# **01 DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY**

**015 MAINE MILK COMMISSION**

**Chapter 20: PREVENTION OF DESTRUCTIVE COMPETITION**

**1. DEFINITIONS**

 Unless the context indicates otherwise, the following terms have the following meanings:

 A. **Commission**. "Commission" means the Maine Milk Commission.

 B. **Cost of milk to a dealer**. "Cost of milk to a dealer" means the dealer's raw product cost, plus any shrinkage allowance permitted by the Commission, to which shall be added the dealer's expenses directly and indirectly incurred in receiving, processing, packaging and delivering milk. Without limitation, these expenses shall include labor, including salaries and bonuses of executives and officers, rent, depreciation, selling costs, maintenance of equipment, utilities, delivery costs, interest, licenses, taxes, insurance, advertising, professional services and all other fixed and variable expenses.

 C. **Cost of milk to a retail store**. "Cost of milk to a retail store" means the price paid by a retail store to a dealer for fluid milk, to which shall be added the retail store's expenses directly and indirectly incurred in shipping, handling and selling fluid milk. Without limitation, these expenses shall include labor, including salaries and bonuses of executives and officers, rent, depreciation, selling costs, maintenance of equipment, utilities, shipping costs, interest, licenses, taxes, insurance, advertising, professional services and all other fixed and variable expenses.

 D. **Dealer**. "Dealer" means any person who purchases or receives milk for sale as the consignee or agent of a producer, or handles for sale, shipment, storage or processing within the State and shall include a producer-dealer and a subdealer, but shall not include a store.

 E. **Integrated operation**. "Integrated operation" means a person who is a dealer and who also sells at retail the milk which it processes and/or delivers. However, such a person shall be considered a dealer and not an Integrated operation with respect to any sales or consignments of milk it makes to a retail store, and shall be considered a retail store and not an integrated operation with respect to any purchases of packaged milk it makes from a dealer.

 F. **Legal competition**. "Legal competition" means a price which is not subject to a restraint or injunction issued by a court of competent jurisdiction and which is set or offered by a dealer or retail store with whom a dealer or retail store seeking to meet that price in fact directly competes.

 G. **Market**. "Market" means any city, town or parts thereof or the State, or 2 or more of the same of parts thereof designated by the Commission as a natural marketing area.

 H. **Milk**. "Milk" means whole milk and cream, fresh, sour or storage; nonfat (fat-free) milk, skimmed milk, lowfat milk and buttermilk; irrespective of whether or not any such milk is flavored.

 1. **Person**. "Person" means any individual, partnership, firm, corporation, association or other unit and the State and all political subdivisions or agencies thereof, except state owned and operated institution.

 J. **Regulated product**. "Regulated product" means milk for fluid consumption, the minimum wholesale or retail price of which was established by the Maine Milk Commission under 7 M.R.S.A. §2951 *et seq*.

 K. **Retail Sale**. "Retail Sale" means a doorstep delivery and over-the-counter sales by stores.

 L. **Retail Store**. "Retail Store" means a grocery store, dairy product store, or any similar commercial establishment where milk is sold to consumers for consumption off the premises.

 M. **Store**. "Store" means a grocery store, dairy product store, canteen, milk vending machine operator, milk dispensing operator or any similar commercial establishment or outlet or any other sale where milk is sold to consumers for consumption off the premises where sold.

 N. **Subdealer**. "Subdealer" means any person who does not process milk and who purchases milk from a dealer and sells such milk in the same containers in which he purchased it, but shall not include a store.

 O. **Wholesale Sale**. "Wholesale Sale" means sale to any other person not included in retail.

**II. APPLICABILITY AND EFFECT**

 A. **Effectiveness: Dealers**. This chapter is in effect for dealers whenever a minimum wholesale price for one or more regulated products established under 7 M.R.S.A. §2951 *et seq*. is not in effect, and is then in effect only for the regulated product or products for which no minimum price is in effect. This chapter shall apply to wholesale sales by dealers, including sales to subdealers, and to wholesale sales by subdealers.

 B. **Effectiveness: Retail Stores**. This chapter is in effect for retail stores whenever a minimum retail price for one or more regulated products established under 7 M.R.S.A. §2951 *et seq*. is not in effect, and is then in effect only for the regulated product or products for which no minimum price is in effect.

 C. **Applicability: Dealers and Retail Stores**. When it is in effect, this chapter applies to all dealers and all retail store and to any employee, representative, agent subsidiary or affiliate of any dealer or any retail store. The terms "dealer" and "retail store" include their respective employees, representatives, agents, subsidiaries and affiliates.

 D. **Applicability: Sales**. When it is in effect, this chanter applies to all sales by a dealer of any regulated product or products as to which it is in effect and to all such sales by a retail store.

 E. **Applicability and Effectiveness; Integrated Operations**. Where this Chapter or the Destructive Competition Law contains specific provisions dealing with integrated operations, an integrated operation shall be governed thereby. Otherwise, the provisions of this Chapter which apply to dealers shall apply to the dealer phase of the business of an integrated operation and those which apply to retail stores shall apply to the retail phase of the business as an integrated operation.

**III. PROHIBITION; INTENT**

 A. **Prohibition**. No dealer and no retail store shall sell any regulated product or products as to which this chapter is in effect for less than the cost thereof to the dealer or retail store, with the purpose or intent to injure competitors or destroy competition.

 B. **Intent**. The Commission shall regard consistent and repeated advertisements, offers to sell or sales by a dealer or a retail store of any regulated product or products as to which this chapter is in effect at less than the cost thereof to the dealer or retail store respectively, the advertisements, offers to sell or sales thereby forming a pattern of sales below cost, as demonstrating purpose or intent to injure competitors or destroy competition.

**IV. WHEN BELOW-COST PRICE NOT PROHIBITED; BURDEN**

 A. **When Below-Cost Price Not Prohibited**. The offer for sale or sale of any regulated product or products as to which this chapter is in effect by a dealer or retail store at a price which is below the cost thereof to the dealer or retail store is not prohibited when done without the purpose or intent to injure competitors or destroy competition or when the price is set in good faith to meet legal competition.

 B. **Burden**. A dealer or retail store which relies on subsection A. to explain or justify a price which is below its cost must provide information which demonstrates that its own price was not set with the purpose or intent to injure competitors or destroy competition, or that its own price was set in good faith to meet legal competition and that the dealer or retail store directly competes with that competition. Proof that a price was set by a competitor may be made by evidence such as an advertisement, proof of sale or receipt. Proof that a price was offered by a competitor may be made by evidence such as a written price proposal or contract to sell at that price.

 C. **Duration of Below-Cost Price to Meet Competition**. A dealer or retail store which, under this section, is not prohibited from selling at a price which is below its cost may continue to sell at that price only so long as it is in fact doing so to meet the legal competition in response to which it set its price.

**V. COST OF MILK TO A DEALER**

 A. **Overview**. The cost of milk to a dealer consists of a dealer's raw product costs as calculated according to subsection 8 or C, plus the dealer's expenses directly and indirectly incurred in receiving, processing, packaging and delivering the regulated product as calculated according to subsection D, E, or F. Examples of dealer expenses directly and indirectly incurred in receiving, processing, packaging and delivering milk are set forth in Section I (B).

 This section contains three sets of procedures for determining raw product costs. The first of these applies to Maine dealers who buy milk in bulk from Maine producers and themselves process the milk they sell. The second of these is similar to the first except that it applies to sales which are not subject to regulation by the State of Maine. The third procedure, which might more appropriately be called packaged product costs, applies to the purchase of milk by subdealers from dealers. See the definitions of "subdealer" and "dealer" contained in Sections I (N) and (D), respectively.

 The expenses directly and indirectly incurred by a dealer in receiving, processing, packaging and delivering the regulated product may be determined by the Commission on the basis of the dealer's actual expenses as calculated under D OR E, or, unless the dealer proves lower actual costs, on the basis of its imputed expenses as calculated under F.

 **B. Raw Product Costs for all Dealers other than Subdealers**

 1. Raw product costs for milk purchased by Maine dairies from Maine producers shall be determined as set forth in subparagraphs (a) - (c), except that where the dealer's purchase price for raw milk is not required by State or Federal law to be based upon a Class I price established by a governmental agency, the dealer's raw product costs shall be deemed to be the purchase price as adjusted by the prevailing butterfat differential, plus any hauling charges paid by the dealer.

 (a) Determine the Class I price per hundredweight of raw milk of 3.5% butterfat content as established monthly by the Commission:

 (b) Reduce the Class I price per hundredweight by the butterfat differential established by the *Federal Market Administrator for Federal Milk Order No. I* (New England Milk Marketing Area) so as to reflect the dollar value on a hundredweight basis of the butterfat found in various formulations of fluid milk. Whole milk shall be deemed to have a butterfat content of 3.25% butterfat unless shown otherwise by the dealer. Nonfat (fat-free) milk shall be deemed to have a butterfat content of .1% butterfat unless shown otherwise by the dealer. Lowfat milk, and skim milk other than nonfat (fat-free) milk shall be deemed to have the butterfat content designated on the cap or container, or as otherwise determined by the Commission.

 (c) Divide the Class I price of the milk as reduced to reflect the dollar value of its packaged butterfat content on a hundredweight basis by the appropriate generally accepted conversion factor so as to determine the raw product dollar value of packaged milk of varying butterfat content as sold in gallons, three-quart, half-gallon, quart and bulk containers.

 2. Raw product costs for milk not purchased by Maine dealers from Maine producers (i.e., transactions not subject to the Class I price established monthly by the Commission) shall be based upon the actual price paid by the dealer for Class I milk of 3.5% butterfat content as reduced by the established or prevailing butterfat differential, so that the butterfat value of fluid milk of varying formulations sold in various container sizes may be calculated in the same manner as set forth in paragraph 1, except that any hauling charges paid by the dealer shall also be included in the calculation of raw product costs. Where the dealer's purchase price for raw milk is not required by state or federal law to be based upon a Class I price established by a governmental agency, the dealer's raw product costs shall be deemed to be the purchase price as adjusted by the prevailing butterfat differential, plus any hauling charges paid by the dealer.

 C. **Raw Product Costs for Subdealers**

 The raw product cost for subdealers shall be the purchase price paid by the subdealer to the dealer for the regulated product.

 D. **Actual Expenses of Receiving, Processing, Packaging and Delivering Milk Incurred by Dealers Subject to Commission Rule 5A.**

 The Commission may determine the dealer's expenses directly and indirectly incurred in receiving, processing, packaging and delivering milk on the basis of the McClain System reports and information filed by the dealer with the Commission. In addition to submitting McClain System Cost Accounting information, a dealer may also submit a determination of its expenses by a cost accounting system other than the McClain System and request that the Commission use such other system to determine its expenses. A dealer submitting a determination of expenses by a cost accounting system other than McClain must demonstrate, and the Commission must find, that the cost accounting system is regularly used by the dealer in the conduct of its business, that it is based on generally accepted cost accounting principles and that it is at least equivalent to the McClain System in comprehensiveness and reliability as to the expenses incurred in the receiving, processing, packaging and delivering of milk. Where these findings are made, the Commission in its discretion may rely on either the McClain System or the system submitted by the dealer as providing the appropriate demonstration of the dealer's actual expenses. Where these findings are not made, the Commission will rely on the McClain System.

 If a dealer contends that its cost of delivering milk to the store in question is lower than its average delivery costs as derived from the McClain System, the Commission may recognize In lieu of such average delivery costs the dealer's cost of delivering milk on the route on which the store is located or the dealer's average cost of delivering milk to the specific store. The Commission shall determine the cost of delivering milk on the route on which the store is located on the basis of the route delivery information filed by the dealer with the Commission pursuant to Commission Rule 11, and the appropriate cost inputs (e.g., driver wages, vehicle expenses) contained in the dealer's records. The Commission shall determine store specific delivery costs on the basis of the route delivery information filed by the dealer with the Commission pursuant to Commission Rule 11 and from other cost information contained in the dealer's records. Store specific costs are to be computed as the sun of the per case average of common route costs, i.e., those costs which cannot be unambiguously attributable to any one stop, and the per case average cost directly attributable to the specific store.

 E. **Actual Expenses of Receiving, Processing, Packaging and Delivering Milk Incurred by Dealers Not Subject to Commission Rule 5A**. The Commission may determine the dealer's (or subdealer's) expenses directly or indirectly Incurred in receiving, processing, packaging and delivering milk on the basis of the McClain System. At the request of the Commission the dealer or subdealer shall prepare and file, within the time set by the Commission, the information and reports required by Rules 5A and 11 covering such periods of time as the Commission may designate.

 Alternatively, a dealer or subdealer may submit a determination of its expenses by a cost accounting system other than the McClain system and request that the Commission use such other system to determine the dealer's or subdealer's expenses. A dealer or subdealer submitting a determination of expenses by a cost accounting system other than McClain must demonstrate, and the Commission must find, that the cost accounting system is regularly used by the dealer or subdealer in the conduct of its business, that it is based on generally accepted cost accounting principles and that it is at least equivalent to the McClain system in comprehensiveness and reliability as to expenses incurred in the receiving, processing, packaging and delivering of milk. Where these findings are not made, the dealer or subdealer shall prepare and file, within the time set by the Commission, information and reports required by rules 5A and 11 covering such periods of time as the Commission may designate. Where these findings are made, the Commission will rely on the system submitted by the dealer or subdealer as providing the appropriate demonstration of the dealer's or subdealer's actual expenses.

 The Commission may recognize route delivery costs or store specific delivery costs in lieu of average delivery costs in the same circumstances and manner as set forth in subsection D.

 F. **Imputed Expenses of Receiving, Processing, Packaging and Delivering Milk (All Dealers and Subdealers)**

 1. In the case of dealers other than subdealers, the Commission may determine the imputed expenses of receiving, processing, packaging and delivering milk by multiplying the dealer's price to the retailer for the regulated product by that percentage shown on Table I which most closely corresponds to the raw product cost per hundredweight, as adjusted for butterfat content under Section V(B)(1)(b), that was paid by the dealer with respect to the regulated product.

 2. In the case of subdealers, the Commission shall determine the imputed expenses of delivering the regulated product by multiplying the subdealer's price to the retailer for the regulated product by that percentage shown on Table II which corresponds most closely to the purchase price paid by the subdealer to the dealer for the regulated product.

 3. Upon request of the Commission, a dealer or subdealer shall furnish to the Commission, within the time set by the Commission, all information necessary for it to determine the raw product cost paid for the regulated product. in the absence of a timely response the Commission shall calculate imputed expenses for purposes of this subsection on the basis of the Maine Class I price, subject to adjustment for butterfat content, which was in effect at the time of the transaction under examination.

 4. Any proof of actual expenses lower than the imputed expenses of receiving, processing, packaging and delivering milk as calculated by the Commission under this subsection shall be made by the dealer.

 (a) in the case of a dealer subject to Rule 5A, in the manner provided in D. for the determination by the Commission of actual expenses of such dealers:

 (b) in the case of a dealer not subject to Rule 5A, in the manner provided in E. for the determination by the Commission of actual expenses of such dealers.

**VI. COST OF MILK TO A RETAIL STORE**

 A. **Overview**. The cost of milk to a retail store consists of the price paid by the retail store to the dealer for the regulated product, plus the retail store's expenses directly and indirectly incurred in shipping, handling and selling the regulated product. Examples of a retail store's expenses directly and indirectly incurred in shipping, handling and selling a regulated product are set forth in Section I (C). The expenses directly and indirectly incurred by a retail store in shipping, handling and selling the regulated product may be determined by the Commission on the basis of the retail store's actual expenses as calculated under subsection B or, unless the retail store proves lower actual costs, on the basis of its imputed expenses as calculated under subsection C or D.

 B. **Actual Expenses**

 The Commission may determine a retail store's expenses directly and indirectly Incurred in shipping, handling and selling milk according to the retail cost accounting system for milk sales developed by the Edward B. McClain Company, Inc. for the Commission in October, 1981. Upon request of the Commission, and within the time set by the Commission, the retail store shall prepare and file the McClain System (retail) reporting forms covering such periods of time as the Commission may designate.

 **NOTE**: The five pages of reporting forms which comprise the *McClain Retail Cost Accounting System for Milk Sales* are attached hereto as Exhibit A. Alternatively, a retail store may submit a determination of its expense by a cost accounting system other than the McClain System and request that the Commission use such other system to determine the store's expenses. A retail store submitting a determination of expenses by a cost accounting system other than McClain must demonstrate, and the Commission must find, that the cost accounting system is regularly used by the store in the conduct of its business, that it is based on generally accepted cost accounting principles and that it is at least equivalent to the McClain System in comprehensiveness and reliability as to expenses incurred in selling milk. Where these findings are not made, the retail store shall prepare and file, within the time set by the Commission, the McClain (retail) reporting forms covering such period of time as the Commission may designate. Where these findings are made, the Commission will rely on the system submitted by the retail store as providing the appropriate demonstration of the retail store's actual expenses.

 C. **Imputed Expenses Based on Retail Margin**

 1. The Commission may determine a retail store's imputed expenses directly and indirectly incurred in shipping, handling and selling of milk by multiplying the retail store's selling price by that percentage shown in Table III which most closely corresponds to the purchase price paid by the retail store to the dealer for the regulated product.

 2. Any proof of actual costs lower than the imputed expenses of shipping, handling and selling the regulated product as determined by the Commission under this subsection shall be made by the retail store in the manner provided in A. for the determination by the Commission of actual expenses of retail stores.

 D. **Imputed Expenses Based on Storewide Expenses**

 The Commission may determine a retail store's imputed expenses directly and indirectly incurred in shipping, handling and selling, dividing store expenses incurred in shipping, handling and selling milk for a relevant period of time by store sales of milk for the same time period and by multiplying the percentage so obtained by the retail selling price under investigation. Upon request of the Commission, and within the time set by the Commission, the retail store shall furnish expense and sales information covering such periods of time as the Commission my designate. Any proof of actual costs lower than the imputed expenses of shipping, handling and selling the regulated product as determined by the Commission under this subsection shall be made by the retail store in the manner provided in A. for the determination by the Commission of actual expenses of retail stores.

**VII. COST OF MILK TO AN INTEGRATED OPERATION**

 A. **Overview**. The cost of milk to an integrated operation shall be the integrated operation's raw product costs plus all expenses of the integrated operation directly and indirectly incurred in the receiving, processing, packaging, delivering/shipping, handling and selling milk. Examples of expenses directly and indirectly incurred in the receiving, processing, packaging, delivering/shipping, handling and selling milk are set forth in Section I (B) and W.

 B. **Raw Product Costs**. The raw product costs of an integrated operation shall be determined as set forth in Section V.(B).

 C. **Actual Expenses**: McClain Wholesale and Retail Cost Accounting Systems. The Commission may determine the expenses of an integrated operation directly and indirectly incurred in receiving, processing, packaging, delivering/shipping, handling and selling milk according to the McClain System contained in Rule 5A and the McClain System (retail) described in Section VI.(B). Procedures for the collection of McClain System reports, forms, and other information set forth in Sections V.(B) and (E) (1) and VI. (B) shall apply to integrated operations. Alternatively, an integrated operation may also submit a determination of its expenses by a cost accounting system other than the McClain System and request that the Commission use such other system to determine the integrated operation's expenses. An integrated operation submitting a determination of expenses by a cost accounting system other than McClain must demonstrate, and the Commission must find, that the cost accounting system is regularly used by the integrated operation in the conduct of its business, that it is based on generally accepted cost accounting principles and that it is at least equivalent to the McClain System in comprehensiveness and reliability as to expenses incurred in receiving, processing, packaging, delivering/shipping, handling and selling milk. Where these findings are not made, the integrated operation shall prepare and file, within the time specified by the Commission, the McClain System reporting forms required by Rule 5A and the McClain System (retail) reports. Where these findings are made, the Commission will rely on the system submitted by the integrated operation as the appropriate demonstration of the integrated operation's actual expenses.

 D. **Imputed Expenses Based on Combined Dealer and Retail Margins**

 1. The Commission may determine the imputed expenses of an integrated operation directly and indirectly incurred in receiving, processing, packaging, delivering/shipping, handling and selling milk by multiplying the integrated operation's retail selling price for the regulated product by that percentage shown on Table IV which most closely corresponds to the raw product cost per hundredweight, as adjusted for butterfat content under Section V. (B) (1) (b), that was paid by the integrated operation with respect to the regulated product.

 2. Upon request of the Commission, an integrated operation shall promptly furnish to the Commission, within the time set by the Commission, all information necessary for it to determine the raw product cost paid by the integrated operation for the regulated product. In the absence of a timely response the Commission shall determine imputed expenses for purposes of this subsection on the basis of the Maine Class I price, subject to adjustment for butterfat content, which was in effect at the time of the transaction under examination.

 3. Any proof of actual expenses lower than the imputed expenses of receiving, processing, packaging, delivering/shipping, handling and selling the regulated product as calculated by the Commission under this subsection shall be made by the integrated operation in the manner provided in C. for the determination by the Commission of actual expenses of integrated operations.

**VIII. ENFORCEMENT POLICY; PRESUMPTIVE PRICING**

 A. **Generally**. As a general matter, the Commission does not intend to investigate as possible violations of the Destructive Competition Law dealer or retail prices for regulated products that are equal to or greater than so-called presumptive prices for regulated products which the Commission will periodically announce. The Commission may nonetheless investigate prices meeting these criteria if it has cause to believe that the prices may be lower than the cost of the regulated product to the dealer or retail store, as the case may be, and were not set in good faith to meet legal competition.

 B. **Notification**. Once this chapter or any part of it goes into effect, the Commission shall send dealers written notice of the establishment and the subsequent change of the presumptive prices it promulgates. At the time a dealer or retail store offers to sell a regulated product for less than the applicable presumptive price then in effect, the dealer or retail store shall simultaneously notify the Commission in writing and submit information which demonstrates that the offered price is not below its cost or if the price is below its cost, that it is offered in order to meet legal competition, specifying the nature and source of that competition.

**IX. MAINTENANCE OF RECORDS**

 A. **Generally**. Dealers and retail stores shall maintain all cost information and prices and records used in the preparation of the reports and forms required by Section V, Section VI, and Section VII for a period of three years from the date the reports and forms are filed with the Commission. Dealers shall retain records of raw product costs for a period of three years following each transaction.

 B. **During Investigations or Proceedings**. Notwithstanding subsection A, any cost or price information or records which are related to an investigation or proceedings undertaken by the Commission under this chapter or under 7 M.R.S.A., §2981 *et seq*. shall be maintained by the dealer or retail store until, in the case of a Commission investigation, the dealer or retail store receives from the Commission a written release from this obligation or, in the case of a judicial proceeding, until a final judgment has been entered and all appeals therefrom have been exhausted.

**X. CONFIDENTIALITY**

 Exercising its discretionary authority to accord confidentiality to commercial information, the Commission will treat as confidential all information furnished to it pursuant this chapter. If such information becomes relevant to any enforcement proceeding, the Commission will no longer treat it as confidential, except that prior to disclosing the information the Commission will allow a reasonable opportunity for any person who would be directly affected by its disclosure to obtain a judicial order protecting the information.

**XI. MISCELLANEOUS PROVISIONS**

 A. **Authorization of Executive Secretary**. The Commission's Executive Secretary is authorized to act for the Commission under this chapter in commencing and conducting any investigation or audit, in requesting any information, reports or data from any dealer, retail store or integrated operation, in specifying any date by which information, reports or data must be furnished to the Commission and in carrying out any related administrative tasks.

 B. **Inspection and Audit**. In addition to the subpoena power conferred by law, all records, books, accounts and information of dealers, retail stores and Integrated operations required to be kept by or relevant to this chapter are subject to inspection and audit by the Commission. Upon request of the Commission, dealers, retail stores and integrated operations shall make such records, books, accounts and information available for inspection and audit at their places of business.

 C. **Severability**. If any provisions of this chapter is declared invalid, or if the application of any provision of this chapter to any person or circumstances is invalid, the invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

**Note: For copies of the attachments to this Chapter, please contact the Maine Milk Commission.**

STATUTORY AUTHORITY: 7 M.R.S.A. §2981 *et seq*.

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