NORTHEAST DAIRY COMPACT COMMISSION

In Re Petition of The Organic Cow, LLC	)	Docket Number HEP-97-006 (On Remand From U.S. District Court for the District of Vermont)

FINAL DECISION OF THE COMMISSION

This matter comes before the Hearing Panel pursuant to the federal district court's April 2, 1999, order remanding this matter to the Commission for further proceedings. *See The Organic Cow, LLC v. Northeast Dairy Compact Comm'n*, 46 F. Supp. 2d 298 (D. Vt. 1998). The Commission, by motion made at its April 7, 1999, meeting, transferred this matter to the Hearing Panel for consideration of the issues identified in the Court's decision.

On remand, petitioner makes two primary substantive claims: (1) that the Commission's decision to accord the same treatment to organic milk and conventional milk under the Commission's over-order price regulations cannot be justified; and (2) that even if such treatment is generally permissible, petitioner's particular circumstances require that the Commission grant it a special exemption from the regulations. In addition, this decision addresses two procedural matters: (1) petitioner's claim that the Commission has violated the injunction of the United States District Court by allegedly refusing to escrow payments from petitioner pursuant to that order; and (2) petitioner's "Motion in Limine" to exclude from the record the affidavits filed by the Commission with its Brief in Opposition on Remand.

For clarity of analysis, the Commission presents its findings of fact in this decision in four sections, corresponding to petitioner's four claims (the two substantive and two procedural claims outlined above). Similarly, the Commission addresses the legal issues presented by petitioner in four parts. Familiarity with the Commission's prior decision in this case is presumed. This decision does not repeat the general procedural history or other findings of fact found in the Commission's earlier opinion.

I. Findings of Fact

A. The Commission's Actions Relating to the Treatment of Organic Milk Under the Compact

1. In addition to the present petition for exemption, the Commission has conducted three primary proceedings bearing on the proper treatment of organic milk under the Compact:

(1) the Commission's initial proceeding to adopt an over-order price regulation, conducted in 1996-97; (2) a rulemaking proceeding in 1998-99 addressing the specific question whether to "exempt organic milk handlers from the Compact Over-order Obligation and exclude organic milk producers from the producer pool"[1]; and (3) a 1998 proceeding addressing a petition for the exemption of organic milk filed by Horizon Organic Dairy, Inc.

2. At the time of the Commission's initial rulemaking, petitioner filed comments urging the Commission to adopt, as part of its over-order price regulations, an exemption for "processors who already pay over-order pricing . . . CONSTANTLY THROUGHOUT THE YEAR, not for example, when milk is in short supply or when it is a means to solicit more farmers."[2]

3. At the Commission's meeting on May 14, 1997, the commissioners considered this request. One commissioner expressed concern that starting down the path toward a patchwork of exemptions from the over-order price regulation would ultimately lead to an erosion of the Compact similar to the erosion of the Regional Cooperative Marketing Agency in the 1980s. Another commissioner observed that it would be administratively difficult to provide an exemption not recognized by the federal Market Order System. Upon completion of the Commission's deliberations, the state delegations voted unanimously not to recognize an exemption from the regulation based on petitioner's comment.[3]

4. The Commission's comments published in the Federal Register upon adoption of the final rule likewise rejected petitioner's request for an exemption. The Commission noted that

> the [over-order] price regulation is designed to mirror operation of the [Federal] Market Order in substantial form to the degree possible. An exemption from regulation based on payment of market-based premiums is not recognized under the Federal Market Order System. Accordingly, to provide such an exemption would disrupt the complimentary function of the Compact and underlying Market Order.[4]

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1 *See* 63 Fed. Reg. 65563, 65564 (Nov. 27 1998).

2 *See* Affidavit of Kenneth M. Becker ("Becker Aff.), Exhibit A (letter to the Commission from Peter M. Flint) (emphasis in original).

3 *See* Becker Aff., Exh. A (minutes of Commission's May 14, 1997 meeting).

4 *See* 62 Fed. Reg. 29626, 29631 (May 30, 1997).

5. Following the Commission's rejection of petitioner's initial request for an exemption -- and after petitioner commenced this proceeding in August 1997 -- petitioner also filed (in April 1998) a Petition to Initiate Rulemaking requesting that the Commission consider whether its over-order price regulations should be modified to establish an independent over-order price and producer settlement fund for organic milk.[5] In response to that petition, the Commission initiated a subjects and issues rulemaking by publishing a notice of rulemaking soliciting comments on the question whether to "exempt organic milk handlers from the Compact Over-order Obligation and exclude milk producers from the producer pool."[6]

6. On December 16, 1998, the Commission held a public hearing on the question whether organic milk should receive special treatment under the Compact. At the hearing, Carmen Ross, the Commission's Regulations Administrator, testified on behalf of the Commission. Mr. Ross stated that the Commission's "Price Regulation was modeled after the regulations of the Federal Milk Market Order 1," which "do[es] not distinguish between milk and organic milk."[7] Mr. Ross also noted that the Commission's regulations followed the Compact itself in defining the term "milk" as the "lacteal secretion of cows," without distinguishing between conventional and organic milk.[8]

7. Some advocates of special treatment for organic milk also testified at the hearing. They made two primary arguments. First, they urged that organic milk should be treated differently than conventional milk under the Compact because the costs of producing, processing, and distributing organic milk are purportedly higher than for conventional milk.[9] Second, they suggested that the organic dairy industry already pays producers a higher rate for organic milk than that mandated by the Commission's regulations or the federal system, and that differential treatment thus should be adopted.[10]

8. Advocates for special treatment of organic milk, disagreed, however, on what that treatment should be. Kelley Devaney, the business manager for petitioner, emphasized that The Organic Cow was "not looking for . . . an outright exemption for organic dairy." Rather, the

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5 *See* Affidavit of Peter Flint, Exhibit B.

6 *See* 63 Fed. Reg. 65563, 65564 (Nov. 27, 1998).

7 *See* Becker Aff., Exh. H, at 6-7.

8 *Id.* at 6.

9 *See, e.g., id.* at 48-52 (testimony of Peter Flint); *id.* at 88-95 (testimony of Mark Retzloff).

10 *See, e.g., id.* at 47 (testimony of Peter Flint); *id.* at 90 (testimony of Mark Retzloff).

"petition was specific for setting up a separate Organic Dairy Compact."[11] In contrast, Mark Retzloff, a representative from Horizon Organic Dairy, disagreed and testified that Horizon's goal was for organic milk to be "exempt from the Compact," without "establishing a subcompact for organic [milk] and all the different things that will have to go into that."[12]

9. At the hearing, a number of commissioners raised questions concerning the proposed differential treatment of organic milk. Chairperson Mike Wiers noted that by exempting organic milk, the Commission would essentially "push [the price of] the 'conventional' milk closer to [organic milk]," and thereby "giv[e] preferential treatment to organic milk."[13] Similarly, Commissioner Jacques Couture suggested that, because the Compact increases the cost of conventional milk to the consumer, it should likewise increase the cost of organic milk, so as to preserve the existing relative "equation" between the two.[14]

10. In addition to hearing from live witnesses, the Commission also received written comments in connection with its rulemaking proceeding on the proper treatment of organic milk. Some letters were filed in support of the petition, primarily reflecting concern for the economic burden that the over-order price regulation could place on The Organic Cow.[15] Other commenters opposed the petition. Two commenters suggested that treating organic milk differently under the Commission's regulations would "weaken the entire Compact," and lead to differential treatment for other "differing production methods."[16] Another urged that organic milk should be treated like conventional milk because much organic milk "finds its way into conventional markets."[17] Commenters also expressed concern with the administrative costs of running a separate pool, were that approach to be adopted as advocated by petitioner.[18]

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[11] *Id.* at 14.

[12] *Id.* at 99-100.

[13] *Id.* at 100.

[14] *Id.* at 38-39.

[15] The complete record from that rulemaking proceeding appears as Exhibit H to the Affidavit of Kenneth Becker.

[16] *See* Becker Aff., Exh. 5, p. 120-21 (letter of Agri-Mark); *id.* p. 129 (comments of Vermont Department of Agriculture, Food & Markets).

[17] *Id.*, p. 123 (letter of Independent Dairymens Cooperative Association, Inc.).

[18] *Id.*

11. At a deliberative meeting on January 13, 1999, the Commission reviewed and considered the rulemaking record and decided not to exempt organic milk from the price regulation. The reasons given by the Commission at that time included: (1) that much of the organically produced milk in new England is not sold as organic fluid milk but is instead sold as conventional milk or for other class uses; (2) that the amount of organic milk in the New England is too small (less than .5% of the market) to justify separate regulation; (3) that the administrative costs of running a separate organic pool would not be cost effective; and (4) that the two major organic milk dealers supplying New England disagreed as to how the Commission should proceed -- one advocated exemption, and the other separate regulation.[19]

12. The Commission also has considered the proper regulatory treatment to be accorded organic milk in connection with a petition filed by Horizon Organic Dairy, Inc. Specifically, in *In re Petition of Horizon Dairy, Inc. on behalf of Farmland Dairies*, HEP-97-009 (Jan. 26, 1998), the Commission denied Horizon's request that certified organic milk processed and packaged by Farmland Dairies and distributed in New England be exempt from the over-order requirement.

13. The arguments advanced by Horizon in that proceeding were similar to those urged by petitioner here. Horizon primarily argued that (1) organic milk is sufficiently different from non-organic milk so as to require different regulatory treatment; (2) that differential treatment is required because Horizon already paid higher prices to its farmers than the over-order price set by the Commission's regulations; and (3) that the Compact over-order price obligation would represent a "severe economic hardship" for Horizon and for organic dairymen and feed growers.[20]

14. In rejecting Horizon's claim that organic milk is a distinct product from conventional milk, the Commission observed that the Federal Milk Market Order System does not make any distinction between organic and conventional milk. In addition, the Organic Foods Production Act of 1990 -- which Horizon invoked -- also provides no exemption or other provision for distinguishing organic milk from non-organic milk under federal law. The Commission noted that the Compact generally "requires the Commission to apply, adapt and develop the regulatory techniques" of the federal system, and held that "[b]ecause [the legislatures] indicated no . . . policy preference that would envision different treatment of organic milk [under] . . . the Compact," "no such distinction" was intended.[21]

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19 *See* Becker Aff., Exh. I (minutes of Commission's January 13, 1999 meeting).

20 *See In re Petition of Horizon Dairy, Inc. on behalf of Farmland Dairies*, HEP-97-009 (Jan. 26, 1998), Part II.

21 *See id.*, Part II.1.

15. The Commission also rejected Horizon's claim that by paying prices in excess of the Commission's over-order price, Horizon was already "meeting the purposes of the Compact." The Commission wrote: "Petitioner reads the purposes of the Compact too narrowly. The mission of the Compact is 'to assure the continued viability of dairy farming in the northeast and to assure consumers of an adequate, local supply of pure and wholesome milk.'" That important mission, the Commission held, would be best served by encouraging the free play of market forces with regard to different subcategories of milk: "The regulation does not, therefore, recognize or give credit for price premiums paid in the market by any processor, whether for organic or non-organic milk." "Contrary to this intended neutral impact," accepting Horizon's argument would have "establish[ed] a preference resulting in an economic advantage for organic milk processors."[22]

16. Finally, the Commission also rejected Horizon's claim of economic hardship. It reasoned that Horizon could have renegotiated its contracts with producers to included the monthly over-order producer payout. Alternatively, Horizon could have continued to build the costs of the over-order obligation and administrative assessments "into the petitioner's price structure [to be] . . . passed on to the wholesale and retail marketplace."[23]

17. Horizon elected not to seek judicial review of the Commission's decision on its petition.

B. Financial Circumstances Relating to Petitioner's Claim of Hardship

18. The Organic Cow, LLC, was originally owned by Peter and Bunny Flint. Effective May 1, 1997, the Flints sold a 70 percent interest in the Organic Cow to H.P. Hood, Inc. ("Hood"), one of the nation's largest dairies. The jointly owned company was also registered as The Organic Cow, LLC.

19. As of August 17, 1997, when the petition at issue was filed, petitioner had contracts in place with approximately 50 New England organic dairy farmers. The average size of those farms was 40 to 45 cows. The contracts were "output" contracts, meaning that petitioner was required to purchase all conforming milk produced regardless of market conditions. The contracts provided for a minimum price of $18.00 per hundredweight, regardless of the class use of the milk, plus additional compensation to be correlated to butterfat and quality. The average price being paid by petitioner under those contracts at the time of the petition was $19.36 per hundredweight.[24]

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22 *See id.*, Part II.2.

23 *See id.*, Part II.3.

24 Effective January 1, 1999, the producer pay price was increased to $21.00 ($21.25 in

20. Petitioner's contracts with producers were to be automatically renewed unless a party opted out of the contract extension by giving notice to that effect sufficiently in advance of the expiration of the contract term. Of petitioner's producer contracts in place at the time of the petition, many were negotiated after the Commission had published its price regulations on May 31, 1997. None of the contracts, however, specifically included a provision to accommodate the Compact price regulation. In contrast, petitioner did take account of the Maine Milk Commission's price regulation by adjusting its contracts with Maine producers to offset the regulatory burdens imposed on petitioner.

21. At the time of its petition, petitioner was suffering persistent operating losses over and above the amount then owing under petitioner's over-order obligation. The record reveals a number of market-oriented explanations for these losses, including competition from western dairies, difficulties in obtaining adequate distribution, and a build-up in inventory arising from an oversupply of milk.

22. Petitioner's partnership with Hood provided access to a large distribution system and to additional capital. During the seven-month period ending November 30, 1998, Hood supplied $1.1 million to petitioner, a transfer of funds characterized by petitioner as a loan.

23. In spite of petitioner's financial difficulties, the record does not reflect any efforts on the part of petitioner to renegotiate its contracts with providers to take account of the Compact price regulation. Nor does it appear that petitioner discussed with Hood whether Hood would be willing to pay the Compact obligations on petitioner's behalf.

24. At the time of the Commission's initial decision in this matter on March 31, 1998, Horizon Organic Dairy ("Horizon"), the nation's largest organic dairy, was petitioner's major competitor in the New England market. Approximately a year later -- at about the time of the district court's decision in this case in April 1999 -- Horizon acquired the Organic Cow's trademark and the rights to the organic milk previously subject to the Organic Cow's producer supply contracts. The record in this proceeding does not reveal the precise date that acquisition was consummated, or anything more about the nature of the transaction.

25. It is also unclear from the record the extent to which petitioner's financial difficulties have continued since the acquisition of its trademark and other assets by Horizon. Although petitioner has had ample opportunity to do so -- and, indeed, was encouraged by the Commission to "address facts or circumstances since the January 1998 oral hearing that relate to [its] claim for an exemption"[25] -- petitioner has not provided the Commission any updated information regarding its financial status since the time of its original petition.

Maine), plus premiums, for an average payment in excess of $24.00.

[25] *See In re Petition of The Organic Cow* at 2, HEP-97-006 (Aug. 9, 1999).

C. Petitioner's Escrow Payments

26. On August 28, 1997, pursuant to a request by petitioner, the Commission ordered that all obligations due from petitioner under the over-order price regulation be placed in an escrow account pending a final administrative determination in this matter. Petitioner failed to comply with that order, by refusing to make payments into escrow when due for the months of July, August, September, October, November, and December 1997 and January 1998.

27. On December 31, 1997, the Commission filed an enforcement action in the United States District Court seeking injunctive relief requiring petitioner to make payments into escrow. On March 16, 1998, the Court issued an order requiring "[d]efendant," The Organic Cow, LLC -- petitioner in this proceeding -- "to pay into escrow with [the Commission] all monthly administrative assessments and over-order price obligations as they come due, commencing with the payment due March 18, 1998, pending further order of this Court." As required by the Court's order, petitioner made payments into an escrow account maintained by the Commission for the months of March, April, May, and June of 1998.

28. On June 30, 1998, petitioner ceased operations at its only plant subject to the over-order price regulation, the Tunbridge, Vermont plant. After that time, petitioner had no further over-order assessments due to the Commission, and ceased reporting its fluid milk sales and receipts to the Commission.

29. Beginning in July 1998, milk from petitioner's producers (formerly received by petitioner at its Tunbridge plant) began being shipped to Hood's pool plant in Agawam, Massachusetts. Hood thereafter included that milk in its reports to the Commission, as required by the Commission's regulations. Hood did not report milk sales under petitioner's label separate from Hood's other milk distributed in New England from the Agawam plant.

30. In the months since July 1998, Hood has paid its over-order obligations on the milk formerly received by petitioner. Hood has done so each month by sending two wire transfers, one of which purports to be attributable to The Organic Cow, LLC.

31. On July 31, 1998, the Commission notified petitioner that the termination of its operations at Tunbridge meant that The Organic Cow was no longer a handler covered by the Commission's regulations. The Commission stated that because the district court's escrow order applied only to The Organic Cow, and "does not apply to Hood," sums received from Hood in satisfaction of its over-order obligations would not be held in escrow. The Commission has since pooled all over-order obligation payments received from Hood and returned producer payment funds from the pool to Hood for payment to its producers consistent with the Commission's regulations.

32. Neither petitioner nor Hood sought to obtain an escrow order applicable to Hood in the district court litigation, notwithstanding that they were notified of the Commission's position long prior to the September 14, 1998 oral argument in that case. Nor has Hood

sought relief from the Commission through participation in this proceeding, or by initiating its own proceeding.

33. Petitioner's Opening Brief on Remand contains a single paragraph arguing that the Commission's failure to escrow funds received from Hood since September 1998 violates the district court's injunction.

34. On January 25, 2000, the Hearing Panel issued an "Order on Procedural Issues." That order directed the Commission to submit comments addressing the escrow issue raised by petitioner, and authorized petitioner to file a reply to those comments.

35. On February 8, 2000, the Commission submitted a pleading entitled "Comments Regarding Escrow," together with a supplemental affidavit and additional attachments. On February 15, 2000, petitioner filed a reply to the Commission's brief, and an accompanying affidavit.

D. Petitioner's "Motion in Limine"

36. On August 9, 1999, the Hearing Panel issued an order establishing a schedule for the submission of written briefs and any accompanying affidavits by the parties to address the issues on remand. Petitioner did not object to the Hearing Panel's proposed method of addressing the issues by way of written submissions and, in particular, did not request a second oral hearing.

37. After two extensions of time were granted to petitioner due to the ill health of her counsel, petitioner filed its Opening Brief on November 22, 1999, accompanied by the affidavits of Peter Flint and Mark Retzloff. On December 22, 1999, the Commission filed its Brief in Opposition, accompanied by the affidavits of Carmen Ross and Kenneth M. Becker.

38. The Affidavit of Carmen Ross and its accompanying exhibit quantified petitioner's obligations under the Commission's over-order regulations for the period from July 1997 through June 1998. The Affidavit of Kenneth Becker addressed the Commission's actions in connection with the regulation of organic milk -- set forth in Part I.A., *supra* -- with an emphasis on activities post-dating the Commission's initial decision in this matter on March 31, 1998.

39. On January 5, 2000, petitioner filed its Reply Brief, together with a pleading styled a "Motion in Limine," "pursuant to Rule 103(a)(1) of the Federal Rules of Evidence." The motion argued that the affidavits of Carmen Ross and Kenneth Becker should be stricken from the official record in this proceeding and should not be considered by the Commission in reaching a decision on petitioner's request for an exemption from the operation of the Compact over-order price regulations.

40. On January 21, 2000, the Commission filed an Opposition to petitioner's motion, arguing that the Ross and Becker Affidavits should properly be included in the record of this proceeding.

41. On January 25, 2000, the Hearing Panel, having reviewed petitioner's "Motion in Limine" and the Commission's Opposition thereto, denied petitioner's request to strike the affidavits submitted by the Commission. The Hearing Panel gave "three separate and independent grounds for its decision, any one of which would be sufficient to warrant denying petitioner's motion": (1) that "it is a settled principle of administrative law that, in fashioning policy on a particular subject -- whether through rulemaking or adjudication -- an agency may properly take account of its related determinations in other proceedings, and the bases for such decisions"; (2) that "the affidavits that have been supplied by the Commission conform to the procedural rules governing this matter"; and (3) that "it would be particularly inappropriate to strike the information regarding the Commission's related proceedings under the circumstances of this case," given that petitioner had urged the relevance of the Commission's rulemaking proceeding on organic milk in its own affidavits on remand.

42. Notwithstanding its denial of petitioner's motion to exclude the Ross and Becker Affidavits altogether, the Hearing Panel provided that petitioner would "be afforded an additional opportunity to file a submission addressing the materials presented by those affidavits, in accordance with the Revised Schedule set forth herein."

43. Pursuant to the Hearing Panel's January 25, 2000 ruling, petitioner filed a Brief Re: Motion in Limine on February 7, 2000. Petitioner's brief did not address the substance of the materials presented by the Ross and Becker Affidavits, but instead renewed petitioners' objections to admitting those affidavits at all. Petitioner also objected that it had not been afforded adequate time to respond to the materials in the affidavits.

II. Conclusions of Law

Petitioner's request for an exemption from the application of the Commission's over-order price regulation is before the Commission on remand pursuant to the April 2, 1999 decision of the United States District Court for the District of Vermont. In that decision, the district court rejected petitioner's constitutional claims (including challenges under the Due Process, Equal Protection, and Contract Clauses of the United States Constitution), but remanded the case because it could not determine whether the Commission had "considered Organic Cow's argument that organic milk producers and handlers should be treated differently than non-organic producers and handlers under the Compact; and if it did consider the argument, on what basis it rejected it."[26]

[26] 46 F. Supp. 2d at 306.

Petitioner's arguments on remand may be organized into two basic issues. First, petitioner challenges the Commission's authority, as a general matter, to treat organic milk and conventional milk alike for purposes of its over-order regulations. Petitioner claims that differential treatment of organic milk is required by the Compact itself, by the evidence on the record in this proceeding, and by federal district court cases disapproving agency efforts to treat particular organic products like conventional products in other contexts. Second, petitioner argues that even if organic and conventional milk may generally be treated alike under the over-order regulations, petitioner's particular circumstances require that the Commission grant it a special exemption.

For the reasons set forth below, the Commission rejects both of petitioner's arguments. Accordingly, petitioner's request for an exemption from the application of the Commission's over-order price regulations is denied.[27]

A. Whether the Commission's decision to treat organic milk and conventional milk alike for the purpose of over-order price regulation was justified.

1. The Compact itself refers to a single category of "milk."

The Compact refers to one category of "milk," defined generally as "the lacteal secretion of cows and includ[ing] all skim, butterfat, or other constituents obtained from separation or any other process."[28] The Compact further specifies that "[t]he term ['milk'] is used in its broadest sense and may be further defined by the commission for regulatory purposes."[29] Thus, the Compact does not differentiate organic milk from conventional milk, and, indeed, the term "organic" does not appear in the Compact at all.

Petitioner argues that the Compact nonetheless implicitly expresses a legislative intent that the Commission treat organic milk differently from conventional milk. In particular, petitioner claims that the Commission's unified approach to regulating organic and conventional

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[27] Notably, petitioner bears the burden to demonstrate that the Commission's exercise of the authority accorded it by the Compact is arbitrary and capricious. *See, e.g., National Ass'n of Regulatory Utility Commissioners v. FCC,* 746 F.2d 1492, 1502 (D.C. Cir.1984) (the party challenging an agency's action as arbitrary and capricious bears the burden of proof). Petitioner has failed to carry that burden here. The Commission's decision on this petition does not, however, depend on petitioner's failure to carry its burden. For the reasons set forth below, the Commission finds that the evidence on the record affirmatively supports its decision to treat organic and conventional milk alike for purposes of its regulations, without regard to the question of burden.

[28] *See* Compact § 2(10).

[29] *Id.*

milk is inconsistent with the Compact's instruction to "consider . . . the costs of production including, but not limited to the price of feed, the cost of labor . . . and the price necessary to yield a reasonable return to the producer and distributor," because the Commission "only considered the . . . [costs] associated with conventional dairy farming."[30]

This argument is fundamentally flawed. First, petitioner's claim that the Commission must consider the costs of organic milk production and conventional milk production separately simply assumes the conclusion that organic milk and conventional milk are so different as to require such treatment. Nothing in the Compact itself supports that conclusion, and it is a conclusion with which the Commission disagrees.[31]

Second, the Commission has considered the costs of organic milk production, just as petitioner claims that Section 9(e) of the Compact requires. In addition to other actions, in response to a Petition to Initiate Rulemaking filed by Petitioner, the Commission published a notice on November 27, 1998 soliciting comments on the specific question whether to "exempt organic milk handlers from the Compact Over-order Obligation and exclude organic milk producers from the producer pool."[32] Petitioner and others involved in organic milk production submitted written comments and, at a hearing held on December 16, 1998, gave oral testimony regarding the costs of organic milk production.[33] At the close of that proceeding, the Commission found that petitioner's evidence of higher costs for the production of organic milk did not justify separate regulation of organic milk in the face of the array of problems that would be presented by such differential regulation.[34] Thus, although the Commission does not interpret the Compact to require it to consider the costs of producing organic milk separately from the costs of producing Class 1 milk generally, it has considered the costs of organic milk production and finds that they do not mandate that organic milk be treated differently from conventional milk.

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30 *Petitioner's Opening Brief on Remand* at 28.

31 *See* Part II.A.2, *infra*.

32 63 Fed. Reg. 65563, 65564 (Nov. 27, 1998).

33 *See* Affidavit of Kenneth Becker, Exhibit H (record of the Commission's rulemaking proceeding regarding whether organic milk handlers should be exempted from the Commission's over-order price regulations).

34 *See id.*, Exhibit I (minutes of Commission meeting in which motion that the Commission not exempt organic milk from its regulations passed). As set forth in detail in Part II.A.2, *infra*, upon careful reconsideration of the evidence regarding the costs of organic milk production in the record, the Commission adheres to its earlier decision that such evidence does not require that the Commission regulate organic milk and conventional milk as separate products.

Moreover, as the Commission wrote in *In re Petition of Horizon Dairy, Inc. on behalf of Farmland Dairies*, HEP-97-009 (Jan. 26, 1998), the enactment of the Compact against the backdrop of the federal Milk Market Order System[35] supports the Commission's view that the Compact should not be interpreted to accord special treatment to organic milk:

> [T]he Compact requires the Commission to apply, adapt and develop the regulatory techniques historically associated with milk marketing [under the federal system]. . . . The [federal system] historically has recognized no distinction between organic and non-organic milk for purposes of regulation. . . . The Congress and the six New England state legislatures are presumed to have known when adopting the Compact that there was no such distinction recognized in the 'techniques historically associated with milk marketing' . . . ."[36]

In the face of that knowledge, however, neither Congress nor the state legislatures suggested any "distinction or policy preference that would [require] different treatment of organic milk [under the Compact] in enacting the Compact enabling legislation."[37] It therefore appears that no such differential treatment was intended.[38]

The fact that the federal system recognizes no distinction between organic and non-organic milk is, however, significant even beyond the guidance that it offers in determining legislative intent under the Compact. As the Commission observed at the time it adopted its over-order price regulation, the "regulation is designed to mirror operation of the [Federal] Market Order in substantial form to the degree possible."[39] Because both the federal regulations and the Compact apply to exactly the same fluid milk distributed in New England, preserving the symmetrical operation of the two systems simplifies the administration of both. In contrast, permitting the Compact to develop a patchwork of such exceptions not recognized by

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[35] The federal Market Order System was established by the Agricultural Marketing Agreement Act of 1937. *See* 7 U.S.C. §§ 601-674 (as amended).

[36] *See In re Petition of Horizon Dairy, Inc. on behalf of Farmland Dairies*, HEP-97-009 (Jan. 26, 1998), Part II.1.

[37] *Id.*

[38] There is no question that the Commission retains the authority to deviate from the regulatory approach of the federal Milk Market Order System when appropriate. *See, e.g.,* Compact § 3(b) (affording the Commission "broad flexibility to devise regulatory mechanisms to achieve the purposes of the compact"). Nevertheless, the settled federal approach on this issue supports the Commission's interpretation.

[39] *See* 62 Fed. Reg. 29626, 29631 (May 30, 1997).

the federal system would "disrupt the complimentary function of the Compact and underlying Market Order."[40]

In sum, the Commission finds that the Compact does not, either explicitly or implicitly, support treating organic and conventional milk differently for purposes of its regulations. In the following section of this discussion, the Commission explains why the evidence presented by petitioner also does not preclude the Commission from applying its regulations consistently to all Class 1 milk produced in the Compact states.

2. The evidence on the record does not require the Commission to accord special treatment to organic milk.

Petitioner devotes much of its briefs to arguing that the evidence on the record requires that the Commission accord special treatment to organic milk because that evidence purportedly demonstrates that organic milk is a separate "product" from conventional milk. The Commission is not convinced, however, that the question whether organic milk is a distinct "product" has any particular significance. Under the Compact, the Commission has broad authority to regulate the category of "milk" -- whether that term comprises one product or many -- so as to "assure the continued viability of dairy farming in the northeast and to assure consumers of an adequate, local supply of pure and wholesome milk," which is a "matter of great importance to the health and welfare of the region."[41]

As the Commission explained in the *Horizon* proceeding, the Commission believes that this mission will be best served by limiting, to the extent possible, the impact of the Commission's regulations on the free play of market forces with regard to subcategories of milk.[42] "Contrary to this intended neutral impact," providing special regulatory treatment for organic milk -- as advocated first by Horizon and now by petitioner -- would, in practice, "establish a [regulatory] preference resulting in an economic advantage for organic milk processors."[43] Regardless of whether organic milk and conventional milk are viewed as one "product" or two, the Commission is unwilling to interfere with market forces with regard to subcategories of milk. Thus, petitioner's conclusion that the Commission must accord special regulatory treatment to organic milk would not follow from its premise that organic milk is a separate "product" -- even if that were true.

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40 *Id.*

41 Compact § 1.

42 *See In re Petition of Horizon Dairy, Inc. on behalf of Farmland Dairies*, HEP-97-009 (Jan. 26, 1998), Part II.2.

43 *Id.*

Moreover, the evidence on the record plainly indicates that petitioner's premise is itself flawed. Far from demonstrating that milk and conventional milk are separate products, undisputed record evidence shows that much of the organically produced milk in New England is not sold as organic fluid milk, but rather as conventional milk or for other class uses.[44] The fact that organic milk is thus commingled with conventional milk in the marketplace undercuts petitioner's claim that these two allegedly "separate" products must be accorded different regulatory treatment.

Petitioner's contrary argument in favor of differential treatment relies primarily on evidence relating to the costs of production of organic milk that it has submitted to the Commission. The Commission does not, however, accept petitioner's implicit claim that in determining whether to treat organic and conventional milk alike, the Commission must focus narrowly on the costs of production. To the contrary the Commission finds that other factors -- such as the fact that distributors may bring organically and conventionally-produced milk to market in the same bottle -- must also be considered.

a. Substitutability

An important factor to consider is "demand substitutability," which reflects consumers' practical ability to switch from one "product" to another. In the antitrust context, for example, it is well-established that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[45] This type of product market analysis is also relevant here. If the cross-elasticity of demand for conventional and organic milk is high, then the Commission must regulate both alike if it wishes to avoid unnecessarily distorting consumer preferences.

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[44] *See* Becker Aff., Exh. H, Tab 3, at pp. 14-15 (Report on Organic Milk Production and Processing in the Northeast) (indicating that of 2.2 million pounds of organic milk produced by farmers shipping to petitioner, only 854,000 pounds was packaged and distributed as organic milk); *id.*, Tab 5, p. 121 (Agri-Mark letter to the Commission) (noting disagreement among organic milk handlers as to whether such milk should receive special treatment by the Commission based on actual production of organic milk, or sale of the milk as organic); *id.*, Tab 5, p. 123 (Independent Dairymens Cooperative Association letter to the Commission) (noting that because "there is a surplus of organic milk over what is needed" to fill demand for the product, the "surplus finds its way into conventional [milk] markets").

[45] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). The "cross-elasticity of demand" between two products measures the extent to which the quantity demanded of the first product will change in response to a change in price of the second product. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 469 (1992).

Petitioner's own arguments suggest that the cross-elasticity of demand between organic and conventional milk is high. According to petitioner, "organic milk is highly price-sensitive."[46] "There are not enough 'committed' users to comprise a meaningful market and pass along significant price increases."[47] In other words, according to petitioner, as the price of organic milk rises relative to that of conventional milk, consumers switch to conventional milk. Correlatively, as the price of organic milk falls relative to that of conventional milk, consumers may switch to organic milk.

As noted above, the Commission is committed to a policy of regulating in a manner as "market-neutral" as possible with regard to subcategories of milk. To effectuate this policy in the face of high elasticity of demand between organic milk and conventional milk, the Commission must avoid -- to the extent possible -- changing the relative prices of organic and conventional milk. Thus, if handlers of conventional milk must pass Compact fees on to their customers, so, too, must handlers of organic milk. Otherwise, the relative prices of the two kinds of milk will be distorted, and organic handlers will receive an administratively-created benefit in the marketplace. Accordingly, the Commission finds that it is not only reasonable, but desirable, to treat organic and conventional milk alike for the purpose of its over-order price regulations.

b. Costs of Production

As set forth above, the Commission does not agree with petitioner's implicit claim that the costs of production are the critical factor to be considered in determining whether organic and conventional milk should be treated alike. Moreover, the Commission finds that the costs of production for organic and conventional milk are not so different as to mandate special treatment for organic milk. The Commission is not, of course, blind to the fact that petitioner has submitted evidence on the record suggesting that the average costs of organic milk production are higher than the average costs of conventional milk production.[48] There is, however, also evidence on the record suggesting that the lion's share of differences in the costs of milk production (whether organic or conventional) are related to the farm size of the producer. A study commissioned by the Commission to address milk production costs in New England found that when certain assumptions – such as opportunity costs of operator labor --

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46 Petitioner's Opening Brief at 13.

47 *Id.* at 14.

48 *See, e.g., Becker Aff., Exh. I.*, Tab 4 (testimony of Horizon Organic Holding Corporation) (stating that the cost of organic milk production is greater than the cost of conventional milk production, and purporting to identify seven specific categories of costs that are higher for organic producers).

are held steady, the median costs of milk production per hundredweight range from $17.60 for herd sizes over 90 cows, to $23.34 for herds with fewer than 47 cows.[49]

According to petitioner, the average herd size of its producers is 40-45 cows.[50] Petitioner's contracts fix a price of $21.00 per hundredweight for its organic milk.[51] This rate paid by petitioner -- which it claims constitutes a sustainable price for organic farmers, and thus must cover their costs -- falls well within the costs of production on similar-sized conventional farms in New England.[52] As a result, even leaving aside the other difficulties with petitioners' arguments, the record does not support petitioner's claim that the costs of organic milk production are so much greater than the costs of conventional milk production as to require special regulatory treatment of organic milk.

c. Producer contracts in excess of the over-order price

Petitioner also argues that regardless of whether organic milk is a separate "product" from conventional milk, petitioner should not be subject to the over-order price regulations because its producer contracts -- which set prices in excess of the Compact over-order price -- already satisfy the Compact purpose of ensuring a sustainable price for producers. The Commission has already rejected this argument in refusing to grant an exemption from the regulations in response to Horizon's petition. We likewise reject the argument here.

Specifically, in *Horizon* the Commission explained that "[p]etitioner reads the purposes of the Compact too narrowly."[53] Those purposes are not limited to "merely establishing equitable prices to producers"; rather, "the Commission is also charged by the Compact with ensuring reasonable regulatory uniformity that will have a neutral effect on the milk market." To

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49 *See id.*, Exh. G at 14 (*1996 Costs of Production in the New England Milk Market*).

50 *See* Petitioner's Opening Brief at 4.

51 *Id.* at 3.

52 Petitioner's Response to Proposed Decision contains the conclusory statement that its costs do not, in fact, fall within this range because its pay price does not include imputed labor costs. However, despite requesting and receiving an extension of time within which to file its Response, petitioner presents no evidence or explanation of this purported distinction beyond its conclusory statement. Accordingly, in addition to the other reasons presented in this decision, petitioner's claim that the Commission is "comparing apples to oranges," *see* Petitioner's Response at 10, is unsupported by the record, and must be rejected.

53 *See In re Petition of Horizon Dairy, Inc. on behalf of Farmland Dairies*, HEP-97-009 (Jan. 26, 1998), Part II.2.

maintain this neutral impact, it is the Commission's policy not to take account of private economic arrangements between handlers and producers, regardless of the basis for such payments. Declining to adapt the price-order regulations to account for petitioner's contracts with its producers is simply an application of that policy.

The record in this proceeding reveals that handlers of conventional milk, like handlers of organic milk, may (and often do) have arrangements that result in payments to producers in excess of the Commission's price floor.[54] Such arrangements may include, for example, additional compensation based on volume, quality, or priority of access to milk over a competitor.[55] The Commission's regulations do not allow handlers of conventional milk to avoid or reduce their obligations under the Compact on the ground that such private economic arrangements with producers result in a price per hundredweight in excess of the floor established by the Commission's regulations. The same result must obtain in cases (like petitioner's) where the additional compensation to producers is based on the use of organic means of production. Here too, the Commission believes that the Compact purposes are best served by regulating with regard to the single category of fluid "milk," rather than creating separate regulatory regimes for subcategories of milk (in this case defined by private economic arrangements).

Petitioner claims that the prices it pays for organic milk should be distinguished from "premiums" paid for volume or quality because they are embodied in two-year contracts and represent "guaranteed" prices that are not "based on marketplace supply and demand," but are "independent of market conditions."[56] The Commission finds, however, that the form taken by a particular private economic arrangement is not determinative of whether its over-order price regulations must take account of such arrangements. The critical question, as explained above, is whether taking such arrangements into account would create market distortions. The Commission finds that it would.

3. The cases cited by petitioner do not require the Commission to accord special treatment to organic milk.

Petitioner also argues that two unpublished district court opinions indicate that treating organic milk and conventional milk alike for purposes of the Commission's over-order price regulation "is an abuse of discretion."[57] Those decisions are thoroughly distinguishable, and,

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54 *See, e.g.,* Becker Aff., Exh. H, Tab 1, at 59, 78-79, 105.

55 *Id.* at 108.

56 Petitioner's Opening Brief at 29.

57 *See Pringle v. United States*, No. 97-CV-60342-AA,1998 U.S. Dist. LEXIS 19378 (E.D. Mich. Dec. 9, 1998); *Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-

moreover, are not binding on the Commission because they arose in different statutory and factual contexts.

The issue in *Pringle v. United States* was whether the Michigan Consolidated Farm Service Agency's failure to pay a higher rate of disaster relief benefits as compensation for the loss of organic beans than for the loss of conventional beans was an abuse of discretion. Because it was undisputed that "organically grown beans demand[ed] a significantly higher price in the marketplace than chemically grown beans," the court found that it was "unreasonable for the [agency] to refuse to recognize this marketplace distinction by way of a separate disaster payment rate."[58] Thus, the *Pringle* court obliged the agency to pay a higher disaster relief price for organic beans.

Pringle is inapposite here because, unlike the disaster relief payments at issue in that case, the Commission's over-order fees are not intended to serve as a substitute for the valuation of milk (whether organic or conventional) by the private marketplace. To the contrary, the Commission wishes -- to the extent possible -- to preserve the market signals generated by consumer preferences with regard to subcategories of milk. As discussed above, the Commission believes that to do so, it must endeavor not to upset or distort the relative prices of organic and conventional milk at the same level. Accordingly, if Compact over-order fees are applied so as to raise conventional milk prices to the consumer, the same fees must also be applied to organic milk. In short, *Pringle* is distinguishable because the regulatory action in that case was intended as a stand-in for the private market, while the Commission's over-order price regulations are intended to supplement that market, without unduly distorting it by exempting a particular subcategory of milk from regulation.

The issue in *Kreider Dairy Farms v. Glickman* was whether Kreider, a kosher dairy, should be regulated as a "handler" under federal milk marketing regulations (and so subject to paying certain fees), or accorded an exemption on the ground that it was a self-contained "producer-handler." The agency found that because Kreider distributed its milk through subdealers -- and thus could allegedly rely on other producers to meet its customers' needs during periods of short supply, rather than having to bear the cost of producing an over-supply of its own -- it was not self-sufficient enough to qualify for the "producer-handler exemption."[59] The court disagreed and vacated the agency's decision. It reasoned that because the record indicated that Kreider's kosher milk could not, in fact, be augmented in periods of short supply

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6648,1996 U.S. Dist. LEXIS 12094 (E.D. Pa. Aug. 15, 1996).

[58] *Pringle*, 1998 U.S. Dist. LEXIS 19278, at *22-23.

[59] *Kreider*, 1996 U.S. Dist. LEXIS 12094, at *23-24.

by conventional milk from other producers, Kreider's autonomy was preserved for purposes of the "producer-handler" exemption, notwithstanding its sales through subdealers.[60]

Kreider is plainly inapplicable in the present circumstances. The question here is whether the Commission may permissibly regulate organic and conventional milk alike so as to avoid conferring an administratively-created competitive advantage on organic milk. For the reasons set forth in Parts II.A.1 and II.A.2, *supra*, the Commission believes that approach is justified. That determination is in no way undercut by the *Kreider* court's unrelated finding that a kosher milk producer-handler reaps no economic benefit from distributing through subdealers because the kosher dairy still must bear the burden of producing an over-supply at some times to satisfy its customers during other times when its cows produce less milk. For these reasons, the Commission finds that the cases cited by petitioner do not prevent it from treating organic milk and conventional milk alike under its regulations.

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In sum, the Commission finds that petitioner has failed to carry its burden to show that the Commission lacks justification for its decision to regulate organic and conventional milk alike. Both the evidence on the record and sound principles of regulatory judgment strongly support the Commission's decision to treat "milk" as a single category, rather than drawing distinctions among different possible subcategories of "milk." Such an approach best serves the Compact's ultimate goal of ensuring stability in the region's local milk supply, with the accompanying benefits for the health and welfare of the region. *See* Compact, § 1.

B. Whether petitioner has demonstrated that its particular financial circumstances present such a unique economic hardship as to warrant an exemption in this case.

In Part II.A of this decision, *supra*, the Commission explains why its decision to regulate organic and conventional milk alike makes sense as a general matter. This section considers whether, notwithstanding the Commission's policy of general applicability, petitioner has demonstrated that applying the regulations in its particular circumstances would result in such unique economic hardship as to warrant a departure from the Commission's regulations. For the reasons set forth below, the Commission finds that petitioner has failed to present -- and the record fails to contain -- the substantial and compelling evidence of unreasonable hardship necessary to justify such an exercise of the Commission's discretion.

Petitioner argues that if the regulations are applied to it, severe economic hardship will befall both petitioner and its producers. According to petitioner, the hardship on it will be a further decline in its financial fortunes, because it cannot pass the cost of Compact assessments

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[60] *Id.* at 25-31.

through to consumers.[61] Ultimately, petitioner could be forced to go bankrupt, "wind down," or sell its assets.[62] The hardship to producers, petitioner claims, is that they may be forced to "shut down their farms."[63]

Petitioner has failed, however, to substantiate its claims that dramatic consequences will follow if the Commission refuses to grant an exemption in this case. Indeed, despite repeated opportunities to update the record, petitioner has failed even to address the effect of recent changes in its ownership and operations on its claims of hardship.

The Organic Cow, incorporated in 1993, was originally wholly owned by Peter and Bunny Flint.[64] On May 1, 1997 -- two months before the Commission's over-order price regulations first went into effect -- the Flints sold a 70 percent interest in the Organic Cow to H.P. Hood, Inc., one of the nation's largest dairies.[65] Then, at about the same time that the District Court's decision was issued in April 1999, the Organic Cow's trademark and the rights to the organic milk that is subject to the Organic Cow's producer supply contracts were acquired by Horizon Organic Dairy, the country's largest organic dairy.[66]

Petitioner has declined to update the record to indicate how its acquisition by its largest and most aggressive competitor has affected its financial situation. Nor does the record contain details of the agreement underlying petitioner's change in ownership -- such as whether Horizon has assumed petitioner's liabilities in addition to acquiring its assets. As a result of petitioner's failure to provide updated information, it is unclear from the record before this Commission what, if any, financial effect of the challenged Compact assessments will be on petitioner. What is clear, however, is that there is no imminent danger of Horizon, which has acquired petitioner's producer supply contracts, going out of business.[67] It therefore does not appear, contrary to

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61 *See* Petitioner's Opening Brief at 10-15.

62 *Id.* at 19-20.

63 *Id.* at 16.

64 Petitioner's Opening Brief at 2.

65 *Id.* at 18.

66 *Id.* at 20.

67 As noted, the Commission also has denied a petition for an exemption from the over-order price regulations filed by Horizon. *See In re Petition of Horizon Organic Dairy, Inc., on behalf of Farmland Dairies, Inc.*, HEP-97-009. Horizon did not seek judicial review of that decision.

petitioner's hyperbolic claims, that "60 family farms in New England will be jeopardized" if the present petition is denied.[68]

Notably, however, even had petitioner remained independent, the record would not support its claim that the Commission's assessments would necessarily have caused it extreme financial hardship. Petitioner emphasizes that its contract prices -- exclusive of Compact monies -- were sufficient to afford producers a fair, sustainable price for their milk.[69] Petitioner also represents, however, that its producers would not have renegotiated those contracts, even faced with the possible failure of petitioner and the resultant jeopardy to the producers themselves.[70] In the Commission's view, this argument strains credulity.

First, as a matter of common sense, if petitioner's prices afford producers a sustainable wage, but petitioner would go out of business if producers insist on receiving Compact monies in addition, it seems clear that producers would generally opt for a sustainable wage over none at all. Indeed, even petitioner grudgingly conceded that at least some of the producer contracts could, in fact, have been renegotiated.[71]

Second, there is evidence in the record that petitioner and its Maine producers were able to agree that their contracts should take the Maine Milk Commission price regulation into account.[72] This strongly suggests that the same could be done for the Compact regulations. So far as the record reflects, however, petitioner never attempted to renegotiate its contracts with producers along these lines.

Third, a general description of financial difficulties, such as petitioner presents at pp. 10-15 of its Opening Brief, does not constitute the kind of compelling evidence of unreasonable hardship necessary to justify an exemption from the Commission's price-order regulations. A petitioner requesting an exemption must bear the burden of demonstrating that the claimed unreasonable economic hardship will result specifically from the application of the Commission's regulations. As the Commission found in its earlier decision, the economic hardships that petitioner describes result primarily from the operation of competitive forces.[73] Importantly,

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68 Petitioner's Opening Brief at 27.

69 *Id.* at 29.

70 *Id.* at 4.

71 *See In re Petition of The Organic Cow, LLC,* HEP-97-006 (Mar. 31, 1998) at 6.

72 *Transcript of January 15, 1998 Hearing*, at 30 (Testimony of Peter Flint).

73 *See, e.g.*, Petitioner's Opening Brief 11-12 (noting a variety of reasons for petitioner's persistent losses, including oversupply, competition with Western dairies, and limited

Horizon's acquisition of petitioner appears to change significantly the facts regarding petitioner's claims concerning its potential to be successful within the Compact regulatory regime, but petitioner has completely failed to address those developments.

* * *

In sum, the Commission finds that petitioner has failed to carry its burden to demonstrate that, notwithstanding recent changes in its ownership, it will still suffer extreme financial hardship from application of the Commission's regulations, such that an exemption should be granted. Petitioner has had ample opportunity to supplement the record to attempt to make this showing, but has failed to do so. Moreover, even without regard to changes in petitioner's ownership, the present record does not support its claim of hardship.

C. Whether the Commission's Refusal to Escrow Payments From Hood in Satisfaction of its Over-Order Payment Obligations Violates the Order of the District Court.

On remand, petitioner also seeks "to have its [post-September 1998] payments made under the District Court injunction escrowed in accordance with the terms of that injunction."[74] Petitioner claims that the Commission has violated the injunction by declining to escrow "petitioner's" escrow payments. The Commission finds that the payments at issue were not, in fact, "petitioner's," and therefore were not subject to the district court's injunction.

The record reflects that since June 30, 1998, when petitioner ceased operations at its plant in Tunbridge, Vermont, petitioner has had no over-order payment obligations to the Commission. The milk from petitioner's producers that had formerly been processed by petitioner at Tunbridge was thereafter received by Hood at its Agawam, Massachusetts pool plant, and Hood has included that milk in reports filed monthly with the Commission. Hood has not reported sales under petitioner's label separate from other fluid milk distributed in New England from the Agawam plant. Hood has, however, made two separate wire transfers each month in satisfaction of its over-order payment obligations, one of which purports to relate to milk received under petitioner's contracts.

In these circumstances, it appears clear that the post-September 1998 payments that petitioner maintains should have been escrowed were not petitioner's payments at all, but rather payments made by Hood in satisfaction of Hood's own obligations under the over-order regulations. Petitioner argues, however, that the term "defendant" in the district court injunction

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distribution).

74 *Id.* at 30.

"means and includes, The Organic Cow, LLC, its successors in interest and assigns."[75] Petitioner cites no authority for this assertion, and the Commission does not agree.

The plain language of the injunction applies only to The Organic Cow, LLC; to the extent that petitioner seeks to expand that language, it had ample opportunity to do so before the district court. In its July 31, 1998, letter, the Commission explained that because the Hood Agawam plant was receiving the milk formerly delivered to Tunbridge, Hood would thereafter be responsible for all plant reporting, pool payment and producer disbursement obligations in connection with that milk. The Commission expressly stated that "the [district court] order in this case requiring the escrowing of funds does not apply to Hood," so its funds would not be escrowed "[u]nless Hood obtains an escrow order applicable to it." Although oral argument before the district court was held on September 14, 1998 -- six weeks after petitioner was notified of the Commission's escrow position -- petitioner chose not to raise this question before the court. Petitioner similarly took no action in the more than six months that then elapsed before the district court's April 1999 decision. Finally, neither petitioner nor Hood sought relief from the Commission through a handler exemption proceeding. In these circumstances, the Commission declines to extend the scope of the district court's order to include Hood.

Petitioner also argues that the disputed monies paid by Hood are "in connection with Petitioner's over-order obligation" and therefore fall within the injunction. Petitioner claims that its over-order obligations did not pass to Hood -- notwithstanding the closing of the Tunbridge plant, and Hood's subsequent receipt of petitioner's milk -- because the Commission's "over-order price obligation is imposed on [all] 'handlers,' not [just] 'operators of pool plants.'"[76] Petitioner urges that, under 7 C.F.R. § 1301.9(e), it remains a "handler" because it "does not operate a plant but . . . engages in the business of receiving fluid milk products for resale and distributes to retail or wholesale outlets."

Petitioner simply misreads the Commission's regulations. Although The Organic Cow may still meet the definition of "handler" in 7 C.F.R. 1301.9(e), the Compact does not require reporting or payments from such handlers ("sub-dealers") that contract with pool plants or partially regulated plants to distribute milk under a specific label. Rather, the Compact regulation prescribes reporting and payment obligations for those handlers described in 7 C.F.R. 1301.9(a)-(d).[77] Indeed, petitioner's contrary interpretation of the regulations makes no sense, because it would impose payment obligations (for the same milk) on both sub-dealers and the pool plants or partially regulated plants with which they contract.

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75 Petitioner's Brief Re: Escrow Issue at 2.

76 *Id.* at 5.

77 *See* 7 C.F.R. Parts 1303, 1304, 1306, 1307, and 1308.

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Petitioner's claim that the Commission is not complying with the district court escrow order is thus without merit. The Commission has fully complied with that order.

D. Whether Exhibits Filed by the Commission with its Brief in Opposition on Remand must be Excluded from the Record.

As noted in Part I.D, *supra*, on January 25, 2000, the Hearing Panel denied petitioner's "Motion in Limine" to exclude from the record the affidavits submitted by the Commission. The Hearing Panel gave "three separate and independent grounds for its decision, any one of which would be sufficient to warrant denying petitioner's motion": (1) that "it is a settled principle of administrative law that, in fashioning policy on a particular subject -- whether through rulemaking or adjudication -- an agency may properly take account of its related determinations in other proceedings, and the bases for such decisions"; (2) that "the affidavits that have been supplied by the Commission conform to the procedural rules governing this matter"; and (3) that "it would be particularly inappropriate to strike the information regarding the Commission's related proceedings under the circumstances of this case," given that petitioner had urged the relevance of the Commission's rulemaking proceeding on organic milk in its own affidavits on remand.

Notwithstanding its denial of petitioner's motion, however, the Hearing Panel provided that petitioner would "be afforded an additional opportunity to file a submission addressing the materials presented by those affidavits, in accordance with the Revised Schedule set forth herein." Pursuant to that authorization, petitioner filed a supplemental Brief Re: Motion in Limine on February 7, 2000.

Petitioner's brief does not, however, address the materials presented by the Commission's affidavits. Instead, petitioner renews its objections to the introduction of the Commission's affidavits. Because petitioner's brief presents no new arguments for excluding the challenged affidavits, the Commission declines to revisit its earlier determination rejecting petitioner's motion.

Finally, petitioner also suggests that it was not afforded sufficient time to respond to the Commission's affidavits. Of course, had petitioner believed more time to be necessary, it could have requested an extension from the Hearing Panel, but it declined to do so.[78] Accordingly, the Commission will not now consider petitioner's claim that it was accorded insufficient time to respond to the Commission's affidavits.

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[78] The Panel has previously granted two Motions for Continuance by petitioner, extending its deadlines by a total of 90 days.

E. Arguments Raised By Petitioner's Response To Proposed Decision.

On April 28, 2000, petitioner filed a pleading -- entitled "Petitioner's Response To Proposed Decision" ("Petitioner's Response") -- outlining its disagreements with the Hearing Panel's Proposed Decision in this case. Petitioner's Response primarily sounds two related themes. First, petitioner reiterates its "Motion in Limine" argument that the Commission may not properly rely in this proceeding on materials contained in the Ross and Becker affidavits, including the Commission's related determinations in other proceedings and the bases for those decisions. In addition, Petitioner's Response argues that the Commission's current deliberations may not include consideration of any evidence arising since the Commission's initial decision in this matter. In petitioner's words, the Commission must now reach a decision "using [only] the evidence which was before it [in 1998]."[79]

As set forth in Parts I.D and II.D, supra, the Commission has already considered and rejected petitioner's claim that the Commission may not, in ruling on the present petition, take account of its other deliberations in connection with the proper regulatory treatment of organic milk. That argument therefore requires little additional discussion here. It bears emphasis, however, that -- contrary to petitioner's claims -- a vast body of case law exists supporting the Commission's consideration of related cases. Indeed, it is a fundamental principle of administrative law that an agency must "treat[] like cases alike; an agency may not casually ignore its own past decisions."[80] The courts "emphatically require[] that administrative agencies adhere to their own precedents or explain any deviations from them."[81] Accordingly, while it could perhaps be argued that it would be irrational for the Commission not to take account of what it has done in other proceedings addressing the regulatory treatment of organic milk, it certainly cannot reasonably be maintained that the Commission must turn a blind eye to such proceedings.

Petitioner's new claim that the Commission may not now consider any evidence or matter that was not before it at the time of its initial decision is equally unsound. In fact, "there is no principle of administrative law that restricts an agency from reopening proceedings to take new evidence after the grounds upon which it relied are determined by a reviewing court to be

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79 Petitioner's Response at 13.

80 *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989); *see also, e.g., Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d Cir. 1993) (when an agency departs from its own precedents, it must present a "reasoned analysis" to justify the shift).

81 *The Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977).

invalid."[82] Indeed, "the Supreme Court has specifically indicated that a reopening is one of the courses an agency may follow after [invalidation by] a reviewing court."[83]

That is precisely the course adopted by the Commission in this case. Indeed, the Hearing Panel's August 9, 1999 order setting forth procedures and a schedule to govern this proceeding on remand specifically provided that the parties could "submit up to two affidavits along with [their] brief[s]," for the express purpose of "address[ing] facts or circumstances since the January 1998 oral hearing that relate to petitioner's claim for an exemption."[84] There can be no question that the Commission's other proceedings considering -- and rejecting -- the possibility of a regulatory exemption for organic milk "relate" to petitioner's nearly identical claim here. Accordingly, petitioner's argument that the evidence properly before the Commission in this case was flash-frozen in 1998 is wholly unfounded.[85]

In sum, the Commission finds that the Petitioner's Response provides no basis on which to substantially alter the Findings of Fact or Conclusions of Law set forth in the Hearing Panel's Proposed Decision.

* * *

CONCLUSION

For the reasons set forth above,

(1) Petitioner's request for an exemption from the Commission's over-order regulation is DENIED;

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82 *PPG Industries, Inc. v. United States*, 52 F.3d 363, 366 (D.C. Cir. 1995).

83 *Id.*

84 As noted in Part I.D, *supra*, petitioner did not object to the procedures established by the Hearing Panel.

85 The cases cited by petitioner on this point provide no support for its argument. Both *National Treasury Employees Union v. Hove*, 840 F. Supp. 165 (D.D.C. 1994), and *Guy v. Glickman*, 945 F. Supp. 324 (D.D.C. 1996), stand for the unremarkable proposition that judicial review of an administrative decision should generally be based on the record developed before the agency, "not some new record completed initially in the reviewing court." *See Guy*, 945 F. Supp. at 329. In the present proceeding, of course, the disputed materials have been properly presented to the Commission, as provided by the Hearing Panel's August 9, 1999 order.

(2) Petitioner's request that the Commission be found to have violated the District Court's injunction is DENIED; and

(3) Petitioner's motion in limine, which previously was DENIED, is again DENIED.

Entered this 7th day of June, 2000

IT IS SO ORDERED

For the Commission

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