing Area. Pursuant to Section 1002.30 of the orders regulating milk in the New York-New Jersey milk marketing area, you are required to submit a report of receipts and utilization to this office. Accordingly, you will find enclosed copies of the required report forms, along with a copy of Order No. 2 Regulating the handling of milk in the New York-New Jersey Marketing Area. The report for the month of November 1990 or any prior period in which you supplied milk to Ahava Dairy should be promptly filed with this office.
>
> You may qualify as a Producer-Handler under this order pursuant to Section 1002.12. If you believe this to be the case, please contact John Poole at this office for the appropriate application forms. Otherwise, you may have a payment obligation to the Producer Settlement Fund of the order.

PX B.

In January 1991, Petitioner filed its first and only application for designation as a producer-handler under former Milk Marketing Order No. 2 with the Market Administrator

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[9]Petitioner's Amended Petition contains two paragraphs identified as "15."

(PX C). The Market Administrator did not designate Petitioner as a producer-handler and in August 1992 denied Petitioner's application for designation as a producer-handler (PX E). Petitioner litigated the Market Administrator's denial of its January 1991 application. Judge Bernstein upheld the Market Administrator's denial of Petitioner's application for designation as a producer-handler under former Milk Marketing Order No. 2.[10] Petitioner failed to file a timely appeal of Judge Bernstein's *Kreider I* Decision and Order on Remand and the *Kreider I* Decision and Order on Remand became final.[11]

Petitioner never reapplied for designation as a producer-handler under former Milk Marketing Order No. 2. Ronald Kreider testified on cross-examination that he did not believe Petitioner was required to file another application for designation as a producer-handler, as follows:

> [BY MS. DESKINS:]
>
> Q. Okay. Okay. Let's move on then. Sometime in the 1990s did Kreider stop selling milk to Ahava?
>
> [BY MR. RONALD KREIDER:]
>
> A. Yes.
>
> Q. I think you testified earlier that Ahava was one of your biggest customers?
>
> A. Yes.

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[10] *In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

[11] *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 397 (1998) (Order Denying Late Appeal), *aff'd*, 190 F.3d 113 (3d Cir. 1999), *reprinted in* 58 Agric. Dec. 719 (1999).

Q. And, of course, you're aware that Kreider did have a previous case against the Department of Agriculture regarding its status under Order No. 2, correct?

A. That's correct.

Q. Okay. And one of the issues in that case was whether Kreider's sales to Ahava affected its status under Order No. 2, right?

A. Yes.

Q. Okay. Did you think at the time that Kreider stopped selling to Ahava that that was a change that would necessitate reapplying for producer/handler status in Order No. 2?

A. No.

Q. Well, didn't stopping the sales of milk to Ahava change how Kreider could be considered under Order No. 2?

A. I guess we're still trying to figure that out.

Tr. 120-21.

I conclude Petitioner's January 1991 "Application for Designation as Producer-Handler" (PX C) did not constitute an application for designation as a producer-handler for the period December 1995 through December 1999. *Kreider I*, the proceeding regarding Petitioner's January 1991 application, is concluded. A necessary prerequisite to the Market Administrator's designation of a person as a producer-handler is that person's filing an application for designation as a producer-handler (Tr. 77-78).[12] Since Petitioner failed to file an application for designation as a producer-handler under

[12]7 C.F.R. § 1002.12 (1999).

former Milk Marketing Order No. 2 subsequent to the January 1991 application, Petitioner's Amended Petition should be denied as a premature challenge to a denial of an application for designation as a producer-handler that has not yet been filed or denied.

Producer-Handler Status For the Period December 1995 - April 1997

Even if Petitioner had filed an application for designation as a producer-handler for the period December 1995 through December 1999, I would uphold any denial of the application for the period December 1995 through April 1997, based on issue preclusion.

Petitioner claims it is entitled to recover payments Petitioner made to the producer-settlement fund during the period December 1995 through April 1997. Petitioner distributed fluid milk products to Ahava in each month of this December 1995 through April 1997 period (Amended Pet. ¶¶ 13-16). The issue of Petitioner's status under former Milk Marketing Order No. 2 in those months in which Petitioner distributed fluid milk products to Ahava was decided in *Kreider I*. Thus, Petitioner is barred by issue preclusion from relitigating in *Kreider II* Petitioner's status under former Milk Marketing Order No. 2 during the period December 1995 through April 1997.[13] Petitioner could have been designated as a producer-handler under former Milk Marketing Order No. 2 only if Petitioner's entire distribution of fluid milk products within former Milk Marketing Order No. 2 qualified. Distribution of fluid milk products to one disqualifying customer, such as

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[13]*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 779, 786-87 (2000) (Ruling on Certified Question).

Ahava, results in person's ineligibility for designation as a producer-handler. There can be no "customer-by-customer" determination of producer-handler status.

Market Administrator's Basis for Denying Producer-Handler Status For The Period May 1997 - December 1999

Even if Petitioner had filed an application for designation as a producer-handler for the period December 1995 through December 1999, I would uphold any denial of the application for the period May 1997 through December 1999, based on Petitioner's sales to "subdealers."

The Market Administrator, who, in 1990, became aware that Petitioner was distributing fluid milk products into the area covered by former Milk Marketing Order No. 2, did not designate Petitioner a producer-handler based on the types of customers to which Petitioner distributed a portion of its fluid milk products (PX B, PX E). Further, the Assistant Market Administrator for former Milk Marketing Order No. 2 testified that Petitioner did not qualify as a producer-handler under former Milk Marketing Order No. 2 during the period May 1997 through December 1999, because of the types of customers to which Petitioner distributed a portion of its fluid milk products (Tr. 34-41). The requirements to be a producer-handler do not prohibit any types of customers;[14] however, in order to meet the requirements for designation as a producer-handler, a person must exercise complete and exclusive control over the distribution of its fluid milk products

[14]7 C.F.R. § 1002.12(b) (1999).

(Tr. 36).[15] Thus, an applicant for producer-handler status could be denied producer-handler status based upon the applicant's customer's subsequent distribution of fluid milk products.

The Market Administrator denied producer-handler status to Petitioner on the ground that Petitioner distributed fluid milk products to "subdealers." Having a "subdealer" as a customer is sufficient grounds to deny Petitioner producer-handler status under former Milk Marketing Order No. 2, according to Respondent. Respondent maintains Petitioner "is not distributing all of the milk it sells" because of the "subdealers." Therefore, Petitioner does not exercise complete and exclusive control over the distribution of its fluid milk products which is necessary to meet the requirements for designation as a producer-handler under former Milk Marketing Order No. 2. (Respondent's Brief at 7, 12.)

An administrative agency's interpretation of its own regulations must be accorded deference in any administrative or court proceeding, and an agency's construction of its own regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations.[16]

The Market Administrator was the official responsible for administering former Milk Marketing Order No. 2. It is well settled that an official who is responsible for

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[15] 7 C.F.R. § 1002.12(b)(1) (1999).

[16] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

administering a regulatory program has authority to interpret the provisions of the statute and regulations. Moreover, the interpretation of that official is entitled to great weight.[17]

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

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[17] *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966); *In re Stew Leonard's*, 59 Agric. Dec. 53, 73 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 Fed. Appx. 606, 2002 WL 500344 (2d Cir.), *cert. denied*, 123 S. Ct. 89 (2002); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 19 (1990); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 876 (1989); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 58-60 (1986); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 137 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 982 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1055-56 (1973), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

Therefore, I give considerable weight to the Market Administrator's determination that Petitioner was not a producer-handler under former Milk Marketing Order No. 2 during the period May 1997 through December 1999.

The Market Administrator's interpretation of former Milk Marketing Order No. 2 differed from Petitioner's interpretation, concerning whether Petitioner exercised complete and exclusive control over the distribution of its fluid milk products. The Market Administrator had greater access than did Petitioner to information about the distribution by Petitioner's customers of Petitioner's fluid milk products. Petitioner was largely unaware of what happened to its fluid milk products once Petitioner had delivered those products to its customers. The distribution of Petitioner's fluid milk products beyond Petitioner's "subdealer" customers was adequate grounds for the Market Administrator to determine that Petitioner had not maintained complete and exclusive control over the distribution of its fluid milk products.

The Market Administrator sought to ensure that Petitioner bore all the risk of supplying its customers with fluid milk products during the months of short production and bore all the burden of carrying surplus fluid milk products during the months of excess production. If neither Petitioner nor its "subdealer" customers were accountable to the producer-settlement fund, and if Petitioner's "subdealer" customers were accessing fluid milk products from other producers, even if Petitioner was not, Petitioner could obtain an unearned economic benefit by not bearing the full risk or the full burden of supplying its customers with fluid milk products. At *Kreider I's* conclusion, the Market Administrator's

determination not to designate Petitioner as a producer-handler was justified, according to Judge Bernstein's Decision and Order on Remand.[18] Judge Bernstein concluded Petitioner's customer Ahava was at all times supplied by at least one producer other than Petitioner and Ahava could obtain fluid milk products from other producers if Petitioner could not meet Ahava's needs during periods of short production. Judge Bernstein also concluded Petitioner maintained an annual surplus that was lower than the average of producer-handlers in former Milk Marketing Order No. 2 and Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs.

The Market Administrator's interpretation of complete and exclusive control over the distribution had a rational basis and was applied consistently and not arbitrarily or capriciously. I conclude the Market Administrator's interpretation of the term "complete and exclusive control" as used in 7 C.F.R. § 1002.12(b)(1) was not contrary to law.

The "Subdealers"

During May 1997 through December 1999, Respondent claims three of Petitioner's customers were "subdealers": (a) the FPPTLC; (b) D.B. Brown, Inc.; and (c) Jersey Lynn (Respondent's Brief at 4; Tr. 40).

Petitioner did not distribute fluid milk products to Jersey Lynn during the period May 1997 through December 1999 (PX 4).

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[18] *In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

Petitioner distributed fluid milk products to D.B. Brown, Inc., in 7 months of the period May 1997 through December 1999, the last 6 months of 1997, and the first month of 1998. The Assistant Market Administrator for former Milk Marketing Order No. 2 testified that D.B. Brown, Inc., is a food wholesale distributor in the business of buying food products and distributing those products to its customers. (PX 4; Tr. 40-41, 191.) The Assistant Market Administrator's testimony indicates that, during the period Petitioner distributed fluid milk products to D.B. Brown, Inc., Petitioner did not have complete and exclusive control over the distribution of its fluid milk products as required for designation as a producer-handler under former Milk Marketing Order No. 2. Petitioner has the burden of establishing that it meets the requirements for designation as a producer-handler.[19] Petitioner failed to carry the burden of establishing that it met the requirements for designation as a producer-handler with respect to D.B. Brown, Inc. Therefore, I conclude, during the 7 months (July 1997 through January 1998) that Petitioner distributed fluid milk products to D.B. Brown, Inc., Petitioner was not a producer-handler under former Milk Marketing Order No. 2.

Petitioner distributed fluid milk products to FPPTLC in each month during the period May 1997 through December 1999 (PX 4; Tr. 131, 191). Consequently, Petitioner emphasizes the facts concerning its distribution of fluid milk products to FPPTLC in this "post-Ahava" period.

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[19] 7 C.F.R. § 1002.12(e) (1999).

FPPTLC is a cooperative that purchases kosher dairy products and sells those products to its members. FPPTLC considers its members, its customers. (Tr. 89, 94-95.) One of FPPTLC's customers, Beth Medrash Govoha Cooperative, purchases fluid milk products from FPPTLC but buys other dairy products from other sources (Tr. 93-94). Another FPPTLC customer, Green Spring Dairy, which has purchased fluid milk products from FPPTLC, is a handler and accordingly has access to the milk pool to purchase milk and dairy products (Tr. 47). Since FPPTLC has its own customers, Petitioner lacks complete and exclusive control over its distribution of fluid milk products. Ronald Kreider, one of the Petitioner's owners, testified that Petitioner did not know who FPPTLC was selling to, as follows:

BY MS. DESKINS:

Q. Mr. Kreider, when you sell milk to FPPTLC do you bill Green Spring?

[BY MR. KREIDER:]

A. I don't know.

Q. You wouldn't be billing BMG Coop?

A. I don't know. Those are two new names to me today.

Q. Okay. Because you wouldn't have known who FPPTLC was selling milk to?

A. That's correct.

Q. Now when you sell milk within your own restaurants or stores if someone wants to -- if someone returns milk they bring it back to your store, correct? It probably never happened.

A. I'm not sure that that ever happened.

Q. It probably never happens. If it ever did and someone for some reason brought milk back they'd bring it back to your store if they brought it from your store, right?

A. Most likely you're right.

Q. But if they brought milk from say the BMG Coop store they'd bring it back to the coop store, right?

A. Most people take products back to where they paid the cash for it.

Q. Okay. So let me just ask you another question to understand distribution. If I walked into a Kreider store and bought milk in theory you might know -- you would know who your customers are, maybe not their names but their faces, correct?

A. Me?

Q. Well, your Store Manager?

A. I'm not sure.

. . . .

Q. You don't know who the customers are for FPPTLC, do you?

A. No, I don't.

Q. So you don't know where the milk that you sell to FPPTLC finally ends up in someone's house?

A. That's correct.

Q. So you didn't know that, for example, FPPTLC said they're selling milk in Michigan?

A. That's correct.

Q. So it would be a surprise to you if you walked into a house in Michigan and found Kreider milk? Is that correct?

A. Yeah. That's pretty far.

Tr. 137-39.

Petitioner's lack of control over its distribution of fluid milk products is demonstrated by Petitioner's lack of knowledge of the locations where FPPTLC distributed fluid milk products purchased from Petitioner. Therefore, I conclude, during the months (May 1997 through December 1999) that Petitioner distributed milk to FPPTLC, Petitioner was not a producer-handler under former Milk Marketing Order No. 2.

The Regulated Pool Plants

During May 1997 through December 1999, Petitioner's former Milk Marketing Order No. 2 customers included two regulated pool plants: (a) Farmland Dairies, Wallington, New Jersey; and (b) Readington Farms, Whitehouse, New Jersey (Tr. 39-40; PX 4; RX 1). Petitioner's distribution to Farmland Dairies and to Readington Farms did not disqualify Petitioner from designation as a producer-handler. Under former Milk Marketing Order No. 2, a producer-handler could distribute fluid milk products to regulated pool plants without losing its producer-handler status. (Tr. 55-57.)

Judge Cahn's Decision in Kreider I

In *Kreider I*, Judge Cahn held Petitioner should not be denied producer-handler status unless Petitioner was riding the pool. Judge Cahn remanded *Kreider I*, stating, to determine whether Petitioner is riding the pool, the Secretary of Agriculture must

determine whether it is feasible for the subdealers to which Petitioner distributes fluid milk products to turn to other handlers in a period of short production.[20]

Kreider II is not on remand from the United States District Court for the Eastern District of Pennsylvania. Nevertheless, a reviewing court may conclude that Judge Cahn's decision in *Kreider I* is the law of the case in *Kreider II*, as Petitioner argues in its "Appeal of Petitioner, Kreider Dairy Farms, Inc." [hereinafter Appeal Petition]. Therefore, I find facts that would have been required if *Kreider II* were being decided on remand from Judge Cahn.

If I were deciding *Kreider II* as directed by Judge Cahn, I would find Petitioner was riding the pool because it was feasible[21] for subdealers to which Petitioner distributed

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[20]*Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *reprinted in* 55 Agric. Dec. 749 (1996).

[21]Judge Cahn's use of the word "feasible" indicates that the Secretary of Agriculture must determine whether subdealers to which Petitioner distributed fluid milk products could obtain kosher fluid milk products from other handlers, not whether those subdealers actually obtained kosher fluid milk products from other handlers. *See generally, e.g.*, Merriam Webster's Collegiate Dictionary 425 (10th ed. 1997):

> **feasible** . . . *adj* . . . **1** : capable of being done or carried out <a ~ plan> **2** : capable of being used or dealt with successfully : SUITABLE **3** : REASONABLE, LIKELY **syn** see POSSIBLE

The Oxford English Dictionary, vol. V, 783 (2d ed. 1991):

> **feasible**. . . .
>
> **1.** Of a design, project, etc.: Capable of being done, accomplished or carried out; possible, practicable.
>
> . . . .

(continued...)

fluid milk products to turn to other handlers to obtain kosher fluid milk products in periods of short production. The Assistant Market Administrator for former Milk Marketing Order No. 2 testified that there were several sources of kosher milk in the area covered by former Milk Marketing Order No. 2, as follows:

> BY MS. DESKINS:
>
> Q. Other than Kreider Dairy are there other sources for kosher milk in the Order 2 area from May 1997 through December 1999?
>
> [BY MR. JOHN POOLE:]

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[21](...continued)

3. Of a proposition, theory, story, etc.: Likely, probable.

See also, e.g., American Textile Manufactures Institute, Inc. v. Donovan, 452 U.S. 490, 508-09 (1981) (citing Webster's Third New International Dictionary of the English Language (1976) for the plain meaning of the word *feasible*: "capable of being done, executed, or effected"); *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) (concluding *feasible* means capable of being done or physically possible); *Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484, 1487-88 (8th Cir. 1992) (concluding *feasible* means capable of being done or physically possible), *cert. denied*, 508 U.S. 972 (1993); *Asarco, Inc. v. OSHA*, 746 F.2d 483, 495 (9th Cir. 1984) (stating *feasible* is defined as capable of being done); *Turner Co. v. Secretary of Labor*, 561 F.2d 82, 83 (7th Cir. 1977) (stating the ordinary and common sense meaning of *feasible* is "practicable"); *Smith v. Chickamauga Cedar Co.*, 82 So.2d 200, 202 (Ala. 1955) (citing with approval the definition of *feasible* in Webster's New International Dictionary (2d ed.): "[c]apable of being done, executed, or effected; possible of realization . . . .); *Mastorgi v. Valley View Farms, Inc.*, 83 A.2d 919, 921 (Conn. 1951) (stating to be *feasible* is to be capable of being successfully done or accomplished); *Lowe v. Chicago Lumber Co.*, 283 N.W. 841, 844 (Neb. 1939) (citing with approval the definition of *feasible* in Webster's New International Dictionary: "capable of being done, executed, or [e]ffected"); *Gilmartin v. D. & N. Transportation Co.*, 193 A. 726, 729 (Conn. 1937) (stating to be feasible is to be capable of being successfully done or accomplished).

> A. Several that I'm aware of. Ahava being one of the them. Farmland Dairies had a kosher supply and I believe Tuscan had a kosher supply.
>
> Q. So FPPTLC wanted to buy kosher milk -- you're talking about just this time period May '97 to December '99 could they have gone to other sources being Kreider?
>
> A. To the best of my knowledge, yes.

Tr. 48-49.

Similarly Rabbi Joseph Tendler, the president of FPPTLC, testified that, while FPPTLC did not actually purchase fluid milk products from sources other than Petitioner, FPPTLC could have purchased fluid milk products from sources other than Petitioner (Tr. 97).

I find subdealers to which Petitioner distributed fluid milk products could turn to other handlers in periods of short production for their fluid milk product needs. Therefore, following Judge Cahn's decision in *Kreider I*, I conclude Petitioner was "riding the pool" and was not a producer-handler under former Milk Marketing Order No. 2 during the period May 1997 through December 1999.

Petitioner's Appeal Petition

Petitioner raises three issues in its Appeal Petition. First, Petitioner contends the ALJ's dismissal of Petitioner's Amended Petition, based on Petitioner's failure to renew its application for designation as a producer-handler under former Milk Marketing Order No. 2, is error (Appeal Pet. at 3-5).

Petitioner filed an application for designation as a producer-handler under former Milk Marketing Order No. 2 in January 1991 (PX C). In August 1992, the Market Administrator denied Petitioner's application for designation as a producer-handler (PX E). On December 28, 1993, Petitioner instituted a proceeding challenging the Market Administrator's denial of Petitioner's January 1991 application for designation as a producer-handler (*Kreider I* Pet.). On August 12, 1997, Judge Bernstein issued a Decision and Order on Remand in which he upheld the Market Administrator's denial of Petitioner's application for designation as a producer-handler under former Milk Marketing Order No. 2 and dismissed Petitioner's *Kreider I* Petition.[22] Petitioner failed to file a timely appeal, and the August 12, 1997, *Kreider I* Decision and Order on Remand became final.[23] Consequently, the proceeding regarding Petitioner's January 1991 application for designation as a producer-handler under former Milk Marketing Order No. 2 is concluded.

Section 1002.12 of former Milk Marketing Order No. 2 (7 C.F.R. § 1002.12 (1999)) defines a producer-handler as a handler who, following the filing of an application for designation as a producer-handler, has been so designated by the Market Administrator. Petitioner has not filed another application for designation as a producer-handler under former Milk Marketing Order No. 2; therefore, Petitioner's Amended Petition constitutes

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[22]*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

[23]*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 397 (1998) (Order Denying Late Appeal), *aff'd*, 190 F.3d 113 (3d Cir. 1999), *reprinted in* 58 Agric. Dec. 719 (1999).

a premature challenge to a denial of an application which has not yet been filed or denied, and Petitioner's Amended Petition should be dismissed.

Petitioner states, until the ALJ's Initial Decision and Order, it had no notice that its failure to file another application for designation as a producer-handler under former Milk Marketing Order No. 2 was an issue. Petitioner contends the ALJ's dismissal of its Amended Petition on grounds that were not raised prior to the issuance of the Initial Decision and Order denies Petitioner due process.

Former Milk Marketing Order No. 2 unambiguously requires a handler claiming to meet the requirements for designation as a producer-handler to file an application with the Market Administrator (7 C.F.R. § 1002.12 (1999)). The application requirement was published in the *Federal Register*; thereby constructively notifying Petitioner of the application requirement.[24] Moreover, based on Petitioner's filing an application for designation as a producer-handler in January 1991, I infer Petitioner had actual notice of the former Milk Marketing Order No. 2 application requirement.

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[24]*See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Comp. Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Comp. Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), *cert. denied*, 396 U.S. 867, and *cert. denied*, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

Second, Petitioner contends the ALJ erroneously held, even though Petitioner met the criteria for designation as a producer-handler set down by Judge Cahn, Petitioner was not entitled to relief (Appeal Pet. at 5-7).

The ALJ found, during May and June 1997 and from February 1998 through December 1999, Petitioner met the criteria for designation as a producer-handler set down by Judge Cahn. However, the ALJ departed from Judge Cahn's 1996 *Kreider I* direction in *Kreider II*, for the reasons that: (1) the January 1991 application did not constitute an application for designation as a producer-handler for the period May 1997 through December 1999; and (2) the Market Administrator's interpretation of complete and exclusive control over distribution was not contrary to law (*Kreider II* Initial Decision and Order at 13-14, 27). Petitioner contends the ALJ's departure from Judge Cahn's 1996 *Kreider I* decision is error because Judge Cahn's *Kreider I* decision is the law of the case (Appeal Pet. at 6).

Generally, under the law of the case doctrine, when a court decides upon a rule of law, that decision continues to govern the same issue in subsequent stages of the same case.[25] While *Kreider I* and *Kreider II* are related cases, *Kreider I* and *Kreider II* are two separate distinct proceedings. Therefore, Judge Cahn's decision in *Kreider I* would not

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[25]*Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Arizona v. California*, 460 U.S. 605, 618 (1983); *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997); *Matter of Resyn Corp.*, 945 F.2d 1279, 1281 (3d Cir. 1991); *Constar, Inc. v. National Distribution Centers, Inc.*, 101 F. Supp.2d 319, 323 n.2 (E.D. Pa. 2000).

appear to be the law of the case in *Kreider II*. However, a number of cases hold that, at least under certain circumstances, the law of the case doctrine is applicable not only to the same case, but also to closely related cases.[26] Nevertheless, even if a court reviewing *Kreider II* were to conclude that Judge Cahn's *Kreider I* decision is the law of the case in *Kreider II* because *Kreider I* and *Kreider II* are closely related cases, the reviewing court might allow departure from the application of the law of the case doctrine because material facts in *Kreider I* are not identical to the facts in *Kreider II*.[27] I find particularly significant

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[26]*Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 856 n.11 (3d Cir.) (stating law of the case rules, including the mandate rule, have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit; other law of the case rules apply to subsequent rulings by the same judge in the same case or a closely related case), *stay denied*, 510 U.S. 1309 (1994); *Antonioli v. Lehigh Coal and Navigation Co.*, 451 F.2d 1171, 1178 (3d Cir. 1971) (stating, even if the Court were to find that res judicata did not apply, the Court would be bound under the doctrine of the law of the case by a decision in a prior related case), *cert. denied*, 406 U.S. 906 (1972); *Coleco Industries, Inc. v. Universal City Studios, Inc.*, 637 F. Supp. 148, 150 (S.D.N.Y. 1986) (stating it is the duty of the District Court to follow the law of the case, albeit a related case, particularly when the law has been pronounced, at least *pro tem*, by this Court); *United States v. Musick*, 534 F. Supp. 954, 956-57 (N.D. Cal. 1982) (stating the law of the case is not properly invoked where the case is not the same; nevertheless, the general rule is that a decision in one case is controlling as the law of the case in a related action if it involves the same subject matter and if the points of decision and facts are identical).

[27]Numerous courts have held that extraordinary circumstances, including changed facts or new evidence, may warrant reconsideration of previously decided issues. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (stating the law of the case doctrine should be applied absent changed circumstances or unforeseen issues not previously litigated); *In re City of Philadelphia Litigation*, 158 F.3d 711, 718 (3d Cir. 1998) (stating the law of the case doctrine does not preclude the court's reconsideration of previously decided issues in extraordinary circumstances such as where: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice); *Patel v. Sun Co.*, 141 F.3d 447,

(continued...)

Petitioner's filing an application for designation as a producer-handler in *Kreider I* and Petitioner's failure to file an application for designation as a producer-handler in *Kreider II*. As an application for designation as a producer-handler is a necessary prerequisite for producer-handler status,[28] Judge Cahn's remand to determine whether Petitioner was "riding the pool" is a question that need not be addressed in *Kreider II* where Petitioner has not taken the necessary first step of applying for designation as a producer-handler. Nonetheless, as stated in this Decision and Order, *supra*, since a reviewing court may conclude that Judge Cahn's *Kreider I* decision is the law of the case in *Kreider II*, I find facts that would be required if a reviewing court were to conclude that Judge Cahn's *Kreider I* decision is the law of the case in *Kreider II*.

Third, Petitioner contends it should be refunded billings related to its sales of fluid milk products during the period from December 1995 to May 1997 (Appeal Pet. at 7-9).

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[27](...continued)
461 n.9 (3d Cir. 1998) (stating there are three traditional exceptions to the law of the case doctrine: (1) new evidence is available; (2) a supervening new law has been announced; and (3) the earlier decision was clearly erroneous and would create manifest injustice); *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir. 1997) (stating extraordinary circumstances that warrant the court's reconsideration of an issue decided earlier in the course of litigation include situations in which new evidence is available, supervening new law has been announced, or the earlier decision was clearly erroneous and would create manifest injustice); *NL Industries, Inc. v. Commercial Union Insurance Co.*, 65 F.3d 314, 324 n.8 (3d Cir. 1995) (stating courts should reconsider an issue when there has been an intervening change in controlling law, when new evidence has become available, or when there is a need to correct clear error or prevent manifest injustice).

[28]7 C.F.R. § 1002.12 (1999).

Petitioner litigated the issue of its status as a producer-handler under former Milk Marketing Order No. 2 in *Kreider I*. The *Kreider I* Decision and Order on Remand decided, on the merits, the issue of Petitioner's status under former Milk Marketing Order No. 2 during the period in which Petitioner distributed fluid milk products to Ahava. Issue preclusion bars Petitioner's claim that it was a producer-handler in those months in which Petitioner distributed fluid milk products to Ahava. Petitioner distributed fluid milk products to Ahava in each month during the period December 1995 through April 1997. Thus, Petitioner is barred by issue preclusion from relitigating in the instant proceeding Petitioner's status under former Milk Marketing Order No. 2 during the period December 1995 through April 1997.[29]

Findings of Fact

1. Petitioner is a Pennsylvania corporation. Petitioner has its place of business in Manheim, Lancaster County, Pennsylvania. Ronald Kreider is an owner and the president of Petitioner. (Tr. 106-07.)

2. During the period December 1995 through December 1999, Petitioner produced milk on its own dairy farm, processed that milk in its own processing plant on its farm, and distributed that milk in its own trucks to its customers (Tr. 106-07).

3. In 1990, the Market Administrator became aware that Petitioner was distributing fluid milk products into the area covered by former Milk Marketing Order

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[29]*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 779 (2000) (Ruling on Certified Question).

No. 2. In a letter dated December 19, 1990, the Market Administrator informed Petitioner that it must pay into the producer-settlement fund or apply for and obtain designation as a producer-handler. (PX B.)

4. In January 1991, Petitioner filed an application for designation as a producer-handler under former Milk Marketing Order No. 2 with the Market Administrator (PX C).

5. The Market Administrator did not designate Petitioner as a producer-handler and in August 1992 denied Petitioner's application for designation as a producer-handler under former Milk Marketing Order No. 2 and continued to classify Petitioner as a handler (PX E).

6. As a handler, Petitioner was required to pay into the producer-settlement fund a percentage of its fluid milk (Class I) proceeds (7 C.F.R. pt. 1002 (1999)). Petitioner paid $244,977.97 into the producer-settlement fund because of being classified as a handler, instead of a producer-handler, for the months of December 1995 through December 1999. Petitioner paid $78,118.64 into the producer-settlement fund because of being classified as a handler, instead of a producer-handler, for the months of May 1997 through December 1999. (PX 4.)

7. If the Market Administrator had designated Petitioner a producer-handler, Petitioner would have been exempt from paying into the producer-settlement fund (7 C.F.R. pt. 1002 (1999)).

8. Petitioner litigated the Market Administrator's denial of its January 1991 application for designation as a producer-handler. On August 12, 1997, Administrative Law Judge Edwin S. Bernstein issued a Decision and Order on Remand in *Kreider I*, which became final, upholding the Market Administrator's denial of Petitioner's January 1991 application for designation as a producer-handler under former Milk Marketing Order No. 2. Judge Bernstein's *Kreider I* Decision and Order on Remand was based on Petitioner's distribution of fluid milk products to Ahava. *In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997). Petitioner distributed fluid milk products to Ahava in each month during the period December 1995 through April 1997 (PX 4).

9. Petitioner's January 1991 application for designation as a producer-handler under former Milk Marketing Order No. 2 was the only application for designation as a producer-handler under former Milk Marketing Order No. 2 filed by Petitioner (Tr. 120-21).

10. The Market Administrator's determination that Petitioner was not a producer-handler was based on the types of former Milk Marketing Order No. 2 customers to which Petitioner distributed a portion of its fluid milk products (Tr. 34-41).

11. Petitioner distributed fluid milk products to FPPTLC, a "subdealer," in each month during the period May 1997 through December 1999 (PX 4).

12. Petitioner distributed fluid milk products to D.B. Brown, Inc., a "subdealer," in each month during the period July 1997 through January 1998 (PX 4).

13. Petitioner distributed fluid milk products to no "subdealer" other than FPPTLC and D.B. Brown, Inc., during the period May 1997 through December 1999.

14. Petitioner distributed fluid milk products to Readington Farms, Whitehouse, New Jersey, a regulated pool plant, in each month during the period May 1997 through July 1997 (PX 4).

15. Petitioner distributed fluid milk products to Farmland Dairies, Wallington, New Jersey, a regulated pool plant, in each month during the periods May 1998 through December 1998, and February 1999 through December 1999 (PX 4).

16. FPPTLC obtained its fluid milk products solely from Petitioner (Tr. 89-90).

17. Subdealers to which Petitioner distributed fluid milk products during the period May 1997 through December 1999, could turn to other handlers for fluid milk products in periods of short production (Tr. 48-49, 97).

18. The distribution of Petitioner's fluid milk products by Petitioner's "subdealer" customers was adequate grounds for the Market Administrator to determine that Petitioner had not maintained complete and exclusive control over the distribution of its fluid milk products.

19. The Market Administrator's interpretation of complete and exclusive control over the distribution of fluid milk products had a rational basis and was applied consistently and not arbitrarily or capriciously.

Conclusions of Law

1. Petitioner's January 1991 "Application for Designation as Producer-Handler" did not constitute an application for designation as a producer-handler for the period December 1995 through December 1999.

2. Petitioner is barred by issue preclusion from litigating its status under former Milk Marketing Order No. 2 during the period Petitioner distributed fluid milk products to Ahava, December 1995 through April 1997.

3. The Market Administrator's interpretation of complete and exclusive control over the distribution of fluid milk products was not contrary to law. Petitioner failed to exercise complete and exclusive control over the distribution of its fluid milk products during the period May 1997 through December 1999.

4. During the period May 1997 through December 1999, Petitioner did not meet the criteria set down by Judge Cahn in *Kreider I* for designation as a producer-handler under former Milk Marketing Order No. 2.

For the foregoing reasons, the following Order should be issued.

ORDER

1. Petitioner's Amended Petition is denied.

2. This Order shall become effective on the day after service on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of this Order in any district court of the United States in which Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture. 7 U.S.C. § 608c(15)(B). The date of entry of this Order is August 5, 2003.

Done at Washington, DC

August 5, 2003

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William G. Jenson
Judicial Officer