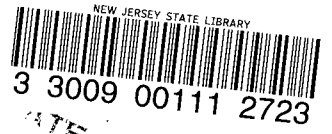


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STATE OF NEW JERSEY.  
DEPARTMENT OF AGRICULTURE.  
DIVISION OF DAIRY INDUSTRY.  
TRENTON, NEW JERSEY

IN THE MATTER OF ESTABLISHING :  
MINIMUM PRICES ON WHOLE, FLUID, : Findings of Fact and Deter-  
WHITE MILK; : minations for Order No. 69-1.

PRELIMINARY STATEMENT

The hearing on the record of which the findings of fact, determinations and order, as hereinafter set forth, were formulated, was convened on August 5, 1968 at the Holiday Inn, U. S. Highway #1, South, New Brunswick, New Jersey, pursuant to notice thereof issued on July 26, 1968. Subsequent sessions of that hearing were held in 1968 on August 5, 6, 19, 20, 22, 23, 28 and 29; September 5, 25 and 30; October 3, 4, 10, 11, 28, 29 and 31; November 12, 13, 18, 21, 22, 25 and 26, 1968; and in 1969 on January 14, 15, 16, 21, 22 and 23; February 4, 5, 6, 12, 13, 19 and 26; April 10 and 15; and May 8.

The material issues of record relate, in general terms, to appropriate changes in Order 64-1 pertaining to the establishment of minimum resale prices for packaged milk at various purchasing points in the marketing process in the State of New Jersey. More specifically, the material issues of record relate to the following:

1. The continuing need for establishing minimum resale prices for packaged milk.
2. Appropriate changes in the purchasing points in the marketing process at which minimum resale prices should apply and the price differentials, if any, which should prevail between those points.
3. The appropriate level of minimum resale prices for packaged milk and the means through which such prices should be adjusted.
4. Appropriate changes in minimum resale price differentials applied to various sizes of containers.
5. The establishment of differentials between the minimum resale prices for milk packaged in various types of containers (i.e., glass, paper or plastic).
6. The establishment of differentials and, therefore, minimum resale prices applicable to low-fat and skimmed milk.

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## FINDINGS OF FACT AND DETERMINATIONS

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

### MINIMUM PRICING POLICY

It shall be the policy of the New Jersey Department of Agriculture, to establish minimum resale prices for milk as hereinafter set forth. The establishment of such minimum prices is deemed necessary to prevent the downward spiraling of prices to unreasonably low levels which, if permitted to exist over protracted periods of time, could be harmful to competition in the fluid milk industry of this State and contrary to the public interest.

This pricing policy, moreover, will continue to permit the free interplay of competitive forces in the market place in the determination of the prices at which most milk will be sold.

Since the enactment of milk control legislation in New Jersey in 1933, it has been the declared policy and intent of the Legislature of the State of New Jersey, "...to treat the production, sale and distribution of milk as a business affecting the public health and affected with a public interest..."<sup>1/</sup> The Legislature has conferred upon the Director, in N.J.S.A. 4:12A-21, 22, and 23, the powers to promulgate orders, rules and regulations, as deemed necessary, to prevent unfair, unjust, destructive and demoralizing practices in the fluid milk industry.

Order 64-1,<sup>2/</sup> under which minimum resale prices have been established since March 31, 1964, employs a key-point minimum pricing concept. That is to say, minimum resale prices are established at selected points in the marketing channels. Those prices are determined by the addition of certain fixed cost margins to the raw product costs established under the State-Federal marketing orders which blanket the entire State of New Jersey.

The points at which minimum resale prices have been established under Order 64-1 are as follows:

1. Milk sold to subdealers by dealers and processors.
2. Milk sold to stores by dealers and subdealers.
3. Milk sold to consumers by stores.
4. Milk sold to consumers from home-delivery routes.

<sup>1/</sup>New Jersey Milk Control Law, as amended, Chapter 274, P. L. 1941, Preamble.

<sup>2/</sup>Exhibit 34.

This regulatory program was based on the recommendations of five eminent economists selected by the Secretary of Agriculture to study the problems of the New Jersey dairy industry and to recommend to him a regulatory program that would best serve the interests of producers, labor, distributors and consumers.

In their report,<sup>3/</sup> the economists were in complete agreement that a considerably greater degree of competitive freedom is desirable in New Jersey milk distribution than had existed under resale price-fixing regulations before 1963.<sup>4/</sup> However, they recognized the desirability of a transitional program to permit the industry to make the many adjustments in going from a long-standing program of full control to that envisioned as a long-run program. The program recommended for the adjustment period, by all but one of the five economists, was a key-point pricing program similar to that encompassed in Order 64-1.<sup>5/</sup>

The economists were in agreement that the long-range program, likewise, should include a price-restraining regulation to prevent the sale of milk at unreasonably low prices. They differed only with regard to the regulatory mechanics through which this policy objective could best be achieved. Two alternative programs were recommended for this purpose -- the establishment of a single minimum marketing margin, or the prohibition of sales below the cost of the least cost competitor in the relevant market.<sup>6/</sup>

The preponderance of the independent, expert testimony, as well as that of most others in the record upon which these findings of fact and determinations are based, supports the adoption of minimum resale pricing (with certain modifications, to be described later) as the appropriate long-range program to prevent the downward spiraling of milk prices to unreasonably low levels.

Three of the five economists who served on the Secretary's advisory committee in 1963 (Aplin,<sup>7/</sup> Carncross<sup>8/</sup> and Markham<sup>9/</sup>) testified at the hearing upon which these findings of fact and determinations are based. They agreed, as they did in the 1963 report and in the policy hearings which immediately followed, that some form of regulation is needed to prevent prices from dropping to unreasonably low levels. They were satisfied that the minimum pricing program adopted in Order 64-1 had been successful in this regard, without unduly enhancing marketing margins for fluid milk.

<sup>3/</sup>"Alternative Economic Regulatory Programs for the New Jersey Milk Industry," November 8, 1963, Exhibit 30.

<sup>4/</sup>Ibid., p. 40.

<sup>5/</sup>Ibid., p. 42.

<sup>6/</sup>Ibid., pp. 46-50.

<sup>7/</sup>Associate Professor of Marketing, Department of Agricultural Economics, Cornell University, Ithaca, New York.

<sup>8/</sup>Professor Emeritus, Department of Agricultural Economics, Rutgers, The State University, New Brunswick, New Jersey.

<sup>9/</sup>Professor of Business Administration, Harvard University, Cambridge, Massachusetts.

Dr. Robert E. Jacobson<sup>10/</sup>, who testified in the current hearing on behalf of a major dairy store operator, joined Aplin, Carncross and Markham in their opinions that minimum resale pricing under Order 64-1 has contended with the problems inherent with unchecked retaliatory pricing and has facilitated effective competition, and has encouraged the adoption of more efficient practices and low-cost methods of distribution.<sup>11/</sup>

The economists noted, for example, that the minimum price levels which have been established under Order 64-1, have met the objectives sought by the committee. Market prices for whole milk, to a substantial degree, have been determined by the interaction of market forces in that they are above the minimum resale prices established by the State.<sup>12/</sup>

The proportion of milk sold in multiple-quart containers (i.e., half-gallons and gallons) has increased from approximately 35.5 percent of that sold in all packages for consumer use in 1963 to nearly 65.4 percent in April 1968.<sup>13/</sup> The shift from home-delivery to store distribution has accelerated. The proportion of milk sold through stores increased by only about 3.9 percentage points between 1961 and 1964 (from 22.3 percent to 26.2 percent), compared with an increase of about 10.6 percentage points between 1964 and 1967 (from 26.2 percent to 36.8 percent).<sup>14/</sup>

As was anticipated by the economists in 1963, the number of milk processors and distributors has continued to decline. Yet, there is no indication of undue concentration of milk sales in the hands of a few large distributors. In December 1963, 145 dealers and processors reported selling milk in New Jersey. Six of those firms sold 70,000 or more quarts per day and accounted for about 27 percent of the milk sold in the State. More than one-half of the dealers and processors sold less than 10,000 quarts of milk per day and accounted for only about 9.1 percent of the milk sold in the State.

During December 1967, in comparison, 117 dealers and processors reported selling milk in New Jersey. Seven of those (six percent) sold 70,000 or more quarts per day and accounted for 31.6 percent of the milk sold in New Jersey. Those selling less than 10,000 quarts per day comprised nearly one-half (47.8 percent) of the total and accounted for 7.6 percent of the fluid milk sold in the State. The market share of the six or seven largest firms, therefore, changed from 27 percent of the fluid milk sold in New Jersey during December 1963 to 31.6 percent during December 1967. The sales of fluid milk in New Jersey by the four largest firms accounted for about 21 percent of the total in December 1963, compared with approximately 22 percent in December 1967.<sup>15/</sup>

<sup>10/</sup>Professor of Agricultural Economics and Rural Sociology, College of Agriculture and Home Economics, The Ohio State University, Columbus, Ohio, Vol. 18, pp. 15-18.

<sup>11/</sup>Vol. 18, pp. 15-18.

<sup>12/</sup>Exhibits 21, 36, 36A & B, 81, 90 and 145; in conjunction with Exhibit 79.

<sup>13/</sup>Exhibit 9, p. 14.

<sup>14/</sup>Exhibit 9, p. 16.

<sup>15/</sup>Data from Exhibit 9, pp. 10 and 11. 4

On the basis of these data and others included in Exhibit 9, Aplin and Markham both concluded that there is no indication of undue concentration of milk sales in the hands of a few large distributors.<sup>16/</sup>

Two parties to the hearing proposed that minimum price controls should be eliminated and replaced by a regulation prohibiting sales of milk below the costs of the least cost competitor. Neither party, however, proffered substantive testimony in support of such a regulation or with regard to how it should be implemented or carried out. Moreover, as previously noted, the preponderance of the independent, expert testimony supports the continuation (with certain modifications) of the policy of establishing minimum prices of milk sold to consumers to prevent retaliatory price-cutting to unreasonably low levels.

For these reasons, and for those hereinafter set forth, the proposals to discontinue the establishment of minimum resale prices and to substitute therefor a regulation to prohibit sales below the costs of the least cost competitor are hereby denied.

In spite of the desirable marketing developments that have occurred since the effectuation of Order 64-1, the preponderance of the testimony, including that of the aforementioned parties, substantiates the need for several changes to permit more freedom of competition and more latitude for the orderly development of more efficient processing and distribution systems.

#### PRICING POINTS

It is concluded that minimum resale prices should be established for whole, white milk sold to consumers by stores and through vending machines for off-premises consumption, and on home-delivery routes. It is concluded, further, that minimum prices should not be established by regulation for milk sold to stores or to subdealers.

As noted previously, minimum prices have been established under Order 64-1 at each of four major purchase points. It is deemed appropriate, in moving to a long-range program, to terminate the practice of establishing minimum prices at wholesale purchase points.

The sales transactions between buyer and seller at the wholesale point are confidential and are not publicly observable. The great differences in the services required or provided to individual customers, and the great variations in volumes purchased result in widespread variations in the costs associated with such services and volumes.

Because of the multitude of factors involved, it virtually is impossible to adequately reflect such cost variations in the minimum prices established by regulation. If such cost variations are reflected inadequately in the minimum prices established by regulation, serious disruptions and dislocations would occur in the pricing system.

<sup>16/</sup>Exhibit 31, p. 3 (Aplin); Vol. 17, p. 104 (Markham).

Frequently, such dislocations take the form of such practices as tie-in sales, secret rebates, the granting of excessive credit, or providing equipment without charge or below cost. These forms of indirect price competition, which may lead to violation of the minimum price structure, are, at best, very difficult to detect and to quantify.

In their testimony at the hearings just completed, both Aplin and Carncross recommended that the practice of establishing minimum prices at the distributor-store, processor-subdealer and dealer-subdealer purchasing points be discontinued. Aplin noted that a vigorous attempt to enforce minimum into-store prices would encourage large supermarket buyers to develop "captive" milk processing and distribution systems of their own or to contract for processing and distribution under various lease arrangements. It is doubtful whether it is in the public interest to stimulate the addition of further resources to an industry already characterized by excess capacity through the vigorous enforcement of minimum prices at the wholesale point in marketing. In fact, as of mid-year 1968 there were 44 leasing arrangements on file with the Division of Dairy Industry. During the month of December 1967, nearly 20 percent of the milk processed for the New Jersey market was processed under such leasing arrangements.<sup>17/</sup>

Moreover, the elimination of establishing minimum prices at the wholesale (i.e., into-store and subdealer) purchasing points will afford processors and dealers more latitude in competing for and servicing of such accounts. It will also encourage the development of more efficient processing and distribution systems.

One industry witness testified in support of the continuation of setting minimum prices at the into-store point to protect the smaller independent dealers from the competitive power of the large distributors. He suggested that, if the principle of into-store pricing is sound, it should be continued, but at lower levels. Independent expert testimony on this issue verifies that the practice of establishing into-store minimum prices has been unsound and ineffective. It is unlikely that any minimum price level at the distributor-store transaction point which would relieve the problems of the independent, smaller distributor could be enforced effectively or equitably. Moreover, the uniform application of such a minimum price level to all buyers would be discriminatory.

For these reasons, and for those noted previously, the proposal to continue the practice of establishing minimum prices--but at reduced levels--at the into-store purchase point is hereby denied.

A witness who testified on behalf of the New Jersey Milk Institute recommended that the policy of establishing minimum prices for milk sold to subdealers be continued. However, for the reasons set forth above, that proposal, likewise, is denied.

<sup>17/</sup>Exhibit 9, p. 7.

It is recognized that price competition frequently is severe at the distributor-storekeeper, processor-subdealer, and dealer-subdealer transaction points. This is particularly true in the transactions between distributors and stores because of the strong bargaining positions of many supermarket operators. It is concluded, however, that unwarranted price-cutting and the use of unfair and destructive practices at these points in the marketing system can be minimized through the adoption of unfair trade practice regulations pursuant to N.J.S.A. 4:12A-7, 20, and 26. This is, however, beyond the scope of the immediate proceedings.

One of the key elements in the success of any regulatory program is the accessibility of information for the detection of violators and the ability to enforce the provisions of such a program. In contrast to the difficulties noted with regard to the determination of the real prices at which milk changes title at the wholesale purchase point, the out-of-store selling prices for milk can be observed easily. Tie-in-sales or the granting of free stamps or merchandise at the retail level can be readily ascertained in most cases.

Stores, in the aggregate, comprise the single, most important sales outlet for fluid milk to consumers in New Jersey. For the 1967-68 licensing year, nearly 12,000 stores and about 1,500 vending machines were licensed to sell milk in the State of New Jersey.<sup>18/</sup> During April 1968, the latest month for which such data were placed in the record of these proceedings, nearly 40 percent of the total sales of fluid milk by dealers, processors and producer-dealers was through stores and vending machines.<sup>19/</sup> In addition, it is reasonable to assume that some of the fluid milk sold by subdealers, likewise, was distributed through stores and vending machines.

Because fluid milk is a staple commodity, a standardized, perishable product that cannot be stored for long periods of time, it is generally regarded by store operators as an effective traffic builder. The high turnover rate for milk sold through stores allows it to be a profitable item even at relatively low unit price margins. These characteristics could result in making milk susceptible to intense price competition at the out-of-store purchase point.

The relative importance of stores as outlets for fluid milk, coupled with the intensity of price competition frequently associated with milk sold through such outlets, makes the out-of-store purchase point a key point in the structure of milk prices for the industry. Therefore, it is the most appropriate point at which minimum prices should be established to prevent the demoralization of the pricing structure.

<sup>18/</sup> Exhibit 9, p. 3.

<sup>19/</sup> Exhibit 9, p. 16.

Although vending machines are less numerous than are stores, they nevertheless have become an important outlet for milk and are likely to become more important in the future. They compete directly with stores for milk sales. Therefore, whole, white milk sold through vending machines for off-premise consumption should be subject to the same minimum resale prices established for milk sold through stores.

#### Price Differentials on Home-Delivered Milk

The minimum resale prices established for whole, white milk sold to consumers on home-delivery routes shall be the same as those established for milk sold to consumers through stores and vending machines.

Order 64-1 provides for a differential between home-delivered milk and milk sold out-of-stores of three (3) cents per quart regardless of the size of container or the volume delivered per stop. The establishment of this "flat" differential fails to recognize the cost savings which can be achieved in serving large-volume customers and, depending upon the market prices for home-delivered milk, could be detrimental to the viability of this mode of distribution.

Carncross suggested that the practice of establishing minimums at the home-delivery purchase point be discontinued. However, because competition frequently is intense at the home-delivery purchase point, this change should not be adopted. Although the proportion and volume of fluid milk sold on home-delivery routes has declined significantly in recent years, it remains an important mode of distributing milk to consumers. During 1967, the latest year for which data are included in the record of these proceedings, approximately 126 million quart equivalents of fluid milk were sold on retail (home-delivery) routes by dealers and producer-dealers.<sup>20/</sup> That quantity comprised nearly 14.7 percent of the total sold for that year.<sup>21/</sup> Also, it is reasonable to assume that a substantial portion of the milk sold by subdealers was on home-delivery routes.

It is deemed advisable, therefore, to continue the policy of establishing minimum resale prices at this purchase point to provide a floor level against destructive pricing on home-delivery routes. Moreover, this policy is consistent with the policy of establishing minimum resale prices for milk sold to consumers at stores.

A witness who testified on behalf of the New Jersey Milk Institute proposed that minimum prices on home-delivered milk be fixed above the minimum out-of-store prices by the following amounts: three (3) cents per quart, five (5) cents per half-gallon, eight (8) cents per gallon, and one and one-half (1.5) cents per quart for containers larger than one gallon.

<sup>20/</sup> Exhibit 9, p. 15.

<sup>21/</sup> Exhibit 9, p. 16.

Still another witness, testifying on behalf of the Independent Milk Dealers Association of New Jersey, proposed that the differential be lowered to one and one-half (1.5) cents per quart applicable to all sizes of containers.

The aforementioned proposals serve as an indication that the existing "flat" differential is too high and inflexible under current marketing conditions. Moreover, the wide variation in these proposals is indicative of the widely varying costs associated with the home-delivery of milk.

Under such circumstances, it is concluded that competition in the market place will be more effective in establishing the appropriate prices for home-delivery service than will fixed differentials established by regulation. Over time, competitive forces will establish home-delivered milk prices above the prices charged at the out-of-store purchase point that will reflect both the added costs of serving home-delivery customers and the value of such added service to consumers.

This price policy, moreover, will permit wider latitude for the adoption of volume discount or service discount plans and other efficiencies in the servicing of home-delivery customers to the end that this mode of distribution can survive -- not as a tradition or luxury -- but as a service the public wants and needs. The maintenance of fixed differentials could serve to impede such developments and this would be contrary to the long-run interest of the industry and of the consumers of this State.

#### LEVEL OF MINIMUM RESALE PRICES

The minimum resale prices initially established pursuant to these findings of fact and determinations and to the order attached hereto shall be at the levels prevailing under Order 64-1 at the out-of-store purchase point on the date this decision and order become effective. Provided, however, that such minimum prices shall be adjusted periodically as hereinafter set forth.

As stated previously, the purpose of establishing minimum resale prices is to prevent the downward spiraling of prices to unreasonably low levels which, if permitted to exist over a protracted period of time, could be harmful to competition in the fluid milk industry of this State and contrary to the public interest. They are intended to provide a floor below which ruinous competitive practices could prevail. Moreover, such minimum prices are intended to be below the market prices at which most milk is being sold to consumers.

Extensive surveys of the prices for which milk is being sold at stores in New Jersey have been conducted by the Office of Milk Industry and the Division of Dairy Industry since July 1967.

Those surveys are based upon price observations at approximately 190 supermarkets, about 50 dairy stores, about 20 small stores, and about 10 vending machines located throughout the State.<sup>22/</sup> Summaries of the findings of those surveys for the months July 1967 through January 1969 are in evidence in these proceedings.<sup>23/</sup> These summaries indicate that the milk purchased by consumers at the preponderance of the aforementioned outlets has been and currently is selling at prices above the minimum resale prices adopted herein.

The surveys indicate that some milk is being sold at minimum price levels. Under normal competitive conditions, and recognizing the wide variation in the costs of processing and distributing milk set forth in the record of these proceedings, variations in market prices are to be expected. Some milk may be sold at minimum price levels, but it is reasonable to anticipate that most milk will continue to be sold at prices above such levels.

On the basis of the aforementioned facts and upon consideration of all testimony proffered on this issue, it is concluded that the initial minimum price levels adopted herein should provide a reasonable floor, under present market conditions, to achieve the objectives of the aforesaid pricing policy. If at some future date the facts indicate the need for adjustment, either upward or downward, in the price levels established under the order attached hereto (other than as provided herein), the Division of Dairy Industry stands ready to hold a hearing for such purpose.

The New Jersey Milk Institute proposed that certain adjustments be made in the cost factors reflected in the present price structure and that allowances be made for a fixed return on investment (net worth) and for a greater markup or price margin for stores. It is concluded, however, that the addition to the minimum price structure of a fixed allowance for return on investment or of a greater allowance for store margins would be contrary to the minimum pricing policy adopted herein. Moreover, these proposals would have the effect of increasing the minimum prices from their present levels. The evidence in these proceedings does not justify an increase in the minimum prices at this time. For these reasons the aforementioned proposals are denied.

The original request for the hearing upon which these findings of fact, determinations and order are based was submitted by a party desirous of an increase in the levels of minimum resale prices and not by a party desiring a decrease in those levels. Nevertheless, a proposal was made by the operator of a vertically-integrated dairy store firm which would, in effect, lower minimum prices commensurate with the achievable costs associated with the lowest cost method of distribution.

This operator submitted into evidence a detailed study of its costs of processing, packaging, distributing and selling milk through its own store outlets.

<sup>22/</sup> Exhibits 20, 35, 35A, 35B, 80, 89 and 144.

<sup>23/</sup> Exhibits 21, 36, 36A, 36B, 81, 90 and 145.

Another firm which operates a chain of vertically-integrated dairy stores, likewise, placed in the record an analysis of its costs in terms of percentages. Because sufficient information was not permitted to be revealed by the operator of that firm, an accurate translation of the percentage figures into actual costs was not possible.

The aforementioned cost data were taken into consideration in arriving at a conclusion regarding the initial levels of minimum resale prices adopted herein. However, as noted by Aplin, costs are only one of several factors that should be considered in the administrative determination of appropriate minimum resale prices. Other factors which must be considered in such a determination include the number and size of firms, prevailing market prices, and the range in market prices.

It would be inappropriate to base minimum resale prices on the costs of a particular firm or firms. A limited service dairy that serves consumers through only one method of distribution with a limited line of products should not be the sole basis of establishing minimum resale prices applicable to the market as a whole. To do so could jeopardize the financial structure of the industry.

Aplin noted in this regard that it would be contrary to the public interest to limit the availability of milk. This would occur if the available service combinations or services to the market were limited by an erroneous price determination. The fact that a firm is able to sell for less than the established minimums would not in and of itself be a sufficient reason for lowering the minimums, particularly if most of the milk was selling at prices above such minimums.

#### Adjustment of Minimum Resale Prices

The minimum resale prices established pursuant to the order attached hereto shall be adjusted in intervals of one-half cent (on a quart-equivalent basis), upward or downward, for each change of 19 cents per hundredweight in the Class I (fluid) milk price as determined under each of the State-Federal milk marketing orders which blanket the State of New Jersey.

Since the inception of Order 64-1, the minimum resale prices established thereunder have been adjusted in this manner, both upward and downward, in response to movements of 23 cents a hundredweight in the Class I prices. This procedure was adopted because changes in Class I prices -- the minimum prices which milk processors and dealers must pay for milk they utilize for fluid (bottling) purposes -- uniformly affect such operators' costs of raw milk, and are costs over which they have no control.

Absent such procedure, the relationship between the costs of processing and distributing milk, and the established minimum resale prices could become seriously distorted, requiring frequent hearings to effect minor adjustments in the level of minimum resale prices. Moreover, it is reasonable to assume that, absent such regulation, market prices for milk would fluctuate in accordance with changes in the level of Class I prices. For these reasons, it is concluded that this procedure (as amended hereinafter) be adopted under the order attached hereto.

The New Jersey Milk Institute proposed that the 23-cent bracket be reduced to 19 cents in order to more closely correlate the movements in Class I prices with adjustments in minimum resale price levels. Originally, the 23-cent per hundredweight (approximately one-half cent per quart) movement in Class I prices was correlated with a one-half cent per quart adjustment in minimum resale price levels to effectuate periodic adjustments in the latter without either reducing or enhancing handlers' marketing margins. Experience has revealed, however, that this procedure has caused minor fluctuations in marketing margins and, therefore, it should be amended. It was noted in this regard that because certain operating costs incurred by milk processors and dealers are incurred on a percentage basis, rather than on an absolute basis, the 23-cent bracket has not functioned as intended. Evidence was presented to show that a 19-cent bracket would correct this defect. It is concluded, therefore, that a 19-cent bracket should be used for the aforesaid purpose and is hereby adopted.

#### Economic Formula Pricing

Prior to the commencement of the hearing upon which these findings of fact and determinations are based, the Secretary of the New Jersey Department of Agriculture requested the assistance of the Dean of the College of Agriculture and Environmental Science at Rutgers - The State University, in the development of an economic formula which could be used in establishing minimum resale prices of milk. The Dean assigned this complex task to Dr. William L. Park, then Associate Research Professor in Agricultural Economics at the College.

Dr. Park undertook an extensive study of published data which could be converted into indexes and incorporated into a formula to reflect changes in the costs of processing, distribution and selling of fluid milk in New Jersey. The economic formula which evolved, together with suggested order language for its implementation, were placed into evidence at the hearing just completed.<sup>24/</sup>

Dr. Park testified at great length at the hearing with regard to the construction of the indexes and the manner in which they are employed in the formula.

<sup>24/</sup>Exhibits 6 and 7.

As noted previously, the margin between the Class I price and the minimum resale prices established under Order 64-1 was fixed. The purpose of the Park formula would be to provide a mechanism through which appropriate adjustments, either upward or downward, could be made in that margin.

Dr. Butz<sup>25/</sup> testified on behalf of the New Jersey Milk Institute as the main proponent for the adoption of the Park formula. Drs. Markham and Jacobson, who appeared as witnesses on behalf of a vertically-integrated dairy store firm, testified in opposition to its adoption.

Upon careful consideration of all of the testimony on this issue, it is concluded that the formula approach to adjusting margins should not be adopted at this time. Although both the formula approach to pricing and the proposed formula have merit, a period of time is needed during which the relative movements of the indexes can be observed, and the impact of the formula upon minimum resale prices can be evaluated.

Minimum Resale Prices Applicable at Vertically-Integrated Dairy Stores

The minimum resale prices for milk sold through vertically-integrated dairy stores shall be the same as those applicable to milk sold through other store outlets or methods of distribution.

A witness who testified on his own behalf as the operator of a vertically-integrated dairy store firm proposed that a differential be adopted which would establish lower minimum resale prices for milk sold at vertically-integrated dairy stores than those applicable to milk sold through other store outlets or methods of distribution. The proponent suggested that differentials of 7.4 cents to 10.4 cents per gallon, and of 4.8 cents to 6.8 cents per half-gallon would be appropriate for such purpose.<sup>26/</sup>

It is concluded that no such differential should be interposed in the structure of minimum resale prices established pursuant to these findings of fact, determinations and order. To do so could be discriminatory. It would prevent other operators who, because their outlets (stores or vending machines) are not vertically-integrated or because they do not qualify as a dairy store under the restrictive definition suggested by the proponent, from meeting the prices of those who qualify for such preferred treatment.

<sup>25/</sup>Dr. William T. Butz, Professor of Agricultural Economics at Pennsylvania State University.

<sup>26/</sup>Exhibit 110.

The price surveys conducted by the Division of Dairy Industry indicate that market prices have adjusted above the current minimum price levels under competitive conditions in the market place in such a manner that milk sold through most supermarkets is priced above the prices charged by most vertically-integrated dairy stores.<sup>27/</sup> In northern New Jersey, the most common difference between the price charged at most supermarkets and those charged at proponent's vertically-integrated dairy stores is five (5) cents per half-gallon and seven (7) cents per gallon. The comparable price differences prevailing in southern New Jersey are approximately one-half of the level of those prevailing in northern New Jersey. The fact that the aforementioned price differentials which have developed under the competitive conditions prevailing in southern New Jersey are not as high as those which have developed under the competitive conditions prevailing in northern New Jersey is not sufficient reason to interpose a fixed differential in the structure of minimum prices.

For these reasons, the proposal to adopt a price differential applicable to milk sold through vertically-integrated dairy stores is hereby denied.

PRICE DIFFERENTIALS BETWEEN SIZES OF CONTAINERS

As noted previously, the minimum resale prices initially established pursuant to these findings of fact and determinations and to the order attached hereto shall be at the levels prevailing under Order 64-1 at the out-of-store purchase point on the date this decision and order become effective. It is concluded, therefore, that the price differentials between quart containers and half-gallon containers (of five cents) and between half-gallon containers and gallon containers (of six cents) inherent in this minimum resale price structure should not be changed.

Testimony was received on proposals which, if adopted, would either increase such price differentials or lower them. A witness who testified on behalf of the New Jersey Milk Institute proposed that the differential between the minimum resale prices for milk packaged in paper half-gallon containers and in paper gallon containers be reduced from six (6) cents to four (4) cents. Another witness proposed that the differential should be six (6) cents between paper quarts and paper half-gallons, four (4) cents between paper half-gallons and paper gallons, seven (7) cents between glass quarts and glass half-gallons and six (6) cents between glass half-gallons and glass gallons. Still another witness, who testified on behalf of his own vertically-integrated dairy store chain, proposed that the differential between glass quarts and glass half-gallons be reduced from the present five (5) cents to four (4) cents, and that the differential between glass half-gallons and glass gallons be increased from the present six (6) cents to eight (8) cents.

27/Exhibits 129 and 155B.

The minimum resale prices established as herein set forth are intended to provide a floor to prevent retaliatory price-cutting to unreasonably low levels. They are intended to be and, in fact, are below the market prices at which most milk is being sold to consumers in New Jersey.

The surveys of prices for which milk is being sold at stores in New Jersey conducted by the Office of Milk Industry and by the Division of Dairy Industry, as noted previously, indicated that most milk is being sold above the minimum resale prices adopted herein. Moreover, the relative prices for milk sold in different sizes of containers have adjusted in such a manner that the price differences between such containers are both lower and higher than those inherent in the minimum resale price schedule.

During December 1968, the cost of purchasing milk in paper half-gallons at supermarkets in northern New Jersey was two (2) cents less than if two paper quarts were purchased. The comparable savings in purchasing a gallon container of milk were nine (9) cents, as compared with purchasing two half-gallons. The price differences for milk sold at dairy stores in northern New Jersey were four (4) cents for a paper half-gallon vs. two paper quarts and eleven (11) cents for a paper gallon vs. two half-gallons. The comparable figures for milk sold at such outlets in glass containers were six (6) cents on the half-gallon and seven (7) cents on the gallon.<sup>28/</sup>

A comparable situation existed in southern New Jersey. Milk sold at supermarkets was five (5) cents less in paper half-gallon containers than in two single quart containers. Similarly, milk sold in paper gallon containers was seven (7) cents less than the cost of two paper half-gallons. The price differences for milk sold at dairy stores in southern New Jersey were seven (7) cents on the paper half-gallon and six (6) cents on both paper and glass gallons.<sup>29/</sup>

Those differentials have developed as a result of the free interaction of competitive forces in the market place. For these reasons, the proposals to change such differentials are denied.

#### Price Differentials for Banded Containers

Since the inception of Order 64-1, which incorporated the aforementioned price differentials into the minimum resale price structure, several dairy firms have begun the practice of banding two paper half-gallon containers together and selling them at the minimum resale price established for the gallon containers, or of banding four paper quarts together and selling them at the minimum resale price established for the gallon container. This practice has developed to permit those firms to meet the preferentially-priced larger single containers being sold by their competition.

<sup>28/</sup>Exhibit 129, p. 1.

<sup>29/</sup>Exhibit 129, p. 2.

The New Jersey Milk Institute and an operator of a chain of vertically-integrated dairy stores proposed that a differential be applied to banded containers to prevent them from being sold at the minimum resale price of the larger container they are intended to represent.

Several witnesses testified in opposition to the aforesaid proposals. Cost information was produced to indicate that the costs associated with this practice were lower for their particular operations than could be achieved by installing additional equipment in their plants to package paper gallon containers. Moreover, the costs associated with this practice vary from one operation to another depending upon the volumes involved. There are, in fact, no costs consistently associated with this particular operation.

The establishment of a fixed differential on banded containers in light of the aforementioned conditions would prevent relatively small volume operators from meeting competition and could be discriminatory. Such discriminatory differentials should not be interposed in the minimum resale price structure. Individual firms should be free to decide how best to meet the demands of consumers and competition, provided that the practice employed is not harmful to competition.

For these reasons, the proposals to fix a differential on banded containers is denied.

#### Minimum Resale Prices for Larger than Gallon Containers

Minimum resale prices for whole, white milk packaged in containers larger than one gallon, when sold for household use, shall be established at the appropriate multiple of the minimum resale price applicable to the gallon container on a quart equivalent basis.

Since the promulgation of Order 64-1 -- which did not provide for minimum resale prices on such containers -- the marketing of milk in larger than gallon size containers has become more common. To assure that such containers are not priced in such a manner that they circumvent the minimum resale price structure adopted herein, it is deemed appropriate to extend minimum prices to include such containers.

Upon consideration of all of the testimony in the record pertaining to this issue, including the proposals filed in this regard, it is concluded that minimum resale prices should be applied to such containers in the manner set forth above.

PRICE DIFFERENTIALS BETWEEN TYPES OF CONTAINERS

The minimum resale prices established for whole, white milk in various sizes of containers shall be the same regardless of the composition (i.e., glass, paper or plastic) of such containers.

Several industry witnesses (representing primarily vertically-integrated dairy store operations) proposed that such differentials should be established in relation to the costs alleged to be consistently associated with the packaging and distributing of milk in various types of containers. Other industry witnesses opposed the adoption of such differentials. Both proponents and opponents submitted cost information in support of their respective positions regarding this issue.

The array of differentials proposed by various parties in these proceedings and the costs submitted in justification thereof indicate that fixed differentials between the minimum resale prices for milk sold in glass containers and paper containers on the one hand, and between milk sold in paper containers and plastic containers on the other hand, are not cost-justified. The savings experienced by some firms in the packaging of milk in glass containers in relation to paper containers appear to be largely offset by higher costs for glass vs. paper associated with the distribution and in-store handling functions. Moreover, the evidence demonstrated that, in fact, there is no particular level of costs consistently associated with the processing and distributing of milk in any particular type of container.

To the contrary, the evidence revealed that such costs vary widely from one firm to another. For some firms, because of their particular method of operation, it is less costly to package and distribute milk in glass containers (than in paper containers); while for other firms, for equally valid reasons, the reverse is true. Before any such cost differences are reflected in established minimum resale prices, they should be both consistent and significant.

The extensive price surveys conducted by the former Office of Milk Industry and by the present Division of Dairy Industry reveal that such price differences, in fact, do exist but in varying amounts depending upon the competitive conditions in the market place. This situation is substantiated further by a price survey conducted by a major dairy store operator who testified in these proceedings. That survey<sup>30/</sup> indicates that the differentials between the selling prices for milk packaged in glass containers and paper half-gallon containers observed at various store outlets during February 1969 ranged from zero (0) to nine (9) cents, with

30/Exhibit 140.

four (4) cents most frequently observed. The comparable differentials for milk sold in gallon containers was either six (6) or seven (7) cents, with six (6) cents most frequently observed.

The proposal submitted by the aforementioned witness provides for a differential between paper and glass of two (2) cents for quarts, four (4) cents for half-gallons, and eight (8) cents for gallons. Another proponent of such differentials requested that such differentials be set at one (1) cent per half-gallon, and four (4) cents per gallon. It is apparent, therefore, that market prices already have adjusted above the minimum price levels established by Order 64-1 to reflect substantially the differentials proposed in these proceedings, without the inclusions of such differentials in the order.

The purpose of establishing minimum resale prices, as explained previously, is to provide a "floor" to prevent retaliatory price-cutting to unreasonably low levels. The great majority of the milk sold in this State should sell and, in fact, is selling at prices above such minimums. Moreover, as previously noted, the free interplay of market forces has established differentials between the prices for milk sold in glass containers and in paper containers. Consumers are more likely to benefit from this procedure than if such container-type differentials are established by administrative determination.

The freezing of such market-determined differentials in the order would not be appropriate and could be discriminatory. As noted by Aplin, a governmental agency should not set up a discriminatory system which would force milk distributors to charge more for milk sold in paper or plastic containers than in glass bottles. It should be left to the individual firm to decide how best to meet the demands of consumers and competition.

#### Bottle Deposits

A witness who testified on behalf of a vertically-integrated dairy store operation proposed that if price differentials were established between glass containers and paper containers, then bottle deposits should be required on glass containers in the amounts of: ten (10) cents on quarts, twenty (20) cents on half-gallons, and twenty-five (25) cents on gallons.

As previously noted, such differentials have not been adopted herein; hence, the proposal to impose required bottle deposits upon the minimum resale prices for milk sold in glass containers is denied.

MINIMUM RESALE PRICES APPLICABLE TO  
LOW-FAT MILK AND SKIMMED MILK

Proposals were made which would extend -- with appropriate differentials -- minimum resale prices established for whole, white milk to low-fat milk and skimmed milk to prevent such products from disrupting the minimum resale pricing structure of whole milk.

Although sales of low-fat milk and skimmed milk represent a relatively high proportion of total fluid milk sales in several markets throughout the country, they have not done so in the New Jersey market.<sup>31/</sup> Carncross noted in this regard that a review of 16 markets, mostly in the central, southern and western states, indicated that half-gallons of low-fat milk were being sold mostly from two (2) cents to four (4) cents less per half-gallon than was whole milk. The price surveys conducted by the former Office of Milk Industry and the Division of Dairy Industry reveal that half-gallons of low-fat milk have been selling at stores in New Jersey at prices three (3) to four (4) cents above the minimum resale prices established for whole milk.

Under such circumstances it does not appear that these products are a threat to the minimum resale price structure at the present time. Based upon the testimony pertaining to this issue it is concluded that minimum resale prices should not be extended to low-fat milk and skimmed milk. If at a later date the facts warrant reconsideration of this matter, a hearing can be called for that purpose.

MISCELLANEOUS

Producer-Dealers

It was proposed by the New Jersey Milk Institute that milk sold by producer-dealers through their own stores located on the premises of their farms be made subject to minimum resale price regulation. However, a one (1) cent per quart price advantage on packages of all sizes would be accorded.

The testimony in these proceedings purports that producer-dealer farm stores near population centers disrupt marketing conditions because their exempt status under the State-Federal Milk Marketing Orders for New Jersey makes it possible for them to sell milk at lower prices than other handlers.

Heretofore, such sales by producer-dealers have not been subject to minimum resale price regulation as a matter of policy. During the 1968-69 licensing year, there were only 18 producer-dealers licensed to sell milk in New Jersey.<sup>32/</sup> The sales of plain whole milk by producer-dealers have comprised less than one percent of the total milk sold in New Jersey.<sup>33/</sup> Their

<sup>31/</sup>Exhibits 16, p. 9; and 9, p. 17.

<sup>32/</sup>Exhibit 9, p. 3.

<sup>33/</sup>Exhibit 9, p. 12.

number and sales volume comprise such a small segment of the market, taken as a whole. No substantive evidence was presented at the hearing that such operators are causing disruptive marketing conditions.

For the reasons set forth above, the proposal to extend minimum resale prices to producer-dealers is denied.

Announcement of Changes in  
Minimum Resale Price Level

Changes in the level of minimum resale prices, as hereby established, shall be effected with changes in the Class I prices applicable under Federal Order No. 2 (for New Jersey Milk Marketing Area 1 -- northern New Jersey), and applicable under Federal Order No. 4 (for New Jersey Milk Marketing Areas 2 and 3 -- southern New Jersey).

The Class I price under Federal Order No. 2 is announced monthly by the Market Administrator on the 25th day of the month, to be effective on the first day of the succeeding month. The Class I price under Federal Order No. 4 is announced on the 15th day of the month preceding the start of each calendar quarter, to be effective on the first day of the succeeding month.

Following such announcements, but before the commencement of the month or period to which they apply, the appropriate minimum resale price schedule shall be announced and posted at the office of the Division of Dairy Industry.

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All of the testimony, written memorandums, and all items of evidence submitted by the parties to these proceedings, whether or not specifically mentioned herein, have been considered in rendering these determinations.


ORDER 69-1

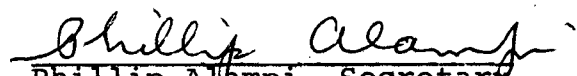
It is hereby ordered this 19th day of May 1969, that on and after the effective date hereof, the minimum prices to be charged for the resale of milk through stores and vending machines for off-premises consumption, and on home-delivery routes shall be as follows:

- (a) In Area One, the minimum resale prices shall be those set forth in Schedule 69-IN, annexed hereto and made a part hereof;
- (b) In Areas Two and Three, the minimum resale prices shall be those set forth in Schedule 69-IS, annexed hereto and made a part hereof,

This order shall supersede Order 64-1.

This order shall become effective at 12:01 A. M., Eastern Daylight Saving Time, June 3, 1969.

  
Joseph C. Mathis, Jr.  
Acting Director  
Division of Dairy Industry

  
Phillip Alampi, Secretary  
New Jersey Department of  
Agriculture

SCHEDULE 69-1N -- NORTH JERSEY

Minimum Prices for Fluid Whole Milk Sold Out-of-Stores, and  
 Vending Machines for off-premises consumption and on Home-Delivery Routes  
 (cents per unit)

	A	B	C	D	E	F	G	H	I	J
M. A. Order	\$5.88	\$6.07	\$6.26	\$6.45	\$6.64	\$6.83	\$7.02	\$7.21	\$7.40	\$7.59
No. 2	to	to	to	to	to	to	to	to	to	to
Class I Price	6.06	6.25	6.44	6.63	6.82	7.01	7.20	7.39	7.58	7.77
Quart	26	26 1/2	27	27 1/2	28	28 1/2	29	29 1/2	30	30 1/2
Half-gallon	47	48	49	50	51	52	53	54	55	56
Gallon	88	90	92	94	96	98	100	102	104	106

Larger-than-gallon: The quart equivalent of the minimum price for gallon containers, multiplied by the number of quarts in the unit.

SCHEDULE 69-1S -- SOUTH JERSEY

Minimum Prices for Fluid Whole Milk Sold Out-of-Stores and  
 Vending Machines for off-premises consumption and on Home-Delivery Routes  
 (cents per unit)

	A	B	C	D	E	F	G	H	I	J
M. A. Order	\$6.32	\$6.51	\$6.70	\$6.89	\$7.08	\$7.27	\$7.46	\$7.65	\$7.84	\$8.03
No. 4	to	to	to	to	to	to	to	to	to	to
Class I Price	6.50	6.69	6.88	7.07	7.26	7.45	7.64	7.83	8.02	8.21
Quart	26	26 1/2	27	27 1/2	28	28 1/2	29	29 1/2	30	30 1/2
Half-gallon	47	48	49	50	51	52	53	54	55	56
Gallon	88	90	92	94	96	98	100	102	104	106

Larger-than-gallon: The quart equivalent of the minimum price for gallon containers, multiplied by the number of quarts in the unit.