

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

 In re:) Docket Nos.
 Milk in the Northeast,) AO-14-A78, AO-388-A23,
 Appalachian, Florida,) AO-356-A44, AO-366-A52,
 Southeast, Upper Midwest,) AO-361-A44, AO-313-A53,
 Central, Mideast, Pacific) AO-166-A73, AO-368-A40,
 Northwest, Southwest, and) AO-231-A72 and AO-271-A44,
 Arizona Marketing Areas) DA-09-02, AMS-DA-09-0007

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 VOLUME I
 - - -

Public Hearing Administrative Law Judge
 Before: Jill S. Clifton

Date: May 4, 2009

Time: Commencing at 1:06 p.m.

Place: Westin Cincinnati Hotel
 21 East Fifth Street
 Cincinnati, Ohio 45202

Before: S. Diane Farrell, RMR, CRR
 Notary Public - State of Ohio

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1 P R O C E E D I N G S

2 JUDGE CLIFTON: All right. Let's go on
3 record, please. This record is being made in
4 Cincinnati, Ohio on the 4th of May, 2009. This
5 is a rulemaking hearing. This hearing is to
6 gather evidence for the use of the Secretary of
7 the United States Department of Agriculture.

8 My name is Jill Clifton. I'm the United
9 States Administrative Law Judge who is assigned
10 to gather that evidence.

11 There are two kinds of evidence,
12 testimony and exhibits. Some of you will have
13 prepared your testimony in advance, and you'll
14 have it in written form.

15 If that is true and you want the written
16 form to become part of the record as well as
17 what you say from the witness stand, then copies
18 of that exhibit need to be made so other people
19 can see them. And please coordinate getting
20 your copies made if you need help with the
21 representatives who are here from the U.S.
22 Department of Agriculture. I'll have them
23 introduce themselves in a minute.

24 If you wrote your statement out just as
25 your own guide to help you in testifying and you

1 don't want the written copy to be an exhibit,
2 you don't need to make copies for everyone. You
3 can just use it as your aid as you sit next to
4 me and testify as a sworn witness.

5 Many people want both their sworn
6 testimony, which will be part of the record in
7 the transcript that's being prepared, and the
8 exhibit to be in evidence. If you want them
9 both in evidence, and you're diverging from what
10 you wrote, please alert us as to which is the
11 correct version. In other words, if you're
12 testifying and you misspeak, we want to correct
13 it. If you say 2007 and you meant to say 2008,
14 we need to clarify that right then.

15 Some people write their testimony and
16 then learn something more and they therefore
17 want to diverge from the written material to
18 give a better statement. And we need you to
19 alert us, this is not exactly the same as in my
20 written statement and what I am saying now is
21 the evidence that I want the Secretary to
22 consider.

23 Now would be good time for us to
24 introduce those representatives from the United
25 States Department of Agriculture that are seated

1 at the first table here. And as you introduce
2 yourself, I do want you to stand and turn around
3 so the people behind you can see you. And,
4 Ms. Pichelman, if you'll begin and we'll just go
5 down the line.

6 MS. PICHELMAN: Good afternoon. Heather
7 Pichelman, USDA Office of the General Counsel.

8 MR. STEVENS: Good afternoon. Garrett
9 Stevens, United States Department of Agriculture
10 Office of the General Counsel.

11 MR. TOSI: Gino Tosi, Dairy Programs,
12 USDA, in the Order Formulation and Enforcement
13 Branch.

14 MR. ROWER: Jack Rower, AMS, Order
15 Formulation and Enforcement Branch in Dairy
16 Programs.

17 MS. FISHER: Kate Fisher, Order
18 Formulation and Enforcement Branch, AMS Dairy
19 Programs.

20 JUDGE CLIFTON: And I'm going to have one
21 more person introduce himself. You are not near
22 a microphone, so would you come around to the
23 front side of the table to introduce yourself
24 please?

25 MR. CARMAN: Cliff Carman. I'm with

1 Dairy Programs as Assistant to the Deputy
2 Administrator.

3 JUDGE CLIFTON: Because the proceedings
4 are recorded, we need to make sure only one
5 person speaks at a time. And if you need to
6 interrupt to clarify or something for the good
7 of the order, you need to catch my eye. I can
8 go off record. I can interrupt the speaker to
9 allow you to come forward and speak for a
10 moment. We need an orderly proceeding, but we
11 need it to be accurate. So I want to be
12 flexible in that regard.

13 I'd like now for the Office of General
14 Counsel representatives who are here to explain
15 to everyone what ex-parte means and what is not
16 permitted during this hearing. Who would like
17 to do that for me? Garrett Stevens?

18 MR. STEVENS: I'll take a shot at it,
19 your Honor.

20 Well, we're under the rules of practice,
21 which -- which apply at the time the notice is
22 issued that contact with the Department from
23 that point on with the people designated in that
24 part of the regulations, which are the people
25 here at the table and the people in the

1 government who are involved in the
2 decision-making process here, contact with those
3 people is limited to discussion of procedural
4 matters, and certainly pleasantries and the
5 exchange of information of that nature, but
6 certainly not to any of the issues in the
7 hearing, as to the -- for or against any of the
8 discussion to that, as to how witnesses should
9 testify or anything of that nature.

10 So it is limited contact. It is -- it is
11 contact of a nature that is necessary to do
12 proceedings like this; that is procedural
13 questions that come up. And we are all
14 available for that to assist everyone in the
15 conduct of this hearing. But there are -- there
16 are questions, there are issues that we cannot
17 discuss from the time that the Notice of Hearing
18 is -- is issued.

19 JUDGE CLIFTON: Thank you, Mr. Stevens.

20 MR. STEVENS: Sure.

21 JUDGE CLIFTON: I would like someone from
22 that front table to explain to those assembled
23 here what goes on the website with regard to
24 this proceeding. Mr. Tosi?

25 MR. TOSI: Thank you, your Honor. As a

1 matter of policy, everything that has occurred
2 to date with respect to any correspondence, any
3 answers by the Department, all requests for
4 information and literally everything that has
5 been associated with this hearing, including the
6 press release, the Notice of Hearing, any and
7 all exhibits that will be entered into evidence
8 at this proceeding, together with the verbatim
9 transcript that's prepared by our court
10 reporter, any and all answers to people's
11 specific data requests together with those raw
12 requests.

13 JUDGE CLIFTON: If someone knew that the
14 way you get to the Department of Agriculture's
15 website is generally usda.gov, g-o-v, and that's
16 all that person knew, how would that person find
17 the website you're talking about?

18 MR. TOSI: I can give the exact web
19 address. It's www.ams.usda.gov and a forward
20 slash, and then the word dairy, d-a-i-r-y. That
21 will bring you to the Dairy Programs home page,
22 if you will.

23 And at the bottom of the page in the
24 center of the display, we have a title that you
25 can click on that will bring you to everything

1 that's happened that brought us to this juncture
2 in this procedure.

3 And it will also be from there that
4 you'll be able to find everything else that will
5 be put on that -- put on our website in the
6 future.

7 JUDGE CLIFTON: Some of you are concerned
8 about the schedule we'll keep here. Beginning
9 tomorrow, all the mornings will begin at 8:00.
10 The evenings will routinely go until 6:00. We
11 have this room reserved until 9:00 p.m. Monday
12 through Thursday, and only till 5:00 on Fridays.

13 We may be able to break as early as 5:00
14 p.m. on Fridays. Whether we go to 9:00 p.m. as
15 a routine matter depends on how much progress
16 we're making and what people need yet to get
17 their testimony in that day because of travel
18 plans, business requirements or any -- any
19 reason.

20 So I need to know if you have a
21 restriction on getting your testimony in. And
22 the best way to alert me of that is to alert all
23 of us at the same time. That way if there are
24 competing interests, I can hear from everyone
25 before I decide in what order we'll proceed.

1 As you know, we'll begin today with the
2 presentation through the government
3 representatives of the statistical information
4 that's a foundation of what comes after. I
5 don't know how much of today that will take. So
6 if there are people who intend to testify today
7 briefly and need to get that in, we'll have to
8 see just when that would best be scheduled.

9 Does anyone have any questions at this
10 point? Would you come forward, please? I'd
11 like everyone who wants to be heard to speak at
12 the microphone, and that way the court reporter
13 will have your name and everyone else will be
14 able to hear you.

15 MR. VETNE: Is that the way I catch your
16 eye, is by standing up?

17 JUDGE CLIFTON: That was perfect.

18 MR. VETNE: My name is John Vetne. I'm
19 an attorney. My address is 11 Red Sox Lane,
20 Raymond, New Hampshire. I represent Mallories
21 Dairy, Country Morning Farms and Nature's Dairy.
22 The first two are producer-handlers in the
23 Pacific Northwest market, and Nature's Dairy in
24 the Southwest market.

25 My clients are located a long ways from

1 this hearing room. I had requested the
2 Department to consider holding various regional
3 segments of this hearing. Apparently that did
4 not work.

5 I have told my clients, I will do my best
6 to give them a couple days' notice before they
7 have to be here. And when I will make that call
8 depends on what's happened up to that point.
9 And then -- and what they -- what I understand
10 and can tell them about what proponents of
11 contrary position -- the primary proponents of
12 the first few proposals have said. That way
13 they'll know what they need to say in opposition
14 and tie that into their alternative proposals.

15 JUDGE CLIFTON: Are they proponents as
16 well as witnesses?

17 MR. VETNE: They are proponents. These
18 three clients are proponents of Proposal
19 Number 17, which is a responsive proposal.
20 Proposal Number 17 would not have been made if
21 there were no more restrictive proposals on the
22 table.

23 And maybe before we get into this much
24 further, we will have some idea of whether all
25 the proposals that were noticed are genuinely

1 still on the table, because it makes a
2 difference on how we prepare and how long the
3 hearing goes, if some, in fact, might be
4 withdrawn or not supported.

5 But the schedule, your Honor, that you
6 discussed is -- is what I found online late last
7 week, which followed a request from National
8 Milk Producers, I believe, for a similar
9 schedule. And as I read the National Milk
10 Producers' rationale for that schedule, it was
11 for everybody's own good.

12 It was not for my own good, and it's not
13 for the good of my clients. And nobody asked me
14 or my clients about that schedule. And I tell
15 you --

16 JUDGE CLIFTON: Let me just interrupt a
17 moment, Mr. Vetne. I just want to correct one
18 thing. You said my orders followed. Actually,
19 my order was filed the day before the request
20 was made. And I was unaware of the request.

21 MR. VETNE: Oh.

22 JUDGE CLIFTON: I was aware that we have
23 a lot of material to cover. And as I said in my
24 order, I'm hopeful that we'll finish much more
25 quickly than the three weeks that we're -- that

1 I've scheduled my hotel here. But we'll have to
2 push.

3 MR. VETNE: I have estimated less than
4 that. But I want to particularly address the
5 first week, which is -- which is very critical
6 as far as presentation of witness testimony,
7 response and analysis of the primary proponent
8 testimony. Your Honor, I'm a solo practitioner.
9 Several of the lawyers in here are sole
10 practitioners and have a little bit of things
11 that are dangling back in the office.

12 JUDGE CLIFTON: Always.

13 MR. VETNE: Always.

14 JUDGE CLIFTON: I understand that.

15 MR. VETNE: The time that we have after
16 the gavel falls in the evening is the time that
17 we analyze and prepare for the next day. In the
18 first week, it is also the time that we take the
19 evidence that has come in -- and some of it I
20 understand the Department is still working on.

21 We take the evidence as it comes in,
22 spend the evening -- those evenings and prepare
23 the responsive and affirmative testimony. It
24 matters less the second week and it matters even
25 less the third week to go to 8:00 p.m., because

1 by that time that information will have
2 coalesced.

3 But I for one am incapable of putting in
4 the hours necessary if I have to be here at
5 8:00 a.m. and might not get back to my room
6 until after 6:00. It just will not work for my
7 clients. There are people here, and maybe my
8 clients, who will be coming a long ways. They
9 don't have a shuttle flight from Cincinnati to
10 Washington or Boston, you know, like I would.
11 They're coming from across the country.

12 Having the gavel fall at 5:00 on Friday,
13 guaranteeing that they will not get back to
14 their homes until Saturday because of travel
15 logistics, is unreasonable for those people,
16 particularly in the first week.

17 I would suggest that we -- that we
18 conclude at noon on Friday so that we can have a
19 decent week with -- weekend with our families
20 and catch up on a few other critical things and
21 come back at 1:00 on -- on the following Monday.
22 We do not need this particularly intensive
23 schedule, I believe, the first week.

24 And I need, for the benefit of my
25 clients, not to have that demand on my time in

1 this hearing so I can be productive for my
2 clients for this hearing in the evening hours.
3 And so I can get back to -- back to my home at a
4 decent time to spend the weekend with my family.

5 So I suggest, your Honor -- I request
6 that you reconsider the schedule you have
7 announced for this first week of the hearing and
8 then see where we are at end of this week.
9 Thank you.

10 JUDGE CLIFTON: Thank you, Mr. Vetne. I
11 will take this day by day. I don't know whether
12 we'll be here until 9:00 tonight. We may be.
13 I'm -- I'm mindful that people have other
14 responsibilities that they have, businesses to
15 run. They have families to care for. But we
16 have a Congressionally-mandated time line that's
17 tight.

18 For my part, I intend to gather the
19 evidence as quickly as we can so everyone can
20 begin to work on it. The turn-around time for
21 the transcript is very short.

22 We are blessed to have the services of
23 Ace-Merit, LLC, the court reporter service
24 that's here. You'll notice they have two court
25 reporters working and they intend to have a very

1 quick turn-around time.

2 I know that counsel would like to be here
3 for every minute so that you can cross-examine
4 effectively at all times. All I can suggest is
5 if you cannot be here and we are operating, you
6 might consider getting a transcript for that
7 portion of the hearing, you might want to order
8 that so that you get it very quickly. Yes, the
9 transcript is also going to be posted to the Web
10 page. I don't know whether you will be able to
11 get it more quickly by ordering portions of it
12 yourself, but that's a -- that's a possibility.

13 Right now, with all due deference to
14 Mr. Vetne's request, I don't see slowing down in
15 the taking of the evidence. I hope we're not
16 here the third week. I hope we finish sometime
17 next week. I'd love to finish this week. I
18 just don't think it's possible. Yes, please
19 come forward.

20 MR. RICCIARDI: Your Honor, good
21 afternoon. I am Al Ricciardi from Phoenix,
22 Arizona, from the firm of Aiken, Schenk,
23 Hawkins & Ricciardi, 4742 North Fourth Street,
24 Suite 100, Phoenix, and I am counsel for AIDA,
25 which is a coalition of a number of

1 producer-handlers throughout the country and now
2 also at some plants.

3 I would join in Mr. Vetne's concerns.
4 Obviously, in these proceedings we do not have
5 the opportunity for discovery and so on-the-fly
6 we are presented with a number of fairly
7 sophisticated points by potential experts in the
8 industry that we have to examine ourselves and
9 to come back and effectively cross-examine on
10 behalf of our respective clients.

11 My clients are potentially restricted by
12 some of the proposals that are made,
13 particularly Proposals 1 and 2, and maybe in
14 some cases their businesses would be affected so
15 much that they may no longer be able to be in
16 business.

17 So obviously this is critical to them.
18 They come from all parts of the country. Like
19 Mr. Vetne mentioned, they will have to travel in
20 for purposes of trying to present their
21 information and testimony at the time of the
22 hearing.

23 While I don't want to stand here and
24 spend a lot of time talking about my own
25 personal medical issues, I will mention that

1 over the last month or so, I've been in the
2 hospital twice and there are some restrictions
3 that I have. While I can travel, certainly the
4 doctor has indicated he doesn't want me to have
5 the type of hours that you are talking about.

6 And, unfortunately, since we're placed in
7 this confined hearing with the restrictions that
8 you've mentioned, my clients need me to be here
9 to represent their interests. So I need to
10 balance my own medical issues and the hearing
11 parameters.

12 I will tell you this, Judge. In looking
13 at the presentations and proposals that have
14 been set forth on the website, I do believe that
15 if we sat here and talked a little bit from the
16 proponents and the counsel, that -- that you'll
17 find that the likelihood is we'll be able to
18 make all the presentations and get the evidence
19 in within the two-week period and maybe less.

20 And if we sit here and go through those
21 and talk about how we get it done -- and that
22 would be, Judge, without having to have
23 accelerated hearings. Now, most of the time I
24 spend in trials in state court or federal court.
25 And if you get 5 1/2 hours in the jury, you've

1 gotten a lot.

2 So if we do an 8:00 to 4:00 or 9:00 to
3 5:00 schedule, given what I believe I know about
4 what's going to happen -- and I may be guessing
5 so we'll need to find that out -- I still
6 believe that within the two-week time frame,
7 that the evidence can be gathered for purposes
8 of closing the formal portion of this
9 presentation.

10 And my suggestion, whether it's a good
11 one or not -- at least my suggestion is that we
12 gather now some information about the number of
13 witnesses that the proponents intend to present,
14 an estimate from -- from each of the groups as
15 to how much time they would end up spending.
16 And we may find that I'm correct, that less than
17 two weeks or two weeks is probably a time
18 period, even if we go at a regular, as opposed
19 to an accelerated schedule, that we can complete
20 this. Thank you, your Honor.

21 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
22 I hope you're right. I hope we finish in two
23 weeks. I'm not that optimistic. I want to see
24 how it goes. Your idea of having proponents
25 work together for a more streamlined

1 presentation appeals to me very much. We've set
2 aside the time today to get started on the
3 government's statistical evidence and that's
4 what I want to do.

5 But I would encourage you to begin to
6 figure out how you might gather to discuss -- I
7 don't know exactly how you would do it.

8 One thing might be, now that all of the
9 proposals are visible, some proponents of their
10 proposals might prefer someone else's proposal
11 better and would give up their own proposal and
12 champion someone else's. That's one way it
13 might work. Mr. English, let me hear from you.

14 MR. ENGLISH: Thank you, your Honor.
15 Charles English for a number of entities, the
16 Northeast Dairy Foods Association, the
17 Pennsylvania Association of Milk Dealers, the
18 Dairy Institute of California, Anderson Erickson
19 Dairy Company, Dean Foods Company, Prairie Farms
20 Dairy, National Dairy Holdings, LP, Shamrock
21 Foods Company, Shamrock Farms and Parker Farms.

22 Your Honor, I certainly sympathize and
23 frankly am going to live through the same
24 process as Counsels Vetne and Ricciardi.

25 I have a couple of comments and then I'll

1 try to keep it very brief.

2 First, I candidly had hoped for my own
3 self that we would be done at noon on Friday and
4 therefore had scheduled a flight accordingly.
5 Got your court order, I've paid a change fee so
6 I can leave appropriately after 5:00 on Friday.
7 And I made that adjustment.

8 But that's not the only adjustment we
9 made. We, who are proponents, adjusted
10 schedules for witnesses based upon this
11 scheduling. And we hope and expect to be able
12 to bring in, you know, most of the witnesses
13 this week.

14 But having done so, the very same
15 restrictions that apply to Mr. Vetne's clients
16 and Mr. Ricciardi's clients -- everybody in the
17 industry has time constraints, everybody has
18 other business to conduct. And we have tried to
19 bring as much as possible to the table.

20 But that means we have witnesses who we
21 expect to be testifying on Friday, and stopping
22 at noon on Friday would mean we need to call
23 somebody now and tell them not to come. And I
24 think that's inappropriate since they paid --
25 paid an airfare.

1 I would say that it could be, based upon
2 cross-examination primarily, that some days we
3 may get to a point where it would be logical to
4 stop before 6:00, because maybe we've -- you
5 know, the witnesses for that day, we may have
6 run the list. It depends.

7 We frankly, on our side, I'm putting our
8 list together, had to approximate how long
9 cross-examination would take as opposed to just
10 simply thinking about how long examination would
11 take.

12 Mr. Beshore is here and -- and others,
13 and they can talk about what other witnesses are
14 available. We've already put out testimony, or
15 the testimony of the proponents has put out for
16 Mr. Cryan, in the event that USDA's testimony is
17 finished today and Mr. Cryan is able to get on
18 the stand.

19 We don't expect and would not expect but
20 are prepared, I think if necessary, if Mr. Cryan
21 gets done, as well as USDA, to go on with
22 another witness. We have prepared that.

23 But I think, candidly, if the USDA
24 testimony goes and Mr. Cryan -- Dr. Cryan goes,
25 I think that will, at a minimum, finish today,

1 and most likely Dr. Cryan will go on.

2 But let me just say that --

3 JUDGE CLIFTON: Let me stop you.

4 MR. ENGLISH: Yes.

5 JUDGE CLIFTON: Would you spell Beshore
6 and Cryan?

7 MR. ENGLISH: It's B-e-s-h-o-r-e,
8 and Cryan, C-r-y-a-n.

9 JUDGE CLIFTON: Thank you.

10 MR. ENGLISH: So the bottom line is we're
11 prepared to move forward. We're prepared to
12 move forward expeditiously. We're certainly
13 prepared to work with counsel. It's not -- it's
14 not in our interest to go until 9. You know, we
15 don't want to go until 9 p.m. every night, but
16 we do want to get this hearing in, we want the
17 record of evidence put in. We have made
18 arrangements with witnesses, especially for the
19 later part of this week, to make sure that we
20 fill the slots. Because we recognize that 8:00
21 to 6:00 is a long day.

22 JUDGE CLIFTON: Thank you. Is there
23 anyone that has any question about what I've
24 said so far?

25 MR. MILTNER: Thank you. Your Honor,

1 this is Ryan Miltner on behalf of AIDA, and the
2 court reporters have my contact information.

3 I don't want to rehash the points that
4 we've been discussing for the past few minutes,
5 but I think that at some point it would be
6 helpful if, as Mr. English points out, they
7 believe they have witnesses slotted through the
8 end of the week, so that we can advise the
9 members of our coalition when they might need to
10 be present as soon as possible, so they can make
11 appropriate travel arrangements; that at some
12 point, even if off the record you could help us
13 get an idea as to how we're going to fill our
14 witness slots for the next few days, that would
15 be a good idea.

16 JUDGE CLIFTON: Good. That's an
17 excellent suggestion. I think two times that we
18 may be able to take the pulse of our gathering
19 would be when we start in the morning at 8:00
20 and when we come back from lunch, and get an
21 idea of who is going to be up.

22 I won't have a lot of time during breaks
23 to do anything. The reason for that is
24 throughout the proceeding I must be here and the
25 court reporter must be here. Everyone else can

1 come in and out of the room. So when we do take
2 a 15 or a 20-minute break, I don't personally
3 want to be organizing anything.

4 If you all can work together on that, I'd
5 be very appreciative. But I will take a pulse
6 and get feedback that everyone in the room can
7 hear as to what's apt to be next. And none of
8 us knows how it's going to work out. None of us
9 can anticipate how long cross-examination will
10 take.

11 But we'll take a reading and we'll see
12 how we're doing. So that's an excellent
13 suggestion, particularly when playing fair is
14 involved. All right. Good.

15 Ms. Pichelman and Mr. Stevens, is there
16 anything further that we should announce as a
17 general matter before we begin to take evidence?

18 MS. PICHELMAN: No, your Honor.

19 JUDGE CLIFTON: Thank you. Oh, there was
20 one other thing. We will take a break around
21 3:00 today. All right. Who of the
22 government -- of the Office of General Counsel
23 will be calling the first witness?

24 MS. PICHELMAN: Your Honor, I guess I
25 should say -- this is Heather Pichelman with

1 USDA. Before we call our first witness, we do
2 have some preliminary exhibits that we wanted to
3 put on the record, if we could.

4 JUDGE CLIFTON: All right. You may.
5 This is a good time to proceed.

6 MS. PICHELMAN: All right. The first one
7 is the Notice of Hearing, entitled milk in the
8 Northeast and Other Marketing Areas; Notice of
9 Hearing on Proposed Amendments to Tentative
10 Marketing Agreements and Orders. That was
11 published in the Federal Register, Volume 74,
12 Number 67, dated April 9th, 2009. We ask that
13 one be marked as Exhibit 1.

14 (Exhibit 1 was marked for
15 identification.)

16 JUDGE CLIFTON: Now, let's talk a little
17 bit about the records, copy of the exhibits. I
18 should have done this before. The rules of
19 practice say bring four copies of your exhibits
20 to all the hearings. Well, as a practical
21 matter, we need one record copy. And I want the
22 record copy to be maintained by someone at this
23 first table, because whoever that is will be
24 responsible for doing two things. One is
25 getting it on to the website and the other is

1 delivering it to the hearing clerk.

2 So I want you folks to handle the record
3 copies. So, for example, if a local dairy
4 farmer comes in tomorrow morning and brings his
5 exhibit, then his record copy of that exhibit
6 goes to your table and someone there takes care
7 of that.

8 I get a courtesy copy. And my courtesy
9 copy is not the record copy, but it is so that I
10 can follow and interpret for clarification when
11 needed.

12 So these that you are announcing now, I
13 need you folks to keep track for me of what the
14 next exhibit number would be throughout. And so
15 you'll keep these record copies. You've already
16 given me my courtesy copies. I appreciate that.
17 But that will be true for the other parties who
18 testify as well. All right. Thank you. Go
19 ahead.

20 MS. PICHELMAN: Thank you, your Honor.
21 Our second exhibit is the news release regarding
22 this hearing, entitled USDA Sets Hearing on
23 Proposed Amendments to All Federal Milk Orders.
24 This is dated April 7th, 2009. We ask that this
25 be marked as Exhibit 2.

1 (Exhibits 2 and 3 were marked for
2 identification.)

3 MS. PICHELMAN: Exhibit Number 3 are
4 several pages, Market Administrator Certificates
5 of Mailing. I'll go through these quickly.
6 Looks like -- yeah, there's a total of eight of
7 them. The first one is for Order Number 1, the
8 Northeast Marketing Area, dated April 10th,
9 2009.

10 The second is for Order Area 5, the
11 Appalachian marketing area. And this is dated
12 April 7th, 2009.

13 The third is for Order 6 and Order 7,
14 Florida marketing area and Southeast marketing
15 area. This is dated April 9th, 2009.

16 The next one is for Order 30, the Upper
17 Midwest marketing area. That is dated
18 April 7th, 2009.

19 The next one is for Order Number 32, the
20 Central marketing area. That is dated
21 April 7th, 2009.

22 The next is for Order 33, the
23 Mideast marketing area. This is dated
24 April 8th, 2009.

25 Then we have another, that's order --

1 Order 1126, Southeast marketing area. And a
2 final for Order 1124 and 1131, the Pacific
3 Northwest marketing area and Arizona marketing
4 area.

5 We had asked that all of those be marked
6 as Exhibit 3.

7 The final exhibit is Certificate of
8 Officials Notified regarding this hearing. This
9 is dated April 9th, 2009. And we'd ask that
10 that be marked as Exhibit 4.

11 (Exhibit 4 was marked for
12 identification.)

13 MS. PICHELMAN: And we ask that
14 Exhibits 1 through 4 would be received into
15 evidence.

16 JUDGE CLIFTON: Is there any objection?
17 Exhibit 1 through 4 are hereby admitted.

18 JUDGE CLIFTON: And what would be the
19 next order -- the next evidence?

20 MR. STEVENS: Your Honor, Garrett
21 Stevens, Office of the General Counsel. We
22 would like to call to the stand Clifford Carman.

23 JUDGE CLIFTON: If you'll approach behind
24 me, there's a step. You may be seated. I'll
25 swear you in in a seated posture.

1 And you may want to pour the water now.
2 First, please tell me your full name and spell
3 it.

4 THE WITNESS: Clifford, C-l-i-f-f-o-r-d,
5 middle initial M., last name Carman,
6 C-a-r-m-a-n.

7 JUDGE CLIFTON: Will you please raise
8 your right hand?

9 CLIFFORD M. CARMAN
10 of lawful age, being duly sworn, was examined and
11 testified as follows:

12 JUDGE CLIFTON: Thank you. You may
13 proceed.

14 DIRECT EXAMINATION

15 BY MR. STEVENS:

16 Q. Good afternoon, Cliff.

17 A. Good afternoon, Garrett.

18 Q. Could you please tell us for the record,
19 give us a brief description of your job, your employment
20 and your work history in the dairy industry?

21 A. I'm currently employed with the
22 Agricultural Marketing Service Dairy Programs as
23 assistant to the deputy administrator. Prior to that
24 position, I was head of order formulation and
25 enforcement. And prior to that position, I worked as a

1 marketing specialist for the western region of the
2 United States, also in order formulation.

3 Those three positions are from January of
4 '94 to present. Prior to my employment with the
5 Agricultural Marketing Service, I worked for Dairyalea,
6 headquartered near Syracuse, New York. And prior to
7 that employment, I worked for Agway, also headquartered
8 near Syracuse, New York.

9 Prior employment was with the Economic
10 Resource Service as a dairy analyst. I did the dairy
11 outlook situation for the ERS.

12 And earlier work was with econometric
13 modeling and long-range projections also with the
14 Economic Research Service.

15 Q. And you have participated in rulemaking
16 hearings on previous cases, have you not?

17 A. Yes, sir.

18 Q. And you have performed various functions
19 in those prior hearings. You have testified, you have
20 participated as -- as a government employee working on
21 hearing matters?

22 A. Yes.

23 Q. Now, in conjunction with this hearing
24 that we're involved in today, you've been involved in
25 this hearing since -- since its inception?

1 A. Yes.

2 Q. And as part of that, you have received
3 requests from people. You have done your own
4 consideration of what documents might be appropriate to
5 enter into evidence in this hearing, and you have
6 prepared documents, have you not?

7 A. Yes, I have.

8 Q. And you've brought them with you today?

9 A. Yes.

10 Q. Do you have a copy of those documents in
11 front of you?

12 A. Yes, I do.

13 MR. STEVENS: And might I say, your
14 Honor, there are copies of these documents --
15 some copies available at the back of the room.
16 We are in a position to make copies if others
17 need them, but certainly they are here for the
18 use and availability to the parties. They are
19 on the table at the back of the room.

20 JUDGE CLIFTON: Let's go off the record
21 just a moment. This will give you a chance, if
22 you'd like to, to obtain a copy.

23 (Off the record.)

24 THE COURT: Let's go back on record. All
25 right. We're back on the record. It's 1:41.

1 MR. RICCIARDI: Thank you, your Honor.
2 It's Al Ricciardi on behalf of AIDA. It's my
3 understanding that the -- the documents that are
4 being provided from the Department are in the
5 process of being copied. There's one back room
6 copy available. Obviously for all of the
7 participants involved, it would be very helpful
8 to have the actual documents to follow along in
9 this testimony.

10 So my suggestion would be that we hold
11 off on the substantive testimony at this point
12 until we are actually able to all get copies.

13 JUDGE CLIFTON: Mr. Beshore, you may
14 approach.

15 MR. BESHORE: Thank you. Your Honor,
16 Marvin Beshore, B-e-s-h-o-r-e. I'd like to
17 enter my appearance on behalf of the Florida
18 Milk Producers Federation and Dairy Farmers of
19 America, Inc. Perhaps for -- certainly for the
20 first time, maybe one of the few times I've
21 been -- I'm going to concur with Mr. Ricciardi
22 in his request. I really would appreciate -- I
23 think we need Mr. Carman's data in front of us
24 to appreciate his testimony.

25 MR. RICCIARDI: You're going to agree

1 with me a lot more, I'm sure.

2 JUDGE CLIFTON: Mr. Stevens.

3 MR. GARRETT: Well, every attempt has
4 been made -- in fact, when we discovered this
5 morning and considered how many people would be
6 here and would be needing to use copies, every
7 attempt was made to produce those copies. And
8 they are being produced at this time, and
9 apparently have not been delivered as promised.
10 That's not the people's problem here. That's
11 our problem.

12 I also might note that all of these
13 documents -- and correct me if I'm wrong,
14 Mr. Carman -- have been up on the website for a
15 goodly period of time. They are certainly
16 available and have been available. Anyone who
17 wanted to look at these documents can go to the
18 website and run them off the website, and I feel
19 confident that many of these people have done
20 that.

21 So if there are people who have them,
22 having gotten them off the website, and are not
23 holding copies that were at the back of the
24 room, maybe they could share those copies. I'm
25 not making any particular point of it, other

1 than the fact that the Department makes every
2 effort to make these documents available and we
3 continue to do so.

4 And we'll make them available as quickly
5 as they can be gotten from the -- from -- from
6 the source of their making at this time. So
7 that -- that is my thought on the matter.

8 I mean, certainly everyone should have
9 copies to be able to review as Mr. Carman
10 testifies. I agree with that.

11 JUDGE CLIFTON: I agree with that, too,
12 Mr. Stevens.

13 I'd like to wait for the copies. And in
14 the meantime, I hope that those of you who
15 thought there might be some way to streamline
16 the presentation of the proponents, or even if
17 there isn't a way to streamline yet, because
18 we're so new to the process, if you want to work
19 together to determine in what order you might
20 proceed, I'm happy to do that as part of our
21 hearing, that I continue to preside, that we
22 have you identify yourselves and so forth, and
23 then take a break. Or if you all already know
24 each other, we could just take a break. You
25 could see in what order you think you might want

1 to go.

2 As you know, my order said we would first
3 take the Government's statistical evidence, and
4 then we'd start with Proposal Number 1 and then
5 we would go to Proposal Number 2 and thereafter.
6 I'm guided by your suggestions. And where there
7 are conflicts, I'll decide. But where you
8 agree, I'm very content to go that way.

9 So Mr. English.

10 MR. ENGLISH: Charles English. Your
11 Honor, it may help, if there are witnesses that
12 may be expected this week who have specific time
13 constraints, who are not known to proponents, or
14 if the -- those who have proposals at the end of
15 the proposal list, have witnesses they need to
16 go. Because we -- we, for our part, who either
17 have proposed Proposals 1 and 2 or support
18 Proposals 1 and 2, you know, have in mind who we
19 think the witnesses are going to be.

20 But obviously, one of the things about
21 these hearings is traditionally, if a dairy
22 farmer comes in, because of the nature of the
23 dairy farmer's business, the dairy farmer may be
24 given, and often is given without any objection,
25 given special priority to get on and off.

1 If there are going to be such witnesses
2 who are not presently known or available for the
3 first week, that would help us to make sure that
4 we haven't overscheduled or underscheduled for
5 any particular day. We certainly anticipated
6 one or more such witnesses, but we don't know
7 who those are. And, again, we can do that on
8 the record or off the record, any way that might
9 be done.

10 But if there are particular witnesses who
11 need to get on this week, who might not normally
12 get on because, say, there's a proposal, random
13 20, you know, it would help us if we knew who
14 those people might be.

15 JUDGE CLIFTON: All right, good.
16 Mr. Vetne.

17 MR. VETNE: Thank you. I have one
18 suggestion before we apparently go off the
19 record, your Honor.

20 I'd like to make a request that your
21 Honor chair the off-the-record discussion among
22 the parties.

23 For example, I assumed that the
24 proponents' witnesses are those that I know that
25 are already here. And I learned for the first

1 time from Mr. English that he has scheduled some
2 people to come in on Friday, apparently not
3 before Friday. So I in turn am prepared to call
4 my clients and say, don't bother to even arrange
5 to come until next week.

6 But it would be useful for us to know the
7 proponents' witnesses, their names and how long
8 they take. I think, your Honor, you would do a
9 good job chairing that discussion, and all of us
10 in that context -- I don't want to be chair.
11 But, you know, it's also a bit chaotic to
12 suggest that, okay, you guys get together
13 somehow. You know, it's not going to happen
14 unless it's structured. Thank you.

15 JUDGE CLIFTON: All right. And thank you
16 for that vote of confidence.

17 MR. STEVENS: Your Honor.

18 JUDGE CLIFTON: Yes.

19 MR. STEVENS: One thing I might suggest
20 is that in hearings of this type, part of the
21 record, the beginning of the record involves
22 the -- the notice of appearances; that is to say
23 that the government has given notice of the
24 people here representing the government's side.

25 And then there is an opportunity for all

1 the participants to make appearances and to
2 indicate for the record who they are
3 representing at this hearing. And then so we
4 might take a few minutes to have the
5 participants identify themselves, their
6 affiliations, and so usefully use our time here
7 to advance the record along and take care of
8 that matter while we await the belated
9 completion of the -- of the copying of the
10 materials for people to use. So I would suggest
11 that, certainly.

12 And I also would add that -- I think it's
13 certainly a very good suggestion, that off the
14 record today we -- we attempt to get as -- as
15 definitive a schedule of the various witnesses
16 who will appear for or against the proposals
17 that your Honor has -- has ably set forth. The
18 nature -- you know, the order in which the --
19 starting in the beginning with the first
20 proposal, and working through those in terms of
21 who the potential witnesses are and about how
22 long it would -- it would be anticipated they
23 would take for all the proposals.

24 And that would certainly be a useful
25 time -- a useful use of our time here probably

1 off the record, in terms of at least getting
2 to -- to decide how that may take place, and
3 then you putting it on the record when we
4 return.

5 So I would throw that out as -- as a
6 useful use of our time while we await the
7 completion of the evidence that is being copied.

8 JUDGE CLIFTON: All right. Thank you,
9 Mr. Stevens. Kate Fisher is not in the room
10 right now, but she forwarded to me some
11 information about people who had communicated
12 travel that caused them some scheduling
13 concerns. And some of these people need to
14 testify this week.

15 So let us start with Proposal Number 1,
16 as Mr. Stevens -- I'm going to keep this on the
17 record.

18 MR. STEVENS: That's fine.

19 JUDGE CLIFTON: Let's start with Proposal
20 Number 1 and talk about -- you've already given
21 us some indication that there are two witnesses
22 that could go today if there's time. But let's
23 talk about what other witnesses would be called,
24 that you're aware of, to testify in support of
25 Proposal Number 1, and then we'll see if there's

1 anyone here now that knows of witnesses who
2 would be testifying in opposition to Proposal
3 Number 1.

4 A lot of those people actually would be
5 proponents of other proposals, I'm aware. But
6 maybe -- maybe we can gather what collective
7 knowledge and have a proceeding that way.

8 Let me ask first, are there present now
9 any dairy farmers who would like to be heard
10 today, any producers? They were smart not to
11 come today.

12 All right. The other entity that I give
13 immediate opportunity to be heard from are state
14 officials from the governor's office or the
15 Department of Agriculture or other entities who
16 are on very tight time schedules. And I'm
17 always delighted to see them come. So I would
18 stop immediately for such representatives.
19 Mr. English.

20 MR. ENGLISH: Charles English. Not
21 speaking for them, but I have spoken with some
22 in-state officials who suggest -- and this is a
23 coalition, as I understand it, I may
24 misunderstand, so I want to be very careful.

25 My understanding is that there are a

1 group of states who would have two witnesses
2 testifying together. My understanding is. And
3 the two witnesses would be from Vermont and
4 Wisconsin, and I believe they would then cover
5 other states.

6 And I believe that -- because they aren't
7 both going to be available until Wednesday
8 night, that they would like to testify on
9 Thursday, officials from Vermont and Wisconsin.
10 And, again, I'm not speaking for them, because
11 since you raised the issue and since I'm at
12 least aware, have been told that's what their
13 intention is, I want to disclose that.

14 JUDGE CLIFTON: All right, good. Is
15 anyone else aware of state officials who might
16 be coming?

17 Mr. Tosi, you raised your hand before I
18 asked the question. Whatever you have to say.

19 MR. TOSI: That's fine, your Honor. Can
20 you hear me --

21 JUDGE CLIFTON: Yes.

22 MR. TOSI: -- on this mic? I might be
23 mistaken, but I was notified late last week that
24 I think Mr. Howard Hatch of New Hampshire, who's
25 a producer-handler under the Northeast Order,

1 may have some restrictions. I'm told that he
2 was going to try to arrive today. But I don't
3 know if that meant he was going to testify
4 today.

5 JUDGE CLIFTON: Mr. Hatch, if you'd come
6 forward, please? If you'd identify yourself and
7 say when you would like to testify?

8 MR. HATCH: Howard Hatch. My plane
9 leaves Wednesday morning.

10 JUDGE CLIFTON: Excellent, thank you. So
11 let's see. I'm thinking we need to have you
12 tomorrow or tomorrow afternoon, then, is that
13 correct, Mr. Hatch? I'm sorry, would you come
14 back?

15 MR. HATCH: Your Honor, I have an
16 attorney that's coming in tonight who is going
17 to be with me when I make my presentation.

18 JUDGE CLIFTON: Excellent. So tomorrow
19 sometime?

20 MR. HATCH: Yes.

21 JUDGE CLIFTON: Good. Thank you.

22 MR. HATCH: Thank you.

23 JUDGE CLIFTON: All right. Let me just
24 mention a few that I am aware of, and I know
25 Ms. Fisher has heard from others.

1 But Ted Dunajski, and that's spelled
2 D-u-n-a-j-s-k-i, needs to testify tomorrow.
3 He's arriving tonight.

4 Rod Daniels, he's to testify on
5 Wednesday. Matt Shatto, that's M-a-t-t,
6 S-h-a-t-t-o, needs to testify Thursday.

7 Mark, that's M-a-r-k, Kastel,
8 K-a-s-t-e-l, needs to testify Friday morning.

9 All right. And is Mr. Ben Carroll here
10 now? Good. Mr. Carroll, would you come to the
11 microphone? I know that your clients are
12 waiting to hear from you. Tell us who will be
13 coming and what you know about their
14 restrictions.

15 MR. CARROLL: There are two.

16 JUDGE CLIFTON: Oh, first tell me
17 everything about you.

18 MR. CARROLL: I'm John Benjamin Carroll.
19 I'm with the firm of Carroll & Carroll Lawyers,
20 PC, 440 South Warren Street, Syracuse, New York,
21 13202. The two persons who are coming are two
22 directly affected producer-handlers who maintain
23 they will be put out of business if this
24 regulation is accepted, so it's important for
25 them to appear.

1 They are Mr. Willard Stearns of Stearns
2 Dairy, Mr. John Rooney of Mountain Dairy. And
3 they were planning to come Friday. And I
4 believe that their reservations either have been
5 made or are in the process of being made.

6 JUDGE CLIFTON: All right. Now, so that
7 the court reporters will have their names
8 spelled right, I show Stearns as S-t-e-a-r-n-s?

9 MR. CARROLL: That's correct.

10 THE COURT: And I show Rooney as
11 R-o-o-n-e-y?

12 MR. CARROLL: That's correct.

13 JUDGE CLIFTON: So do you know what time
14 they're arriving?

15 MR. CARROLL: They'll be here Thursday --

16 JUDGE CLIFTON: Okay.

17 MR. CARROLL: -- available for Friday.

18 JUDGE CLIFTON: For Friday, okay.

19 MR. CARROLL: Right.

20 JUDGE CLIFTON: Good. Thank you.

21 MR. CARROLL: And while I have the
22 podium, instead of coming back and forth, I am
23 concerned for the scheduling here. I had
24 assumed that -- assuming the simplicity of these
25 proposals -- they're very simple, they put our

1 people out of business or they don't -- that it
2 could be put in rather quickly and that sometime
3 by Friday, the case of both the milk producers
4 and the dealers would have been completed.

5 If that's not going to happen, that's
6 something I'll find out in later discussion,
7 then I would have to change our dates as well.

8 JUDGE CLIFTON: All right. So you had a
9 realistic expectation we could finish in one
10 week?

11 MR. CARROLL: This is a very simple --
12 these proposals themselves are very simple. It
13 will either eliminate these producer dealers
14 from all opportunities to be in the market or
15 you don't. And it doesn't take mounds of data
16 and everything else to make that decision.

17 If the Department has got the documents
18 ready, and I understand they have, then it seems
19 to be very simple for these gentlemen to come to
20 a decision as to what kind of proof they have to
21 put in. Because it's basically a decision
22 that's going to be generated on the statistics
23 and opinions of experts, and other people
24 probably are going to be helpful, but they
25 aren't going to be controlling.

1 On the other hand, you could, with this
2 simple issue, keep this hearing going
3 indefinitely. Because there are plenty of
4 people who will want to express what their
5 thoughts are, and that may not have anything to
6 do with a decision.

7 JUDGE CLIFTON: John Hornstra,
8 H-o-r-n-s-t-r-a, may be present either Thursday
9 or Friday. He's still trying to -- we're still
10 trying to confirm his travel arrangements.
11 Kathie, that's K-a-t-h-i-e, Arnold, plans to be
12 here Friday. Looks like Friday is our shortest
13 day and Friday looks like it's going to be --
14 we'll have plenty to do, so -- Mr. Tosi?

15 MR. TOSI: Yes, your Honor. I received
16 an e-mail this morning from Kathie saying
17 that -- that she and three other organic dairy
18 farmers from the Northeastern part of the U.S.
19 will not be coming now until the 11th.

20 JUDGE CLIFTON: That's helpful. Good.
21 All right. Let us hear from someone about what
22 witnesses are likely to be called in support of
23 Proposal Number 1. This is for rough
24 scheduling. This in no way limits you from
25 calling other people. This is just so we can

1 get an idea of how long things might take.

2 MR. BESHORE: With respect to schedule
3 one, which also covers many witnesses, would
4 address Proposal 2 and 26 as well, not all
5 witnesses might, but many would.

6 JUDGE CLIFTON: So Proposal 1, Proposal 2
7 and Proposal 26 might be addressed?

8 MR. BESHORE: Jointly.

9 JUDGE CLIFTON: By the witnesses you're
10 telling me about?

11 MR. BESHORE: Yes.

12 JUDGE CLIFTON: Okay.

13 MR. BESHORE: The first witness, whose
14 testimony has already been made available in the
15 back of the room, is Dr. Roger Cryan from the
16 National Producers Federation. Okay?

17 Then not a witness that is on behalf of
18 my clients, but a witness who on behalf of the
19 International Dairy Foods Association, which is
20 a co-sponsor of 1 and 2, is Dr. Robert Yonkers.
21 He will -- he's here and also prepared to
22 testify.

23 Then there are a number of witnesses who
24 are on behalf of members of the National Milk
25 Producers Federation Member Cooperative. So I

1 expect them to be coming and testifying. They
2 are not, per se -- just so there are no
3 misunderstandings -- employees or -- or
4 witnesses of the National Milk Producers
5 Federation in and of itself.

6 But I expect them to be supportive
7 generally of the National Milk proposals.
8 Dennis Tonak from Midwest Dairyman's Company.

9 THE COURT: How do you spell Tonak?

10 MR. BESHORE: T-o-n-a-k. And he would be
11 available tomorrow. Mike Asbury, A-s-b-u-r-y.
12 He would be available tomorrow or Wednesday
13 certainly. Paul Rovey, R-o-v-e-y, is available
14 Wednesday, yeah, he is a dairy farmer.

15 Leon Berthiaume, B-e-r-t-h-i-a-u-m-e,
16 would be available tomorrow afternoon or
17 certainly Wednesday. We have three dairy
18 farmers who are members of Dairy Farmers of
19 America that will be available on Wednesday to
20 testify.

21 From Northwest Dairyman, which is a
22 member cooperative of the National Milk
23 Producers Association, Steve Rowe, R-o-w-e, is
24 available Thursday, probably Wednesday, possibly
25 Wednesday, depending on travel from the Pacific

1 Northwest. We're hoping -- we're hoping he's
2 available Wednesday, but I'm not certain.

3 Elvin Hollon for Dairy Farmers of America
4 is here and we would expect to have him testify
5 after some of the other scheduled witnesses.

6 Those are the witnesses of National Milk
7 Producers Federation Members Cooperative that I
8 specifically am aware of coming in presently.,
9 scheduled to be here presently in support of 1,
10 2 or 26 or some combination thereof.

11 There are other witnesses who I would
12 defer to Mr. English, who would be with his
13 group, who maybe are supportive of some
14 combination of those proposals.

15 THE COURT: Thank you, Mr. Beshore.
16 Mr. English?

17 MR. ENGLISH: Charles English, your
18 Honor. We have a witness for the New York State
19 Dairy Foods Association and also Steuben Foods
20 who should be here tonight and available if
21 there's time tomorrow. Mr. Jim Buelow,
22 B-u-e-l-o-w.

23 We also have available Wednesday a
24 witness for Prairie Farms Dairy, Mr. Gary Lee,
25 and he's only available Wednesday. We have

1 another witness from New York State Dairy Foods
2 Association, Gary Latta, who is only available
3 Thursday. Actually, he'll be available Thursday
4 or Friday, but Thursday is preferred.

5 JUDGE CLIFTON: Spell his last name for
6 me.

7 MR. ENGLISH: L-a-t-t-a. We have a
8 witness from Shamrock Foods Company, Mr. Mike
9 Krueger, K-r-u-e-g-e-r, who is available
10 Thursday.

11 We have a witness from the Pacific
12 Northwest, preferably Thursday, could go
13 Wednesday, so we're trying to be flexible
14 working, depending on your timetable, your
15 Honor.

16 We expect a witness from Dean Foods
17 Company to be available, and that could start by
18 Friday or Monday.

19 Then we do have witnesses hearing over
20 this next week because they were not available
21 this week. On Monday the 11th, a witness from
22 Dairy Institute of California, Mr. William
23 Schiek, spelled S-c-h-i-e-k.

24 On Tuesday the 12th, a witness from
25 Anderson Erickson Dairy Company, Warren

1 Erickson. And a witness from Harrisburg
2 Dairies, also on behalf of the Pennsylvania
3 Association of Milk Dealers, Christen Dewey.

4 JUDGE CLIFTON: And how is Erickson
5 spelled?

6 MR. ENGLISH: E-r-i-c-k-s-o-n.

7 JUDGE CLIFTON: And Ms. Dewey would also
8 be on Tuesday the 12th?

9 MR. ENGLISH: Tuesday, the 12th. That's
10 the only day she could make it in. And at this
11 time those are the things I'm aware of. There
12 are a few things in play I don't think are going
13 to happen but that is what I'm aware of.

14 JUDGE CLIFTON: All right. I believe we
15 may be at the point where I should guarantee
16 that we will be here for two weeks. And that
17 way people who are trying to figure out, should
18 I come this week or should I come next week,
19 will know that they can come next week rather
20 than come this week and sit and wait and not get
21 in. So as much as I appreciate Mr. Carroll's
22 viewpoint that we ought to be able to do this in
23 a week, I don't think we will.

24 Is there anyone that would strongly
25 object to my guaranteeing that I will be here to

1 continue to receive evidence through at least
2 noon a week from Friday? There's no objection.
3 I will be here receiving evidence until at least
4 noon a week from Friday. Okay. Let me see how
5 close we're getting to 3. Oh, we're a long way
6 from 3. Mr. English.

7 MR. ENGLISH: I just want to say in
8 fairness to proponents, might we also hear from
9 others who witnesses may be and when they might
10 be here? We don't seem to have documents yet,
11 so I would think in fairness to those of us who
12 disclosed who our witnesses are likely to be,
13 that we have the same courtesy.

14 JUDGE CLIFTON: Thank you, Mr. English.
15 That was in fairness to them or in fairness to
16 you?

17 MR. ENGLISH: In fairness to me.

18 JUDGE CLIFTON: Okay. Mr. Beshore?

19 MR. BESHORE: Well, I would join that.
20 But I wonder, your Honor, if -- if the record --
21 I would hope the record would not reflect that
22 going till next Friday at noon is absolutely
23 cast in concrete if, in fact, you know, we run
24 out of witnesses before that time.

25 JUDGE CLIFTON: How we will know? If I

1 guarantee it, that means I better be here.

2 MR. BESHORE: Well, I would like you to
3 reconsider or clarify precisely the view on
4 that. If we invite folks now by a
5 cast-in-concrete statement that you'll be here
6 on Friday, we can guarantee some people are
7 going to schedule themselves probably for Friday
8 and things could go faster than we anticipate.

9 I don't know how many witnesses -- we
10 really need to hear -- hear the numbers of
11 witnesses that are coming from the other
12 proponents, and both Mr. Ricciardi and
13 Mr. Miltner and Bryson, and Mr. Carroll have
14 perhaps provided his witnesses.

15 JUDGE CLIFTON: All right. Let's do
16 this. Let me start this way, rather just
17 proposal by proposal, to find out who's here --
18 and I realize a lot of people aren't here yet
19 because they knew they would have no chance to
20 speak today.

21 Let me ask this. Let me ask, if you're
22 here as a proponent of a proposal or as counsel
23 for a proponent of a proposal, please stand,
24 everyone. If you are here as a proponent of a
25 proposal or counsel for a proposal. Okay.

1 If you have not yet come to the podium at
2 all today, please come forward and identify
3 yourself.

4 MR. BROSCHE: Thank you, your Honor. I'm
5 Kevin Brosch. I'm outside general counsel for
6 National Milk Producers Federation. I'm here on
7 behalf of National Milk with Mr. Beshore.

8 I don't have anything to add, though,
9 with respect to what Mr. Beshore said. He's
10 already described National Milk's proposal and
11 who is going to be here on behalf of National
12 Milk, Dr. Cryan. Thank you.

13 MR. YONKERS: Your Honor, I'm Robert
14 Yonkers with the International Dairy Foods
15 Association. Mr. Beshore already mentioned that
16 my testimony is available on Proposals 1 and 2
17 to follow Dr. Roger Cryan.

18 MR. YALE: Good afternoon. Benjamin F.
19 Yale on behalf of Select Milk Producers and
20 Continental Dairy Products. We support
21 basically National Milk's proposal, as long as
22 there's grandfathering. We may have one
23 witness, but that will be available next week.

24 JUDGE CLIFTON: Mr. Yale, come back. Do
25 you care which day next week?

1 MR. YALE: No. We will be very flexible.

2 JUDGE CLIFTON: Okay. Now, let me --

3 MR. YALE: Like maybe Friday afternoon at
4 6:00, and nobody would care anyhow, so --

5 JUDGE CLIFTON: Okay. Now, let me --

6 MR. YALE: I mean, part of it just
7 depends on how things go. I think as
8 Mr. Carroll, I think, aptly put it, there's just
9 a tremendous amount of duplication in these
10 proposals.

11 And a lot of people, in testifying on
12 behalf of one proposal will, in effect, will be,
13 whether they realize it or not, providing
14 evidence in support of other proposals that are
15 there. But we don't intend to duplicate or add
16 to the record any more than we need to necessary
17 to differentiate if there's any issue we need to
18 specifically address.

19 JUDGE CLIFTON: All right. Thank you
20 Mr. Yale.

21 MR. METZGER: Yes. My name is Erick
22 Metzger, M-e-t-z-g-e-r, general manager for
23 National All-Jersey, 6486 East Main Street,
24 Reynoldsburg, Ohio, 43025.

25 We do not have a proposal on this

1 hearing, although as a national producer member
2 organization, including several members who are
3 producer-handlers, we would provide a statement
4 in support of some proposals and opposed to
5 others.

6 I have the luxury of living within
7 130 miles of here, so within -- you know, given
8 half a day's notice, I can be back to provide
9 testimony to fill in a gap if there's perceived
10 to be one at some point.

11 JUDGE CLIFTON: All right. How do you
12 spell Erick?

13 MR. METZGER: E-r-i-c-k.

14 JUDGE CLIFTON: And on what phone number
15 should we contact you to say we need a witness?

16 MR. METZGER: It would be area code
17 (209) 613-2286.

18 JUDGE CLIFTON: All right. And do you
19 have any objection to that phone number being in
20 the transcript?

21 MR. METZGER: No. It's all over the web.

22 JUDGE CLIFTON: Thank you. All right.

23 MR. BERTHIAUME: Good afternoon, your
24 Honor. My name is Leon Berthiaume. And I am
25 the CEO and general manager of the St. Albans

1 Cooperative Creamery, 140 Federal Street,
2 St. Albans, Vermont, 45478.

3 JUDGE CLIFTON: Would you spell your last
4 name?

5 MR. BERTHIAUME: B-e-r-t-h-i-a-u-m-e.

6 JUDGE CLIFTON: And tell me again how you
7 say it.

8 MR. BERTHIAUME: Berthiaume.

9 JUDGE CLIFTON: Berthiaume?

10 MR. BERTHIAUME: Yes.

11 JUDGE CLIFTON: Thank you.

12 MR. BERTHIAUME: Thank you.

13 JUDGE CLIFTON: Oh, come back. What is
14 your schedule, yours and your witnesses?

15 MR. BERTHIAUME: I am part of the
16 witnesses that Mr. Beshore had mentioned
17 earlier. And then I need to be completed by
18 Wednesday afternoon.

19 JUDGE CLIFTON: Thank you.

20 MR. BERTHIAUME: All right.

21 JUDGE CLIFTON: All right. Is there
22 anyone else who is here as a proponent or to
23 testify on a particular proposal? Mr. Vetne,
24 you may come forward.

25 MR. VETNE: John Vetne representing

1 Mallories Dairy, Country Morning Farms and
2 Nature's Dairy.

3 As I indicated earlier, those three
4 clients are West Coast clients. They're
5 proponents of Proposal 17, opponents of
6 Proposal 1 and 2. And either quasi supporting
7 or quasi opposing some other proposals. They
8 will come on two days' notice, as I indicated
9 earlier. I'm going to tell them this afternoon
10 that they don't have to plan to come until next
11 week.

12 They will not have extensive testimony.
13 They will try to limit their testimony
14 uncharacteristically in these proceedings to
15 facts rather than argument. That's what I'm
16 going to encourage them to do. So that's it.
17 They will give facts on their operations.

18 If there are questions on the -- on how
19 the regulations that are proposed by them works,
20 they are not regulatory experts, they're not
21 administrative lawyers, and I will address those
22 questions.

23 And the material is already in the
24 record, the proposal's submitted. So that's
25 all. So we have three, possibly -- possibly

1 four, if it gets legal and technical. And
2 shouldn't take more than 15, 20 minutes each.

3 JUDGE CLIFTON: Now, when you say
4 possibly four, you would be a witness?

5 MR. VETNE: If there are questions on how
6 it works, and there frequently are. My clients,
7 like most of the targets of the Proposal 1 and
8 2, Proposal 1 in particular, are small
9 businesses.

10 You know, unlike the proponents of
11 Proposal 1, they do not have economists on
12 staff. They do not have lawyers on retainer.
13 Pretty much like most dairy farmers that come in
14 here, they don't have a good handle on how
15 things work and how things fit. They do have a
16 good handle on their own bottom line, so they
17 will address bottom line issues. And I will --
18 if necessary if there are questions, I will
19 address how it fits. Thank you.

20 JUDGE CLIFTON: Thank you.

21 MS. ORR: I'm Dr. Carolyn Orr. I am the
22 agricultural liaison for the Eastern Regional
23 Conference of the Council of State Governments,
24 spelled O-r-r. And I'm here mostly as an
25 observer, to testify if necessary. I represent

1 the state legislators in the Northeast that have
2 spent considerable sums of state money to prop
3 up and support the dairy industry the last four
4 years, and are very concerned about issues that
5 will affect their small producers.

6 JUDGE CLIFTON: Sounds to me like you
7 should testify.

8 MR. MILTNER: Ryan Miltner on behalf of
9 AIDA. Given the schedule that has been laid out
10 and the witnesses that have been identified, we
11 will be prepared to put on our witnesses next
12 week, and it looks like as early as Tuesday.

13 Depending on the specific testimony that
14 is presented by the proponents of 1 and 2 and
15 26, members of AIDA may testify, probably in the
16 neighborhood of six representatives, and we
17 expect their testimony to be relatively brief.

18 And depending on cross-examination, of
19 course, we would also anticipate putting on two
20 economic experts, and in total, possibly a third
21 economic expert depending, again, what needs to
22 be presented in rebuttal.

23 And we would anticipate that, including
24 cross-examination, our testimony both in support
25 of our proposals and in opposition to the other

1 proposals could be completed in 2 1/2 to 3 days.

2 JUDGE CLIFTON: What -- what do you think
3 of my idea that I guarantee that I'll be here
4 through Friday -- a week from Friday at noon?

5 MR. MILTNER: I think it's certainly
6 possible. And I hope that we can conclude next
7 week.

8 I understand Mr. Beshore's concern of
9 guaranteeing that there will be somebody in this
10 room to take testimony until noon on Friday.
11 Because if we're able to start our witnesses on
12 Tuesday, we could have them done on Thursday,
13 and we're towards the ends of the line, as far
14 as proposals as they're numbered.

15 Depending on what rebuttal testimony
16 others may have, we could conceivably wrap this
17 up on Thursday. And like Mr. Metzger, I live
18 relatively close to Cincinnati and I would love
19 to be home on Friday with my family, if we can
20 avoid that.

21 JUDGE CLIFTON: So you think my guarantee
22 might be better placed, say, Thursday at 6:00?
23 That I'll be here through Thursday at 6:00?

24 MR. MILTNER: I would be stunned if we
25 were done on Wednesday, but I'll leave the

1 guarantees up to you, your Honor.

2 JUDGE CLIFTON: So you think we'll be
3 here at least part of Thursday?

4 MR. MILTNER: Based on what we believe
5 we're going to have in terms of testimony and
6 the list of the 20 or 25 people that have
7 already been identified, many of them I believe
8 will be short, both on the other side and ours
9 in terms of, you know, total testimony of an
10 hour or less. But there will be some that will
11 be extensive and include a lot of data, and so
12 we're going to take a good portion of next week.

13 JUDGE CLIFTON: Thank you. All right.
14 Is there anyone else here who has not come to
15 the podium? But -- Mr. Beshore, did you have
16 something?

17 MR. BESHORE: Yeah, I'm sorry. I meant
18 to try to get a question in before Mr. Miltner
19 left the podium. The two or three economic
20 expert witnesses were not identified, and I
21 think that would be appropriate.

22 JUDGE CLIFTON: Oh.

23 MR. BESHORE: All our witnesses are
24 named.

25 JUDGE CLIFTON: All right. Mr. Miltner,

1 would you return, please, to the podium? You
2 did mention two economic experts. Who are they?

3 MR. MILTNER: I did. The first is
4 Dr. Ron Knutson from Texas A&M. And the second
5 is Dr. Wayne Knoblauch from Cornell University.
6 And the third, because we have not confirmed his
7 retention and because his testimony we
8 anticipate would be chiefly in rebuttal, I don't
9 necessarily want to promise his attendance or
10 disclose him at this point. But we'll know
11 before the end of this week whether he would be
12 in attendance and once a decision is made, we'll
13 certainly disclose that.

14 JUDGE CLIFTON: All right. Spell Knutson
15 for me.

16 MR. MILTNER: Sure. K-n-u-t-s-o-n. And
17 Knoblauch is K-n-o-b-l-a-u-c-h.

18 JUDGE CLIFTON: Thank you. All right.
19 Is there anyone else here who has not yet been
20 to the podium who is a proponent of one of the
21 proposals or expects to testify on behalf of one
22 of those proposals?

23 MS. ORR: I'd like to provide my phone
24 number and I can be available next week. I'm
25 only four hours away.

1 JUDGE CLIFTON: All right.

2 MS. ORR: (765) 893-8209.

3 JUDGE CLIFTON: Thank you. All right.

4 We'll go off record while you have an
5 opportunity to take a copy from the back of the
6 room of the documents that will be testified
7 about by the witness.

8 (A recess was taken from 2:26 to 2:41.)

9 JUDGE CLIFTON: All right. Let's go
10 back on the record. We're back on the record at
11 2:41. I'd like to continue with identifying
12 people who may be testifying. Would you come
13 forward, please?

14 MS. BRYSON: I'm Nancy Bryson with
15 Holland & Hart. I'm also here for AIDA,
16 American Independent Dairy Alliance.

17 JUDGE CLIFTON: And are there any
18 witnesses that you anticipate calling that have
19 not already been identified?

20 MS. BRYSON: I just -- no. I just
21 arrived. My plane was delayed. Thank you.

22 MR. MILTNER: Ryan Miltner, I just
23 announced our witnesses before Mrs. Bryson went.

24 JUDGE CLIFTON: All right. Mr. Carroll,
25 would you resume position at the podium and add

1 to what you said?

2 MR. CARROLL: Yes. During the break, I
3 advised your Honor that I will also be a witness
4 on behalf of our proposal.

5 JUDGE CLIFTON: Has everyone had an
6 opportunity to obtain a copy of the proposed
7 exhibits from the back of the room? It appears
8 so.

9 All right. Mr. Stevens, you may resume.

10 CONTINUED DIRECT EXAMINATION

11 BY MR. STEVENS:

12 Q. Mr. Carman, I guess you were describing
13 for the record before we -- we went in a different
14 direction for a while. You were describing that you had
15 appeared in a hearing before that -- in different ways,
16 and also that you had prepared documents that you
17 brought with you today for the hearing, is that right?

18 A. Yes.

19 MR. STEVENS: And as I say, your Honor,
20 now copies have been available -- made available
21 to the parties here.

22 Q. Mr. Carman, could you -- could you go
23 through the documents that you have in front of you,
24 starting with the first one and -- well, before you --
25 let me --

1 MR. STEVENS: Let me ask, I guess, your
2 Honor, you have copies of these documents. We
3 have copies. They have been distributed.

4 I guess I would like them to be marked
5 for identification before Mr. Carman testifies,
6 if that would be permissible.

7 JUDGE CLIFTON: I think that would be
8 helpful. And those of you who are participating
9 in the hearing, if you'll mark your own as we go
10 so that we're all on the same page.

11 Q. You have in front of you a document that
12 at the top of the page has the title, Order Exempt Plan,
13 right?

14 A. Yes that's a three-page document.

15 MR. STEVENS: Your Honor, I would like
16 that marked for identification as Exhibit
17 Number 5.

18 (Exhibit 5 was marked for
19 identification.)

20 JUDGE CLIFTON: And I'm going to ask the
21 witness to mark those, the ones he's testifying
22 from will become the record copy.

23 MR. STEVENS: Okay. And the only
24 comments I might have on that is, he probably
25 has -- may have a note or two written on his,

1 and if that is the case, we will make sure that
2 the document that goes into the record is the
3 one that might not have any notes that he might
4 have written.

5 JUDGE CLIFTON: All right. And,
6 Mr. Stevens, you're going to take responsibility
7 for that?

8 MR. STEVENS: Yes.

9 JUDGE CLIFTON: Thank you.

10 MR. STEVENS: I'll be happy to take
11 that responsibility with my colleague, Mr. Tosi.
12 So a three-page document marked as
13 Exhibit 5.

14 Next document, your Honor, I'd like to
15 mark for identification I believe is a one-page
16 document has the title, Actual Route Sales by
17 Handler Type - Eight Orders.

18 JUDGE CLIFTON: Mr. Stevens, that's
19 actually Annual.

20 MR. STEVENS: Annual. Did I read the
21 wrong words?

22 JUDGE CLIFTON: You said actual.

23 MR. STEVENS: That shows that I'm having
24 trouble reading. But, in fact, annual. Thank
25 you.

1 JUDGE CLIFTON: And you want him to mark
2 that as exhibit what?

3 MR. STEVENS: 6.

4 (Exhibit 6 was marked for
5 identification.)

6 MR. STEVENS: The next document is a
7 one-page document entitled Information on
8 Producer-Handlers Operating in Federal Milk
9 Orders -- Milk Order Marketing Areas, Selected
10 Time Periods. I would like that marked for
11 identification as Exhibit 7.

12 (Exhibit 7 was marked for
13 identification.)

14 MR. STEVENS: The next document, and I
15 understand a one-page document, entitled
16 Producer-Handler List, and has plant names and
17 some information about that. One-page document.
18 I would like that marked as Exhibit 8.

19 (Exhibit 8 was marked for
20 identification.)

21 MR. STEVENS: Next document, one-page
22 document entitled, Package Dispositions of
23 Class I Milk Products by Handlers Regulated
24 Under Federal Milk Orders, by Product, by Order,
25 2000 to 2008. I would like that marked for

1 identification as Exhibit 9.

2 (Exhibit 9 was marked for
3 identification.)

4 MR. STEVENS: The next document, your
5 Honor, is a one-page document entitled Sales of
6 Fluid Milk Products in Federal Milk Order
7 Marketing Areas, by Producer-Handler,
8 by Order, 2000 to 2008. I would like
9 that marked for identification as
10 Exhibit 10.

11 (Exhibit 10 was marked for
12 identification.)

13 MR. STEVENS: The next document that I'd
14 like to mark is a one-page document entitled
15 Sales of Fluid Milk Products in Federal Milk
16 Order Marketing Areas, by Exempt Handlers, by
17 Order, 2000 to 2008. I would like that marked
18 as Exhibit 11.

19 (Exhibit 11 was marked for
20 identification.)

21 MR. STEVENS: The next document is a
22 one-page document entitled Sales of Fluid Milk
23 Products in Federal Milk Order Marketing Areas,
24 by Producer-Handler, by Order, 2000 to 2008. I
25 would like that marked as Exhibit 12.

1 (Exhibit 12 was marked for
2 identification.)

3 MR. STEVENS: The next document is a
4 five-page document entitled Producer-Handler
5 Regulatory Status, and the first page is marked
6 2005. And I think after that, I think it goes
7 through the years from 2005 through 2009 --
8 2009. Five-page document, Exhibit 13,
9 please.

10 (Exhibit 13 was marked for
11 identification.)

12 MR. CARROLL: I don't believe I have a
13 copy of either of those.

14 JUDGE CLIFTON: Does everyone have that?
15 It has lots of Xs on it.

16 AUDIENCE MEMBER: Yeah.

17 JUDGE CLIFTON: Oh. Didn't you tell us,
18 Mr. Stevens, that we only had 1 through 12 so
19 far?

20 MR. STEVENS: No, now we have all the
21 documents.

22 JUDGE CLIFTON: Oh. Let's go off record
23 while you retrieve the other documents.

24 (Off the record.)

25 JUDGE CLIFTON: All right, let's go back

1 on record.

2 MR. STEVENS: Thank you, your Honor. I
3 believe we were at Exhibit 13. The document
4 that I would like marked as Exhibit 13, which is
5 a five-page document entitled Producer-Handler
6 Regulatory Status, and I think it has pages
7 representing the years 2005 through 2009.

8 The next document is a one-page document
9 which I believe -- the next document and the
10 following documents, what I'm asking for is 14
11 through what will be 19, are -- I'm sorry, 20 --
12 are basically the same information for different
13 years.

14 The document numbered -- I'd like marked
15 as 14 is Federal Order Small Plant Structure
16 Information for October 2002, and that I would
17 like marked as Exhibit 14.

18 (Exhibit 14 was marked for
19 identification.)

20 MR. STEVENS: The same information
21 appearing on the next document I would like
22 marked as 15, which is Federal Order Small Plant
23 Structure information for May 2003.

24 (Exhibit 15 was marked for
25 identification.)

1 MR. STEVENS: Then 16 is the same
2 information, Federal Milk Order Small Plant
3 Structure Information for October 2007, marked
4 as Exhibit 17. I'm sorry, May 2007.

5 (Exhibit 16 was marked for
6 identification.)

7 JUDGE CLIFTON: So Exhibit 16 is
8 May 2007?

9 MR. STEVENS: Okay, I'm sorry. Just give
10 me a minute, your Honor.

11 JUDGE CLIFTON: Then Exhibit 17,
12 Mr. Stevens, will be October 2007.

13 (Exhibit 17 was marked for
14 identification.)

15 MR. STEVENS: 17 is October 2007. Just
16 to make sure, 16 was May of 2007, correct.

17 Exhibit 18 I would like marked for
18 identification represents the month of May 2008
19 for Federal Milk Orders Small Plant Structure
20 Information.

21 (Exhibit 18 was marked for
22 identification.)

23 MR. STEVENS: All right. Next is a
24 one-page document, Federal Milk Order Small
25 Plant Structure Information for October 2008,

1 Exhibit 19.

2 (Exhibit 19 was marked for
3 identification.)

4 JUDGE CLIFTON: Let me ask. If you're in
5 the back of the room, when Mr. Stevens turns his
6 head away from the microphone, can you still
7 hear him?

8 AUDIENCE MEMBER: No.

9 JUDGE CLIFTON: These are meant for you
10 to be close.

11 MR. STEVENS: Okay, sorry about that. Is
12 there anyone missing any information that I can
13 give you now?

14 JUDGE CLIFTON: Let's go to 20. Let's do
15 20.

16 MR. STEVENS: 20. Federal Milk Order
17 Small Plant Structure Information for
18 March 2009.

19 (Exhibit 20 was marked for
20 identification.)

21 JUDGE CLIFTON: Okay. Did anyone need
22 Mr. Stevens to repeat anything that you might
23 have not heard? All right. Mr. Stevens, you
24 may resume.

25 MR. STEVENS: All right.

1 BY MR. STEVENS:

2 Q. Starting with the exhibit that we have
3 marked as number 5, for identification number 5, could
4 you go through the document and explain the information
5 that's contained in it?

6 A. We were asked by a number of parties to
7 try and put together a list of exempt plants. We don't
8 normally have such a list in Washington. We went to the
9 websites of a number of the Market Administrators as
10 well as made some individual contacts and assembled this
11 list that contains the name of the plant, the location,
12 city, town and state of the exempt plant.

13 We believe that that time period is the
14 end of 2008, beginning of 2009. Depending on the order
15 and their website availability, it could cover the
16 period from October 2008, November, December and January
17 of 2009 in assembling that list.

18 Q. Okay. Go to the document marked as 6.
19 Could you describe what's contained in that document?

20 A. We were asked to provide some information
21 similar to what the Federal Order 1 had done in a market
22 bulletin dealing with -- with -- with route sales by
23 handlers, by type of handler. The original data was for
24 2002, 2006 and 2007 in the New York -- in the Northeast
25 market bulletin. We've added 2008 and we've done it for

1 eight orders rather than all ten.

2 If you'll remember that on April 1 --
3 pardon me, on April 1 of 2004, the Western Order was
4 terminated. So at that time we went to ten orders.
5 Previous to that, we had eleven.

6 And then on April 1 of 2006, there were
7 size limitations put on producer-handlers in the Pacific
8 Northeast and the Arizona, Las Vegas Order.

9 In order to have capability or
10 comparability between 2002 and 2006 with 2007 and 2008
11 data, we are limiting it to eight orders. So it's
12 the -- they all have a similar status of regulation
13 across those four -- four selected years.

14 Q. All right. Could you describe for us
15 now -- these documents, some of them have footnotes and
16 some of them have, in this case, an asterisk with a note
17 that the document is subject to the footnotes, is it
18 not, or any explanatory notes on the document?

19 A. Yes.

20 Q. With that in mind, can you describe
21 what's contained in exhibit -- on the document marked as
22 Number 7?

23 A. Number 7 is a table that we have
24 attempted in the past to produce every five years to
25 just give a snapshot of some information on

1 producer-handlers. You'll note that in -- there's a
2 break -- there's not a five-year time period between '92
3 and 2001. That was when we were doing Federal Order
4 Reform, which started as a result of the 1996 Farm Bill.
5 We did not do October or -- or didn't do October of
6 1997. When we finally got back to collecting the
7 information and putting it together, it was December of
8 2001.

9 And then we have added December of 2008
10 in preparation for this hearing.

11 Q. Could you explain -- the footnotes of
12 course are applicable to the information?

13 A. Correct.

14 Q. Could you explain what's contained in the
15 document marked as Exhibit Number 8?

16 A. Number 8 is a list of producer-handlers
17 for the end of 2008. It contains the name of the plant,
18 the order number, the city the state and the Class I
19 differential for that plant.

20 Q. Looking at the document marked as
21 Exhibit 9, what's contained in that document?

22 A. That contains the packaged disposition of
23 Class I milk producers by handlers regulated under
24 Federal Orders for each of the eleven orders.

25 You will note that the Western Order is

1 footnoted as being terminated effective April 1 and the
2 data there is for the January-March period of 2004.
3 Also the Arizona, Las Vegas Order name changed on
4 April -- pardon me, May 1 of 2006, with enactment and
5 regulatory status under the milk -- Milk Regulatory
6 Equity Act.

7 Q. All right. Go to the document marked as
8 Number 10. What's in that document?

9 A. Number 10 is the Sales of Fluid Milk
10 Products in Federal Orders by Fully Regulated Handlers.
11 That's in-area sales for each of the eleven orders
12 starting in 2000 and ending in 2008. Those are annual
13 totals.

14 Q. Subject to the footnotes?

15 A. Yes.

16 Q. Please describe what's on the document
17 marked for identification as Exhibit 11?

18 A. Number 11 is the Sales of Fluid Milk
19 Products in Federal Marketing Order Areas, in Area Sales
20 by Exempt Handlers, also for the eleven orders from 2000
21 through 2008. There is a significant footnote of data
22 being restricted in a number of those years and a number
23 of those orders. That is footnote number 2.

24 Q. All right. How about the document marked
25 for identification as Exhibit 12, what's on that

1 document?

2 A. This is in-area sales for
3 producer-handlers, 2000 to 2008 by the eleven orders.
4 Again, we have footnote 2, some restriction on release
5 of the data.

6 Q. All right. Now, Exhibit 13 is a
7 five-page document. Could you -- could you tell us
8 what's contained in that document?

9 A. In preparation for this hearing, we were
10 asked to prepare a listing of the producer-handlers'
11 regulatory status by month for -- we began that listing
12 from January of 2005 and it continues through March of
13 2009, spread across these five pages of the -- of the
14 exhibit.

15 It contains the name of the plant, the
16 city and state, the Order number. You will note that in
17 all these five pages they're sorted by Order number, so
18 that all of the Northeast Order producer-handlers and
19 their regulatory status is shown together in similar
20 fashion, Order 5, Order 7, 30 in such order.

21 Q. Okay. And there's some notes on there.
22 Sometimes it says ED, Closed. Obviously that would mean
23 the plant is closed, right?

24 A. ED stands for -- it's an exempt
25 distributor for that month. An exempt distributor in

1 this case is one that has less than 150,000 of route
2 sales for that designated month. So rather than being a
3 producer-handler, they may have been an exempt
4 distributor for that month.

5 In addition, there's a -- an additional
6 footnote in 2008, page RD. One of the plants moved to
7 a -- be a regulated distributor during two months of
8 2008.

9 Q. Well, that just -- that just describes
10 the situation where -- where a plant can change status
11 from month-to-month depending on its sales?

12 A. That's correct.

13 Q. Thank you.

14 JUDGE CLIFTON: Mr. Carman, would you
15 clarify, when you say less than a hundred
16 thousand?

17 THE WITNESS: Less than 100,000 pounds --
18 pounds of milk sold as Class I product during
19 the -- during the marketing period, which is a
20 calendar month.

21 JUDGE CLIFTON: Thank you.

22 BY MR. STEVENS:

23 Q. Please go to the document marked as
24 Exhibit 14 and explain what is contained on that
25 document.

1 A. Number 14 is for the year -- or, pardon
2 me, is a snapshot of October 2002, looking at the
3 structure of the various plants under full or partial
4 regulation or exempt or producer-handlers.

5 The table is broken out into four parts
6 on each -- on each page. Following exhibits, Numbers 15
7 through 20, are set up in a similar fashion. They look
8 at, in the first part of -- of each page, the number of
9 producer-handlers. This is strictly numbers. It does
10 not -- does not represent actual -- or pardon me --
11 total sales in that category, but breaks the
12 producer-handlers into those that are in the Eastern
13 Orders 1, 5, 6, 7 and 33, and those that are in the
14 Western Orders 30, 32, 124, 126 and 131. And then
15 attempts to break those producer-handlers, for example,
16 into various size classes; route sales of less than
17 150,000.

18 In other words, yes, they could be a
19 producer-handler or are classified as a producer-handler
20 in May of 2002, but could have been exempt under that
21 condition.

22 Additional size classes are 150 to 300,
23 350 to 450, et cetera. Those size categories were
24 broken out based on discussion that seemed to indicate
25 different -- different desires of -- of exempt plants or

1 producer-handler sizes that might be discussed during
2 this hearing.

3 JUDGE CLIFTON: I'm just concerned. I
4 want to make sure that the record accurately
5 reflects what you're teaching us here,
6 Mr. Carman.

7 When you just -- could you just go back
8 over that last thought? For example, if you say
9 something like, 150 to 300, did you mean 150,000
10 to less than 300,000?

11 THE WITNESS: Yes, 150,000 pounds to less
12 than 300,000 pounds during the marketing period.
13 In this case, October of 2002.

14 JUDGE CLIFTON: All right. And so could
15 you just, with clarity now, tell us what
16 categories you have chosen for the breakout?

17 THE WITNESS: If -- if we go to May of
18 2007, which is the Exhibit Number 16, and you
19 look down at the total of regulated pool
20 distributing plants, you can see the 11 size
21 classes broken out across all of that third part
22 of that table. That's less than 150,000 pounds,
23 150 to 300,000.

24 JUDGE CLIFTON: Wait. It's the 150
25 bothers me. What you're saying is

1 150,000 pounds when you say 150, is that
2 correct?

3 THE WITNESS: That's correct.

4 JUDGE CLIFTON: That's where I want the
5 record to be clear, that we're just not talking
6 about 150, we're talking about 150,000 pounds.
7 So go ahead and show me those breakouts, but say
8 the whole thing rather than a shorthand way of
9 referring to it as people in the industry would
10 do.

11 THE WITNESS: Category 1 breakout was
12 less than 150,000 pounds of route sales for the
13 calendar year -- calendar month of 2002 or any
14 other similar snapshot.

15 Category 2 was 150,000 to less than
16 300,000 pounds during the marketing period.

17 Category 3 was 300,000 to less than
18 450,000 pounds.

19 Category 4 was 450,000 to less than
20 600,000 pounds.

21 Category 5 was 600,000 to less than
22 1 million of Class I route sales during the
23 marketing period.

24 Category 6 was 1 million to less than
25 2 million pounds.

1 Category 7 was 2 million to less than
2 3 million pounds of Class I route sales.

3 Category 8 was 3 million to less than
4 5 million.

5 Category 9 is 5 million to less than
6 10 million pounds.

7 Category 10 is 10 million to less than
8 20 million.

9 And category 11 was more than
10 20 million pounds of route sales during the
11 marketing period.

12 In each of these exhibits, 14 through 20,
13 categories were combined in order to not
14 disclose an individual plant's size.

15 Returning then back to Exhibit 14, if
16 you're looking in the third part of that chart
17 or table, you can see the category 3 is blank.
18 If you go back to category 2, it is no longer
19 150 to 300. It now reads 150,000 to less than
20 450,000. That is, those two categories, 3 -- 2
21 and 3 were combined.

22 JUDGE CLIFTON: Thank you, Mr. Carman.
23 That was very helpful. Mr. Stevens, back to
24 you.

25 MR. STEVENS: Thank you, your Honor.

1 BY MR. STEVENS:

2 Q. So, Cliff, as you were describing and as
3 you went on to describe the information in Exhibits 14
4 through 20, it is basic -- it is basically the same
5 information. It is information that covers a period of
6 years?

7 A. Covers selected months and selected
8 years.

9 Q. Okay. Selected months and over a period
10 of years. And it has to be modified in certain
11 circumstances, as you described?

12 A. Yes.

13 Q. All right. Now, with respect to these
14 Exhibits 5 through 20 -- I'm sorry, 14 through 20 -- no,
15 actually, what I mean is 5 through 20 -- what I mean is
16 5 through 20, which is all the exhibits that you have
17 just described. Those exhibits, as you -- as you have
18 described in your testimony, you received certain
19 requests for -- for this information?

20 A. Yes.

21 Q. And -- and then having received those
22 requests, did you make any determination as to -- as to
23 what this information, the use of this information at
24 the hearing might be?

25 A. In support of or opposition, no.

1 Q. Okay. But you did look at -- you got the
2 requests, and did it cause you to -- to -- to look at
3 the information?

4 A. Yes, it did.

5 Q. And so documents were prepared?

6 A. Yes.

7 Q. And you brought them and we have had them
8 identified and you've talked about them?

9 A. Yes.

10 Q. Now, they were prepared by you or
11 pursuant to your supervision?

12 A. Yes.

13 Q. And they come from official records of
14 the Department of Agriculture?

15 A. Yes, they do.

16 Q. And they're not presented for or against
17 any proposal, are they?

18 A. That's correct, they are not.

19 Q. You just testified to that. In other
20 words, they're for the use of the parties here, for
21 their use during the course of the hearing as they will
22 use them, and you are not here testifying for or against
23 any of the parties?

24 A. That's correct.

25 MR. STEVENS: I submit the witness for

1 cross-examination on these documents.

2 JUDGE CLIFTON: Thank you. Who would
3 like to begin -- or Mr. Vetne, are you ready?

4 MR. VETNE: Sure.

5 JUDGE CLIFTON: Good.

6 CROSS-EXAMINATION

7 BY MR. VETNE:

8 Q. Good morning, Mr. Carman -- or afternoon,
9 I'm sorry. Let's see if I can find what I'm looking for
10 here. Exhibits 14 --

11 JUDGE CLIFTON: I'm sorry. I'm sorry to
12 interrupt you. Did you want to move their
13 admission before cross?

14 MR. STEVENS: Well, I'd be happy to do
15 that, but I found over the years it's better to
16 let the cross-examination take place and then
17 move them at the end of cross-examination.

18 JUDGE CLIFTON: Very fine. Thank you.
19 Go ahead then, Mr. Vetne.

20 BY MR. VETNE:

21 Q. Okay. Let me start with Exhibit 6, which
22 did some Annual Route Sales by Handler Type. You
23 explained why some orders were excluded from that list.
24 The Western Order because it went away, the Pacific
25 Northwest Order because there was a new limit that

1 didn't make it oranges to oranges or apples to apples,
2 and it appears also the same thing with Arizona, is that
3 correct?

4 A. Correct.

5 JUDGE CLIFTON: Mr. Vetne, because
6 you're tall -- yeah, that will happen.

7 MR. VETNE: I'm tall and soft spoken, not
8 just tall.

9 Q. Okay. This is -- this follows the same
10 format as similar information prepared solely for the
11 Northeast Order published by the Market Administrator, I
12 think it was in the April 2008 Market Administrator's
13 bulletin.

14 A. That's correct.

15 Q. I don't have my request in front of me,
16 but I recall looking at that. Why was this information
17 not assembled for individual orders, like it already has
18 been for the Northeast market, or combination of orders
19 if there's confidential information, so we can know what
20 the impacts are market by market or region by region?

21 A. By individual handler type, it would have
22 resulted in many restrictions.

23 Q. It did not result in restrictions for the
24 Northeast, right?

25 A. No, it does not.

1 Q. And there are some other markets for
2 which restrictions also would not apply?

3 A. That's correct.

4 Q. Now, I have questions -- I'm going to
5 look at Exhibit 14, but my questions relate to each
6 of -- each of the exhibits, 14 through 20.

7 Exhibits 14 through 20, do they respond
8 to a specific data request by any party or parties?

9 A. They were -- the -- let me get my -- let
10 me transfer some numbers here. Exhibit Number 16 was
11 some work I was doing to look at relative size structure
12 of fluid handlers under the Federal Order regulations.

13 While I was gathering that information
14 from the Market Administrators, I also was asked to look
15 at exempt plants, producer-handlers and partially
16 regulated distributing plants with the same, similar
17 size structure.

18 During a meeting with outside
19 individuals, that May of 2007 data was shared during
20 that -- during the discussion, during the meeting. And
21 I was subsequently asked to add additional months to
22 that data and that structure information, which resulted
23 in -- if you look at the upper left -- right hand --
24 excuse me -- the upper left-hand corner of some of those
25 individual charts, you can see the time frames of when

1 the data was put together and when it was revised.

2 That request resulted in five additional
3 tables -- or five tables in total, four additional
4 beyond May of 2007. And Dr. Cryan, in preparation for
5 this hearing, asked that I confirm the five tables have
6 been generated by my office. And later he asked for an
7 extension to include October of 2008, and the most
8 current data available for -- in a similar format, which
9 turns out to be March of 2009.

10 Q. Okay. Am I correct that Dairy Programs
11 periodically examines and publishes information on
12 structure of regulated distributing plants?

13 A. Yes.

14 Q. Okay. So what you did, then, was expand
15 that type of analysis to include a spectrum of
16 unregulated or partially regulated plants?

17 A. Yes.

18 Q. Okay. And that -- okay. And that
19 request occurred when? Let's break it up. Your
20 interest to expand and to look at producer-handlers and
21 exempt plants, when was that work undertaken that you --
22 you went off on -- on that --

23 A. That was in the July, August 2007 time
24 period, and was finally all compiled and put together in
25 a formal sheet in October of 2007. And then when the

1 request came in, additional -- the other four sheets
2 were put together and this initial sheet was updated or
3 revised October of 2008.

4 Q. To expand it to include more months, more
5 years?

6 A. Four other months and other years, yes.

7 Q. Okay. The title of the document says
8 Federal Order Small Plant Structure. The document
9 includes information on plants that have, for example,
10 10 million to 20 million, 20 million pounds per month,
11 and more than 20 million pounds per month.

12 I'm trying to figure out how the title
13 relates to plants of that size.

14 A. The request was to be all-inclusive of
15 all plants, so the upper-sized categories was, okay,
16 here they are, that's how many that are out there. But
17 the detail is on the smaller size plants.

18 Q. Okay. The term small plants as used in
19 the title, Small Plant Structure, is not defined here,
20 and you haven't described it.

21 First of all, when you placed that title
22 on there and presented it to us, did you have something
23 in mind for what are "small plants" for purposes of the
24 caption identification?

25 A. No.

1 Q. Okay. Did -- did the words "small
2 plants" enter into this analysis? Was that your idea or
3 were you requested to do something with small plants and
4 put the title on there in response to a request?

5 A. That was my description of what the data
6 ranges that I was looking at that there were -- we were
7 concentrating on the smaller plants under regulation.

8 Q. Okay. But you do not have and weren't
9 requested to draw a line as to what constitutes a small
10 plant versus a nonsmall plant, be it a medium or large
11 plant?

12 A. No.

13 Q. And you do not draw that line in your
14 testimony?

15 A. That's correct.

16 Q. Okay. And, again, I'm looking -- looking
17 at Exhibit 14 just for -- just to have one of these
18 papers in front of me.

19 I -- the second grouping involves exempt
20 plants and there are three identified in the category of
21 150,000 to less than 450,000. Is that something that's
22 currently authorized, exempt plants between those
23 poundage numbers?

24 A. The exempt plant definition contained in
25 1000.8 points out that an exempt plant includes a plant

1 that is operated by a government agency, the plant is
2 operated by a duly accredited college or university and
3 a plant from which there are charitable operations in
4 total.

5 Q. I see.

6 A. And then there is the size exemption of
7 less than 150,000 pounds of route sales?

8 Q. Okay. So the three not specifically
9 identified plants would be one of those former three
10 categories?

11 A. Yeah, those three plants have more than
12 150 to less than 450,000 pounds in May of -- pardon me,
13 in October of 2002.

14 Q. Okay. And then the following grouping of
15 plants, totally -- total of regulated pool distributing
16 plants (includes unit pooling plants). First, why don't
17 you describe for this record what "unit pooling plants"
18 means in this exhibit?

19 A. They're -- unit pooling plants is two
20 plants owned by the same handler. One of them qualifies
21 as a fluid distributing plant and the second one has
22 Class II sales, and they can unit pool and both be --
23 and in this case, they are listed as having -- they're
24 listed as a distributing plant -- regulated distributing
25 plant when, in fact, they may not even have a filler --

1 a bottling operation in the plant.

2 Q. Okay.

3 A. So if you look at the regulated plant in
4 October of 2002, there were six plants with less than
5 150,000 pounds of route sales. In fact, may have been
6 zero.

7 Q. Oh. You would put -- I see. So you
8 would put in there, in the smallest plant category, a
9 unit plant that is associated with a distributing plant
10 that might have zero?

11 A. There would be two plants. One of them
12 could be very large. Another one could be a stand-alone
13 ice cream plant --

14 Q. Uh-huh.

15 A. -- that may or may not be large, but it
16 would show up in this data as having less than
17 150,000 pounds of route sales, that individual plant,
18 that ice cream plant.

19 Q. Okay.

20 A. Because it was unit pooled.

21 Q. And that plant would not on its own be a
22 pool distributing plant, is that correct?

23 A. That's correct.

24 Q. But in the way that Dairy Programs
25 compiles its data, it would show up as a pool

1 distributing plant for statistical reporting purposes?

2 A. Yes. I believe, except for the early
3 years, the total regulated distributing plants would be
4 consistent with the total number of distributing plants
5 that we show on our website in Federal Order statistics.

6 Q. And unit -- plants that are in the pooled
7 unit, are they limited in number to two? Can it not be
8 more than two?

9 A. Two --

10 Q. Two plants in unit pooling?

11 A. No, they can be more.

12 Q. They can be more. So it's two or more
13 plants involving at least one distributing plant?

14 A. Yes.

15 Q. So that characteristic where they're --
16 where there is a soft products plant or something of
17 that nature separate from a -- a bottling plant, and the
18 soft product plant has little or -- well, little Class I
19 from that plant, could -- could apply to any of the size
20 categories across line 1 in the third category?

21 A. Say -- pardon me, could you repeat your
22 question?

23 Q. Okay. A soft products manufacturing
24 plant included as a pool distributing plant could apply
25 to any one of the size categories in the individual

1 columns under the third grouping. In other words, for
2 example, the grouping 150,000 to less than 450,000 may
3 include one or more or all unit pooled plants that are
4 soft product plants that have a little bit of Class --
5 Class I?

6 A. That's correct. They could have some --
7 some buttermilk that was being bottled and sold as a
8 Class I fluid product.

9 Q. Right. Or some other Class I cultured
10 products, like beverage yogurt, that kind of thing?

11 A. Correct.

12 Q. So we don't know anything specifically
13 about whether these are bottling plants that are of the
14 same nature and compete in the same markets as
15 producer-handlers, for example?

16 A. That's correct.

17 Q. Okay. And we also -- we also don't know
18 the -- from this exhibit, anything about the size of the
19 plants to which some of this lower volume is attributed,
20 whether these plants are otherwise large volume milk
21 receipt plants that have some economies of scale,
22 notwithstanding their modest distribution?

23 A. There is nothing in this data that
24 relates to the receiving bay capabilities of -- of
25 individuals plants.

1 Q. Capabilities or actual receipts, correct?

2 A. Correct.

3 Q. Oh. I want to go back to the first
4 group, the producer-handlers. Some have sales in more
5 than one marketing area. And the sizes here are based
6 on sales in all areas. Does all areas mean the sales of
7 the producer-handler in both Federal marketing areas and
8 unregulated areas?

9 A. Well, that's my understanding.

10 Q. Okay.

11 A. That's the way the data was assembled.

12 Q. Okay. So it's -- in that case, it would
13 be the size something -- it would say something about
14 the size of the plant and its total distribution?

15 A. Yes.

16 Q. Now, going to the last category,
17 partially regulated distributing plants, first of all,
18 it says, none have own-farm milk. Does that mean none
19 of the plants that are identified here have own-farm
20 milk, or there is not a partially regulated distributing
21 plant in the nation that has own-farm milk?

22 A. Partially regulated distributing plants
23 in -- in this case would be those with sales in Federal
24 Order marketing areas.

25 Q. Yes.

1 A. That are reporting and no -- none of
2 those plants were recorded as having own-farm milk.

3 Q. Okay. Some parts -- partially regulated
4 distributing plants in most cases have two options on
5 how they report?

6 A. Or more.

7 Q. Well, actually, if you're in a state
8 pool, you don't have an option, do you?

9 A. No.

10 Q. Okay.

11 A. If you're in a state that has a
12 marketwide pool, yes, you have option one, or whatever
13 it is.

14 Q. They don't have a choice?

15 A. That's correct.

16 Q. They report under Section 76(c)?

17 A. Yes.

18 Q. A plant that reports under Section 76(a),
19 however, simply reports sales into a marketing area and
20 doesn't want to open its books to you, doesn't want to
21 tell you how much milk it received and where it's
22 marketed, and so really all you know is what is sold in
23 the area, and they pay a compensatory payment whenever
24 Class I prices are higher than the blend price?

25 A. That's correct.

1 JUDGE CLIFTON: And just so it's
2 perfectly clear, spell the words blend price.

3 MR. VETNE: Two words, blend (indicating)
4 and price.

5 Q. Can you state whether all of the plants
6 that are included in these numbers include plants for
7 which you -- for which the plants report all of the
8 receipts that they did and all of the distribution that
9 they have? In other words, none of them are just simply
10 76(a) plants?

11 A. Could you ask that --

12 Q. I can. Let me -- let me ask it this way.

13 Do you know whether any of these plants
14 are or are not plants that report under the 76(a)
15 option, that they just pay compensatory payments and
16 don't reveal their out-of-area sales to you?

17 A. Some of them report that way, but I don't
18 know how many.

19 Q. Okay. Would this include plants that
20 report that way?

21 A. Yes.

22 Q. And you don't know what -- what ratio or
23 part of these numbers are plants of that nature that
24 don't report to you all of their sales everywhere?

25 A. I do not know.

1 Q. Okay. So in the case of
2 producer-handlers -- I mean, in the case of partially
3 regulated plants, then, the size is based on sales
4 reported to you, not necessarily the total sales of the
5 plant?

6 A. That's correct.

7 Q. That's all I have. Thank you very much.
8 Oh, I did want to say -- ask one more.

9 I understand that there's some more data
10 that's being assembled, is that correct?

11 A. That's correct.

12 Q. Okay. And your plans to present that --
13 that's additional data in response to a specific
14 request, is that correct?

15 A. Yes.

16 Q. And what are -- just in the timing of
17 getting that information?

18 A. We hope to put up three additional sets
19 of data later today or early tomorrow. It's about 50
20 pages worth of stuff.

21 Q. Okay. Thank you.

22 JUDGE CLIFTON: Mr. Carman, which of the
23 exhibits that we now have were already posted on
24 the website?

25 THE WITNESS: All of the ones that you

1 now have been posted on the website.

2 JUDGE CLIFTON: All right. And is it
3 fair to say none of the ones that are coming
4 were posted on the website?

5 THE WITNESS: Well, that's correct.

6 JUDGE CLIFTON: All right. Mr. Beshore.

7 CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. Thank you. Marvin Beshore.

10 Mr. Carman, I have just a number of
11 clarifying questions, I hope on -- on your exhibits,
12 starting with Number 6.

13 The total column is total in-area sales.
14 I'm wondering if each column is limited to the in-area
15 sales of those entities, and in particular the exempt
16 distributors and producer-handlers?

17 A. I believe it is.

18 Q. Okay. Thank you. On Exhibit 7, I
19 believe that more information has been requested by
20 Dr. Cryan for March '09. Is that information that may
21 be coming on later? Do you know?

22 A. We do not intend to provide March of '09
23 for Exhibit Number 7.

24 Q. Is that just un -- not feasible or is
25 there some other difficulty?

1 A. I have no request out to individual
2 market offices to -- to do March of '09.

3 Q. Okay. With respect to Exhibit 8 -- I may
4 have missed this in your direct -- but is there a date?
5 This is --

6 A. This is the end of 2008. The -- if you
7 count the number on Exhibit Number 8 and match it up
8 with the December of -- Exhibit Number 7, for December
9 of '08, those should come to 40. The number of
10 producer-handlers remain consistent between those two
11 exhibits.

12 Q. Okay. So the Exhibit 8 should be the
13 list of 40 for December '08 that are identified on
14 Exhibit 7?

15 A. Should be.

16 Q. Okay. Thank you.

17 A. I didn't count every line.

18 Q. Okay. That's the intention. Thank you.

19 Now, Exhibit 9. I think I -- I think I
20 understood this one when you go to later exhibits,
21 but Exhibit 9 is total sales by these regulated handlers
22 as opposed to in-area sales, is that correct?

23 A. That is correct.

24 Q. Okay. 10 is, then, in-area sales by the
25 same set of regulated entities for the same time

1 periods?

2 A. Yes.

3 Q. Now, when you go to Exhibit 11, the
4 exempt handler volumes, first of all, the all markets
5 combined column, does that include an aggregation of the
6 not disclosed entries that are shown as footnote 2?

7 A. Yes.

8 Q. And in this case, for these exempt
9 handlers, these volumes are just in-area volumes,
10 correct?

11 A. Yes.

12 Q. I guess the same two questions with
13 respect to Exhibit 12. The all markets combined data
14 would include the volumes that are not disclosed for the
15 particular markets pursuant to footnote 2?

16 A. Yes.

17 Q. And it is only in-area sales by the
18 producer-handlers?

19 A. Yes.

20 Q. Thank you. Okay.

21 Now, with respect to Exhibit 13, if you
22 take -- for instance, taking an entity close to my home
23 in York County, Pennsylvania, Perrydell Farm, which is
24 about the eighth or ninth entry on the list, perhaps.
25 Do you see that?

1 A. Excuse me, York --

2 Q. Yes, York, Pennsylvania. Perrydell Farm.

3 JUDGE CLIFTON: Would you spell that for
4 the record?

5 MR. BESHORE: P-e-r-r-y-d-e-l-l.

6 Q. They're identified with an X in one -- in
7 January, and EDs for the rest of the year.

8 A. Well, no. They're a producer-handler in
9 January and also in April.

10 Q. I'm sorry, yes.

11 A. And then they're an exempt distributor.
12 In this case, the Market Administrator -- they flop back
13 and forth.

14 Q. And is that flopping or toggling back and
15 forth related strictly to the volume at the plant, if
16 you know?

17 A. No. It could be that they received milk
18 from a non-farm source, from not a farm source in excess
19 of the limit, so that they would not have qualified as a
20 producer-distributor during that marketing period. But
21 it's probably that they moved below 150,000 in route
22 sales for the month.

23 Q. So exempt distributors have -- is it
24 correct that exempt distributors do not have any
25 limitations on the receipt of milk from sources other

1 than their own farm if they have receipts from their own
2 farm?

3 A. Right.

4 Q. Now, the -- the columns or the entities
5 which show exempt in some months and producer-handler in
6 some months, just a quick look at it, it doesn't seem to
7 apply to every order. Is there any -- do you have any
8 explanation for that?

9 A. Excuse me? I don't follow what you're
10 asking.

11 Q. Well, I didn't notice in every order that
12 there were entities which went back and forth between
13 exempt and producer-handler. For instance, Order 32.
14 Is that just because they're all too large to be exempt?

15 A. There are -- administratively, there are
16 some differences from order operation to order
17 operation. Some of the marketing administrators, once
18 an entity qualifies as a producer-handler, they leave
19 them designated as a producer-handler even though they
20 may move below 150,000.

21 Other Market Administrator operations,
22 they track the operation more closely on a
23 month-to-month basis and may change their designated
24 status.

25 Q. For year 2008, the January and February

1 entries for Monument Farms in Weybridge, Vermont are RD.
2 I take it that that means that this entity was a fully
3 regulated plant in those months?

4 A. Yes.

5 Q. And then in March it was back to being --
6 back to being a producer-handler, is that correct?

7 A. Correct.

8 Q. Now, let's look at a question or two
9 about Exhibits 14 through 20. And let's just talk
10 about 20.

11 A. Number 20?

12 Q. Yes. These questions generally apply to
13 all of them. Let's use Exhibit 20 as a reference.
14 Where you have the entry na. Is it correct that in --
15 well, first of all, in some cases there are zeros
16 entered, a number of places, categories that show zero
17 plants in that size category, such as if we're looking
18 down at the partially regulated distributing plant. The
19 Western Orders, 150,000 pounds to less than
20 300,000 pounds category shows zero, correct?

21 A. Right.

22 Q. In other -- okay. If there's a situation
23 where there's an na, is it fair to infer that there were
24 less -- there were more than zero plants in that box?

25 A. Yes.

1 Q. So basically there are one or two?

2 A. Yes.

3 Q. I guess that's pretty basic, for me
4 anyway.

5 With respect to the partially regulated
6 distributing plants, and look -- I was confused or not
7 sure about some of the answers given to Mr. Vetne's
8 question. In order to -- for the Market Administrator
9 to determine if a plant is fully regulated or partially
10 regulated, he needs to have two pieces of information,
11 does he not? That is in-area sales and total sales, so
12 that he can determine whether the proportion of the
13 plant sales in-area are 25 percent or more?

14 A. Yes.

15 Q. So that -- and this is what I wasn't sure
16 I was hearing right. So that the plant has got to
17 record to the Market Administrator their in-area volume
18 and their total route sales volume?

19 A. Well, but not -- but it may not report
20 any -- some of their other uses.

21 Q. Okay. So the -- when you're putting --
22 if you got -- if you have a plant that's just reporting
23 total route sales and in-area sales, your volume -- your
24 bracketing here would be based on their total route
25 sales?

1 A. Yes.

2 MR. BESHORE: Thank you very much,
3 Mr. Carman, for all your efforts in response to
4 our request. We appreciate that very much.

5 JUDGE CLIFTON: Mr. English.

6 CROSS-EXAMINATION

7 BY MR. ENGLISH:

8 Q. Charles English. Good afternoon,
9 Mr. Carman.

10 A. Good afternoon, Chip.

11 Q. I may have missed something in this case.
12 I'm sure it was because I wasn't paying close enough
13 attention, and I apologize.

14 But on Exhibit 5, is there a specific --
15 does this apply to 2008?

16 A. We assembled, to the best of our ability,
17 based on the web pages, where exempt plant lists were
18 available. Not all of those web pages had the same
19 dates. And then we also went to some individual offices
20 and got an exempt plant list. So the time period is
21 October, November, December 2008, January 2009.

22 It's not as specific as the
23 producer-handler list was for the end of 2008.

24 Q. But if -- if a plant showed up on some
25 list of a Market Administrator website for one of those

1 four months, October, November, December, January, as
2 exempt, then it's on this list?

3 A. Yes.

4 Q. But it may only be one month because you
5 have an asterisk, for instance, for plants in Order 5
6 called White Wave Foods?

7 A. Yes.

8 Q. That was not for the full -- you said
9 full year, but you mean for the full period of four
10 months.

11 At the very bottom, the asterisk says,
12 "Denotes plant that was not an exempt plant for the full
13 year." But what that really means is, was not an exempt
14 plant for the full four months of this schedule,
15 correct? Or what does it mean?

16 A. It appeared on the list as an exempt
17 plant during that time period with some indication that
18 it was not an exempt plant every month.

19 Q. I want you to hold Exhibit 5 kind of
20 handy, and I want to turn over to Exhibit 7 and
21 ultimately 13.

22 But Exhibit 7, for the time periods
23 December 2001 and December 2008 has a footnote 4 and
24 indicates orders reporting producer-handlers as 9 and
25 10.

1 Now, in December 2001 there would have
2 been eleven orders at that time still, correct? The
3 Western Order would have still been in place.

4 A. Yes.

5 Q. Okay. So nine of eleven in place, but
6 today -- December 2008, you have order reporting
7 producer-handlers as 10, and there's 10 orders, correct?

8 A. Correct.

9 Q. Now, when I look at Exhibit 13, for 2008
10 I don't see Orders 6 and 7 listed on producer-handler
11 regulatory status, correct?

12 A. Correct.

13 Q. So bear with my simple mind for a moment.
14 That would suggest to me that there are, in reality,
15 producer-handlers only on eight orders, not ten orders,
16 in its technical term, correct?

17 A. Exhibit Number 7 includes route sales
18 in --

19 (Counsel conferring.)

20 A. Exhibit Number 7 includes route sales by
21 producer-handler into more than one marketing area.

22 Q. So orders reporting producer-handlers, it
23 may be the case that a producer-handler is physically
24 located in another market but is selling milk into
25 Order 6 and 7 --

1 A. Yes.

2 Q. -- is that correct? Whereas Exhibit 13
3 is the order where the entity qualifies as a
4 producer-handler?

5 A. Correct.

6 Q. Thank you for that clarification. Let me
7 go to Exhibit 20 and I have a couple of questions. I
8 didn't want to contradict my colleague, Mr. Beshore. He
9 said if it's an na, that means a one order, small plant
10 structure or a two.

11 But let me suggest a different
12 possibility. For instance, under partially regulated
13 facilities, 450,000 to less than a million pounds, there
14 are a total of seven in both -- in all orders, correct?

15 A. Yes.

16 Q. And then there is -- it's not available
17 for both Eastern and Western. That would mean just -- I
18 think just chasing what Mr. Beshore was saying, that one
19 of those two, Eastern or Western, would be one or two.
20 And one of those two would be five or six, is that
21 correct?

22 A. Correct. Correct. One of those
23 breakouts does not have a zero.

24 Q. Well, neither of those breakouts have a
25 zero. Because if you have a zero, you would be able to

1 say seven as you did in another, correct?

2 A. Correct.

3 Q. Now, I thought in answer -- I may have
4 misheard, but I thought in answer to a question from
5 Mr. Vetne, you agreed with him with respect to -- I
6 thought he asked a question about unregulated plants and
7 partially regulated plants. And as to plants listed
8 here, would it be more correct to say that plants that
9 are not subject to pricing provisions are partially
10 regulated rather than unregulated plants?

11 A. Clarify that question.

12 Q. A producer-handler plant, is it not the
13 case, is exempt from pricing and pooling?

14 A. Correct.

15 Q. But the Department doesn't take the
16 position on unregulated, does it?

17 A. That is correct. They are regulated for
18 all the other parts of reporting to the Market
19 Administrator.

20 Q. Now, putting the pieces together for a
21 moment of the various documents, and looking at this
22 record for a moment, in 2006 there was a change
23 effective April 1 of 2006, correct?

24 A. There were two changes.

25 Q. Two changes? A change made in the

1 Pacific Northwest Orders and a change made in the
2 Arizona Order, correct?

3 A. Correct, on April 1.

4 Q. And leaving aside -- anyway, I think that
5 that happened on May 1, the change on April 1 for those
6 two orders was that plants that might otherwise qualify
7 or did otherwise qualify as producer-handlers would not
8 qualify if they had in-area route disposition of
9 3 million pounds or more, correct?

10 A. Correct.

11 Q. And I note that there are three
12 facilities listed on the 2006 listing that through March
13 were listed producer-handler, and then they are linked
14 to the footnote that says, subject to pricing and
15 pooling effect of April 1, 2006, correct?

16 A. Yes.

17 Q. So if one were to look at the data on
18 Exhibit 14 through 20 and the time periods that occurred
19 prior to April 1 of 2006, and after -- on and after
20 April 1, 2006 and look at the breakdowns, one would have
21 to take into consideration that there were three
22 facilities that ended up being subject to pricing and
23 pooling post April 1, 2006, when a rule went into place
24 that plants larger than -- plants with route disposition
25 in the marketing area of more than 3 million pounds were

1 regulated, correct?

2 A. Correct.

3 MR. BESHORE: Thank you very much for
4 your efforts.

5 JUDGE CLIFTON: Mr. Vetne.

6 RECROSS-EXAMINATION

7 BY MR. VETNE:

8 Q. One of the other questions stimulated a
9 question or two and a realization that I forgot one.

10 When you presented your direct
11 testimony --

12 JUDGE CLIFTON: Would you move that
13 microphone closer?

14 MR. VETNE: I have to move my body
15 closer.

16 Q. When you presented your direct testimony,
17 you said that the plant sizes that are listed in the
18 columns here are sizes that you chose because they --
19 they might be discussed in the course of a hearing, if a
20 hearing was called at that time. There was no hearing
21 called. But you anticipated that interest and thought
22 this might be discussed.

23 A. My original breakouts on -- on these size
24 categories were more in the less than 150 to -- and then
25 150 to 500,000, 500,000 to a million, 1 to 2. I didn't

1 have as much fine detail in the breakouts.

2 And then there was discussions, they
3 seemed to be ongoing in the trade, about all -- it's
4 triple the size of the exempt plant, it's double the
5 size of the exempt plant. What happens at 3 million?

6 Q. That was my question. 3 million is an
7 oft repeated number in the 28 proposals or so. And
8 there's no -- there's no 3 million line drawn here.

9 Did you -- did you intentionally, for
10 example, make a category that was 1 to 2 million rather
11 than 1 to 3 million?

12 A. I had -- going back to Number 16, the 11
13 categories were 600,000 to a million, 1 million to
14 2 million, 2 million to 3 million, 3 million to
15 5 million. So there was -- trying to look at the
16 population in those various categories or sizes, there
17 was no intention to draw to scale somewhere other
18 than -- than that.

19 Q. Okay. There's a huge spread between
20 2 million and 20 million. You'll agree with that?

21 A. I will agree with that. But that happens
22 to be that you have to do that in order to not disclose
23 individual operations.

24 Q. Okay. So -- so using 2 million rather --
25 if you use the 3 million rather than 2 million, it might

1 tell us a lot more about the population of plants that
2 are under 3 million. But it may have precluded you from
3 providing a number for plants that are over 3 million?

4 A. Yes.

5 Q. And even by not providing a number, you
6 would be disclosing something about those that were not
7 included, is that correct?

8 A. Correct.

9 Q. That was one.

10 And number two, to clarify after my
11 questions and Marvin's questions. On partially
12 regulated plants that are -- that are on here, first of
13 all, we've -- we've determined, and necessarily, that
14 the -- what this exhibit says about -- well, labeled
15 plant size, is really about volume of distribution
16 attributed to that plant?

17 A. Yes.

18 Q. It doesn't say, for partially regulated
19 plants or even pool distributing plants, anything about
20 the size of that plant?

21 A. The distribution is an approximation of
22 the receipts in most cases, but it's not a direct.

23 Q. It's not even an approximation where
24 there's a unit plant that has mostly Class II, correct?

25 A. You're dealing with less than two hands

1 of numbers.

2 Q. I'm sorry, I do not understand the
3 answer.

4 JUDGE CLIFTON: Fewer than ten.

5 A. Out of -- out of 265 plants in May of
6 2007 --

7 Q. Uh-huh.

8 A. -- only six of them had less than 150,000
9 of route sales, fully regulated distributing plants.

10 Q. Those six -- for those six, they may be
11 large plants with very small route distribution
12 attributed to them?

13 A. Or zero.

14 Q. Or zero, okay. And the same thing could
15 be true -- oh, let me ask you this. If a -- if a
16 primarily soft products plant or manufacturing plant,
17 for that -- for that matter, receives into the plant
18 packaged fluid milk from a distributing plant, and that
19 soft products or manufacturing plant in turn sells that
20 packaged fluid milk product along with some yogurt or
21 cottage cheese or cheddar cheese to a customer, is that
22 attributed to the manufacturer or the soft product plant
23 as route disposition?

24 A. I don't know. I'll have to check.

25 Q. Okay. Well, you've indicated that some

1 plants don't have fillers and that might be included
2 here.

3 A. (Nodding head.)

4 Q. A --

5 A. A fully regulated distributing plant;
6 i.e., one that was unit pooled --

7 Q. Uh-huh.

8 A. -- if they received packaged milk and
9 then turned around and sold it on routes, I don't know
10 how that would be reported. I'll have to check.

11 Q. Is it not the case that a regular
12 distributing plant that receives packaged fluid milk and
13 in turn distributes it with its products, that that
14 route distribution is attributed to the distributing
15 plant that receives this?

16 A. Yes.

17 Q. Yes. And is there any reason why the
18 rules would be different for anybody else?

19 A. I wouldn't expect that.

20 Q. And partially regulated distributing
21 plants, although we're talking about volume of
22 distribution, the ones that have small -- smaller volume
23 in this group, they could be rather large soft product
24 plants that have a little bit of distribution either of
25 their own, like liquid yogurt, or for that matter

1 receipts of packaged fluid milk products from somebody
2 else?

3 A. Yes, if that's -- if that's the way of
4 it.

5 Q. Okay. So again, we don't know with
6 respect to the last two categories whether the plants
7 that have small volume are, in fact, small plants?

8 A. The last two categories?

9 Q. The -- there are four groupings here,
10 first there's producer-handlers, then comes exempt, then
11 comes regulated and then comes partially regulated.

12 For the regulated and partially
13 regulated, we do not know whether the plants to which
14 this volume data is attributed are small or not by
15 virtue of the distribution volume attributed?

16 A. That's correct.

17 Q. Thank you.

18 JUDGE CLIFTON: Who next? Yes, sir. Are
19 you Mr. Miltner?

20 MR. MILTNER: I am. Thank you.

21 CROSS-EXAMINATION

22 BY MR. MILTNER:

23 Q. Ryan Miltner, thank you. I have a couple
24 of questions about the exhibits that have been --

25 JUDGE CLIFTON: Mr. Miltner, I think you

1 need to pull it closer to you.

2 Q. Okay. Thank you. A couple of questions
3 about the documents that we've been going through and a
4 couple of questions about the documents that are
5 forthcoming. And then Mr. Ricciardi will have a few
6 questions to follow me as well.

7 I want to look at Exhibit 9, if we could
8 start there. And were Exhibits 9 through 12 requested
9 by any particular party?

10 A. I believe Mr. Carroll.

11 Q. Okay. Exhibit 9 is titled, Packaged
12 Dispositions of Class I Milk Products by Handlers
13 Regulated Under Federal Milk Orders. Can you tell us,
14 for the record, what types of handlers are included in
15 that definition, handlers regulated under Federal Milk
16 Orders?

17 A. I believe it is all.

18 Q. Okay. So that would be fully regulated
19 handlers, right? It would include fully regulated
20 handlers?

21 A. Yes.

22 Q. It would include producer-handlers?

23 A. Yes.

24 Q. Would it include exempt plants?

25 A. Yes.

1 Q. And would it include partially regulated
2 plants?

3 A. I believe so.

4 Q. Okay. And if you turn to Exhibit 10,
5 which is titled, Sales of Fluid Milk Products in Federal
6 Milk Marketing Areas by Fully Regulated Handlers,
7 essentially the same structure, same chart, but this is
8 just the volumes by fully regulated handlers, correct?

9 A. Correct.

10 Q. It's a subset of Exhibit 9?

11 A. And it would -- and it would be in-area
12 sales.

13 Q. In-area sales, okay. So let's go through
14 in-area sales. If you have a -- a plant regulated in
15 Order 1 that has sales into multiple marketing areas,
16 would this chart capture all those sales in one order or
17 another?

18 A. Yes. A plant in Syracuse with sales into
19 Washington, D.C. would be captured. A plant in Syracuse
20 with sales into Buffalo, those sales wouldn't be
21 captured in Exhibit 10.

22 Q. Sales into Buffalo would not be captured?

23 A. It's out-of-area sales.

24 Q. Okay. But if you had a plant in Syracuse
25 with sales into -- into Order 1 area and also had sales

1 into Order 33, for instance, those sales would be
2 captured?

3 A. Yes.

4 Q. And would the sales into Order 33 be
5 reported under Order 33 or Order 1?

6 A. It would be reported under Order 1.

7 Q. If we turn, then, to Exhibit 11, titled,
8 Sales of Fluid Milk Products in Federal Milk
9 Marketing -- Federal Milk Order Marketing Areas by
10 Exempt Handlers, again, the same structure of chart for
11 the exempt handlers. So this would be, again, data
12 that's a subset of Exhibit 9?

13 A. Yes.

14 Q. And for Exhibit 12, the same information,
15 same structure of chart for producer-handlers. This
16 data is included in Exhibit 9 as well?

17 A. Yes.

18 Q. So we don't have a specific exhibit --
19 perhaps because it wasn't requested directly, we don't
20 have a chart like this reflecting the partially
21 regulated sales, sales by partially regulated handlers,
22 right?

23 A. Something had to be left out in order to
24 try and avoid disclosure of individual operations.

25 Q. Okay.

1 A. If you've got the aggregate and you've
2 got three parts, by leaving out one part, you have less
3 disclosure issues.

4 Q. Okay. Let me go through some math then
5 with you.

6 If we start with Exhibit 9, the number in
7 any one cell on that spreadsheet, okay, and we subtract
8 out the fully regulated sales, the producer-handler
9 sales and the exempt plant sales, are we left with
10 partially regulated sales?

11 A. No, because number 9 also includes sales
12 out of area.

13 Q. And there's no way to --

14 A. 10, 11 and 12 is in-area sales.

15 Q. There's no way for us to ascertain this
16 partially regulated sales. You can't disclose any of
17 that?

18 A. No.

19 Q. Okay. So if we did the calculation that
20 I had estimated or discussed with you, we'll have some
21 number that includes -- it includes partially regulated
22 sales, but also includes the out-of-area sales?

23 A. Yes.

24 Q. So at the very least, we would have an
25 upper bound for partially regulated sales?

1 A. I believe that's correct.

2 Q. Okay. Let's change gears and go to
3 Exhibit 14. And I'll cross off my list my questions
4 about the numbers created on 2, because Mr. English had
5 covered that as well. But if we look at the note in the
6 section dealing with -- in the section dealing with
7 regulated pool distributing plants --

8 A. Yes.

9 Q. -- this notes that nine of the plants
10 have some own-farm milk, four have between 150,000 --
11 which is, I assume, pounds, for the record -- so less
12 than 3 million pounds of sales, and five have sales
13 between 3 million and 20 million pounds. Those plants
14 do not -- well, can you state whether those -- those
15 plants have only own-farm production at their plants?

16 A. No, they have -- they have receipts from
17 other dairy farmers.

18 Q. Because otherwise they will likely
19 qualify as a producer-handler, or at least be eligible
20 for qualification as a producer-handler?

21 A. Yes.

22 Q. Does Dairy Programs have the ability to
23 determine the amount of own-farm production in each
24 marketing area that's handled by a fully regulated
25 distributing plant?

1 A. And record it, no.

2 Q. But if we're looking to determine an
3 upper bound, at the very highest, based on the data you
4 have provided, we could take for October 2002, four
5 times 3 million plus 5 times 20 million and that would
6 give us the absolute upper end of own-farm production in
7 plants that are not producer-handlers, right? With the
8 exception of exempt plants.

9 A. That would give you the upper bound of
10 the regulated plants that have own-farm production.

11 Q. Okay. Can you offer any guidance or
12 characterization -- characterization, I think, as to the
13 amount of own-farm production by these fully regulated
14 handlers as compared to their other sources of milk?

15 A. No.

16 Q. Okay. All the exhibits that we have been
17 going through thus far were all posted to the Dairy
18 Programs' website over the past -- most over the past
19 week, but some of them have been up there quite a while,
20 correct?

21 A. Correct.

22 Q. Was it the intent for Dairy Programs to
23 produce all the documents that were posted under that
24 subheading on the page as far as USDA-provided data?

25 A. My belief is that we would have created

1 those documents and posted them.

2 Q. Okay. There are at least two documents
3 that were posted to the website that weren't included in
4 today's submission. One of which is titled -- and I
5 hope I haven't missed them, but I have looked several
6 times -- Total Estimated Milk Not Pooled in Federal Milk
7 Order Markets as a Result of Disadvantageous Price
8 Situations. That was posted on --

9 A. That's -- that was a set of data that
10 individuals could put together based on the weekly dairy
11 market and Federal Milk Order statistics data, as every
12 time there was milk not pooled, that an estimate of that
13 number is reported. We assembled that data and it's
14 posted out there. But I did not present it today.

15 Q. Is it the intent for Dairy Programs to
16 present that data?

17 A. No.

18 Q. Why?

19 A. It's not audited data. It's not -- it
20 may not be in our books and records. It's an estimate.

21 Q. Okay. So you would not -- who compiled
22 the data then that is posted on the website?

23 A. At my request that data was assembled and
24 put together. But it turns out that we can't verify
25 that those numbers are accurate.

1 Q. Is it your belief that it's the best data
2 available to the Department?

3 A. Yes.

4 Q. And it was pulled from Dairy Market News?

5 A. It's an estimate at the time of the pool
6 how much was not pooled by the eight individual market
7 orders -- offices, and for the ten orders.

8 Q. There's another chart, by the way, for
9 the record, that was posted on -- the table Mr. Carman
10 and I have been discussing was posted on April 27th.

11 A table that was posted late Friday is
12 entitled, Packaged Disposition of Organic Fluid Milk
13 Products by Regulated Handlers as a Percentage of Class
14 Utilization. Is that table going to be presented by
15 Dairy Programs at that hearing?

16 A. I don't know the intent of whether or not
17 we're going to put that up, but we believe that's
18 accurate and true. And it was being provided somewhat
19 following up on one of your requests, I believe request
20 number 2.

21 Q. Request number 2. The additional data
22 that Dairy Programs is in the process of compiling, you
23 said that while you're working at it, obviously as
24 quickly as you can, that you anticipated it to be
25 completed today or tomorrow. Is that right?

1 A. Yes. We -- we anticipate putting up a
2 set of data that relates to a recalculation of the pools
3 per your request, or your association's request, to look
4 at what happens if the producer-handler provision is
5 eliminated, i.e., the most expansion of Class I route
6 sales in the order, then leaving the producer-handler
7 provision there and expanding the exempt plant from 150
8 to 450,000, Proposal Number 2, if you will, that would
9 take the most amount of Class I route sales out of the
10 marketing areas. And then a combination of the two
11 scenarios.

12 We then are -- turned our attention to a
13 theoretical pool as requested by Mr. Yale of taking a
14 3 million pound plant and dropping it in overnight and
15 what would happen to the Class I -- to Class I route
16 sales that went to that producer-handler and was lost to
17 a regulated handler. Likewise, removing 3 million
18 pounds out of the producer-distributor side of the -- of
19 the pools.

20 The other request that we hope to put up
21 later today or tomorrow is a listing of the number of
22 producers and nonmember producers by order and the
23 volumes of milk associated with total producers and the
24 nonmember producers.

25 Q. Do you intend to provide any responses or

1 data that would document or estimate the amount of milk
2 that was depooled by handlers, identifying the months in
3 which that occurred and the estimated impact on the
4 blend prices or uniform prices?

5 A. The data that we have related to depooled
6 milk is what we -- is available on our website. The
7 impact -- the estimated impact on the blend, I do not
8 have.

9 Q. Has any request been made to the Market
10 Administrator's offices to recompute the pools using the
11 estimates?

12 A. The handlers have elected not to pool
13 their milk. These would be Class II, III and IV
14 handlers. They would have to be paid -- they would have
15 to -- the reason they've elected probably not to pool is
16 because they would have to pay into the pool. That is,
17 the lower valued manufactured products would be higher
18 priced than Class I. Not always is the case. There are
19 sometimes where it's, depending on location value,
20 within the marketing area.

21 But it would be an arbitrary pool. They
22 are -- they're free to pool or not pool. Class I
23 handlers do have to pool.

24 Q. We had -- and the question was, as I
25 recall, is there going to be an estimation of the

1 economic impact of those handlers' decision to not pool
2 their milk, whether they're entitled to or not? There's
3 an economic impact to the pool, right?

4 A. Yeah, the pool's less than it otherwise
5 would be.

6 Q. And so the producers that are in the pool
7 receive less money than they would have if those
8 handlers had participated in the pool, right?

9 A. Yes.

10 Q. And, in fact, USDA had at least three
11 hearings back in 2004 and 2005 on opportunistic
12 depooling in the Upper Midwest, the Mideast and the
13 Central Orders, right?

14 A. Yes.

15 Q. And in December 2006, rules went into
16 effect in each of those marketing areas that were
17 intended to curtail the ability of handlers to depool
18 their milk?

19 A. It curtailed the ability to come back --
20 it curtailed the ability to come back onto the pool as
21 fast. There was a percentage limit on what could come
22 back on the pool. Notwithstanding -- well, yes, they
23 could qualify the milk by shipping it to a pooled
24 distributing plant and then it would be on the pool
25 right away.

1 Q. Sure. But the purpose of the amendments
2 was to provide -- to provide an economic disincentive to
3 opportunistic depooling. Is that a fair
4 characterization?

5 A. Yes.

6 Q. And in those hearings, the Department,
7 each of the Market Administrators', were asked to
8 provide some estimates about the impact of the blends
9 price from milk that was opportunistically entering and
10 leaving and then re-entering the pool, is that right?

11 A. I'm not aware of what was supplied in
12 that hearing.

13 Q. Okay.

14 A. Those hearings. Pardon me. There's
15 three.

16 Q. If you took -- if we took the figures
17 that were provided in the document posted to the AMS
18 website, had those numbers by Order, the Market
19 Administrators' offices could estimate what the pool
20 calculation would be if those volumes of milk
21 participated in the pool rather than exiting the pool,
22 right?

23 A. Theoretically, that could be done.

24 Q. And, in fact, AIDA asked that be done in
25 one of our data requests, right?

1 A. Help me. I don't remember seeing that.

2 MR. MILTNER: Could I mark a potential
3 exhibit, your Honor?

4 JUDGE CLIFTON: Certainly. Now, I don't
5 know whether the government has already chosen
6 numbers for the rest of its exhibits. Not yet?

7 Should we then just continue
8 consecutively and this would be Exhibit 21? Or
9 do we want all the basic government statistical
10 numbers consecutive?

11 MR. STEVENS: We don't have a problem if
12 he wants to have it marked and give it a number.
13 We don't have a problem.

14 JUDGE CLIFTON: Okay. I'm -- what I'm
15 thinking is, I can give it the number 101, for
16 example, if that would help. If it does not
17 help, I will give it the number 21 or --

18 MR. MILTNER: 21.

19 MR. STEVENS: I just want the record to
20 reflect -- this is Garrett Stevens for the
21 General Counsel -- it can have a number 21,
22 doesn't mean it's offered by the
23 government.

24 JUDGE CLIFTON: Right, okay.

25 MR. MILTNER: I'm not intending to offer

1 anything on behalf of the government.

2 MR. STEVENS: I just want to make sure
3 the record is clear. Sometimes when they're
4 grouped together, some people get a
5 misimpression or they may take a misimpression.
6 So I just want to make sure the record is clear.

7 JUDGE CLIFTON: All right. We'll mark
8 this Exhibit 21.

9 (Exhibit 21 was marked for
10 identification.)

11 A. What is this?

12 Q. It's a copy of our data request and --

13 AUDIENCE MEMBER: None of us could hear
14 that.

15 JUDGE CLIFTON: The one you handed to
16 counsel over here is the government's -- is the
17 record copy. And if you have more than one for
18 that table, that would be helpful.

19 Q. What has been marked for identification
20 as Exhibit 21 is four documents. The first is an e-mail
21 directed to me from the Office of the Deputy
22 Administrator, the second is a data request sent to the
23 Deputy Administrator on April 16th, the third is a data
24 request sent April 22nd, and the last is a data request
25 sent on April 24th. And I want to wait until the

1 Department has provided all the exhibits that it intends
2 to address to talk about a number of issues in the
3 e-mail from the Deputy Administrator.

4 But I want to look at request number 13
5 on the data request that's dated April 16th. And it
6 says -- first of all, Clifford, you've had the
7 opportunity to see these data requests?

8 A. Yes.

9 Q. And did you have an opportunity to see
10 the e-mail from Dana Coale's office? Did you receive a
11 copy of that?

12 A. Yes.

13 Q. So you've seen these before?

14 A. Yes.

15 Q. And they appear to be as you've seen them
16 before; there's been no changes or anything as far as
17 you can tell?

18 A. As far as I can tell.

19 Q. Okay. And the data requests themselves
20 are portions from the USDA website, the AMS website, is
21 that correct?

22 A. Correct.

23 Q. So the only thing in here that is not
24 publicly available at this point is the e-mail, the
25 first two pages?

1 A. I think it's publicly available now.

2 Q. It's publicly available now, that's
3 right. Okay. You're looking at request number 13 from
4 the April 18th letter?

5 A. Yes. AIDA requested, for each marketing
6 area, identify those months in 2006, 2007, 2008, and
7 2009 in which milk was depooled by handlers, the volumes
8 of milk depooled, and the estimated impact on the PPD or
9 blend price received by pooled producers. And we've
10 been talking about depooled. Maybe the record needs to
11 be clarified on this point.

12 When you talk about -- in the chart we've
13 discussed that's titled, Total Estimated Milk Not Pooled
14 in Federal Milk Order Markets as a Result of
15 Disadvantageous Price Situations, is that sometimes
16 referred to in shorthand as depooling?

17 A. Yes.

18 Q. And the disadvantageous price situation
19 that occurs -- maybe you can just describe it from your
20 perspective as to what is the disadvantageous price
21 situation that occurs?

22 A. For those handlers that can elect to pool
23 or not pool their milk, if the value, due to the pool,
24 due to the -- would be greater than the current amount
25 that they would have to pay the total produced, in other

1 words, they'd have to pay into the pool, it'd be to
2 their -- it'd be to their advantage not to pool.

3 Q. And the plants that don't have to pool
4 are Class II, III and IV plants, right?

5 A. Correct.

6 Q. So, generally, the Class I minimum price,
7 it's highest of the four classified prices, correct?

8 A. Generally, yes.

9 Q. And when prices move rapidly --

10 A. When prices move up rapidly?

11 Q. Prices move up rapidly, you can have a
12 price incursion where the Class I price is not the
13 highest price, right?

14 A. That occurs because of advanced announced
15 Class I price and the advanced Class II skim price. And
16 as prices are -- are going up in a rising market, it
17 could be that the value of fat in Class I, the skim in
18 Class I or the skim in Class II is less than the other
19 values in the pool.

20 Q. And so when that happens, when the
21 Class II, III and IV price, or any of them exceed the
22 Class I price --

23 A. Exceed the blend price?

24 Q. I'm sorry, exceed the blend price, you're
25 right, the -- the handler -- manufacturing class handler

1 has an incentive to not pool their milk?

2 A. Correct.

3 Q. And, of course, those plants are under no
4 obligation to pool their milk? Otherwise, this would
5 not occur, right?

6 A. Well, as we talked earlier, there's some
7 disincentive that's been put in to create more of a
8 economic harm. They can't get back on the pool as fast.

9 Q. To get back to the specific request in
10 13, now we've talked about what depooling is. Does
11 Dairy Programs intend to respond to that request?

12 A. The depooled milk table that's out on our
13 website was put together in Washington. No request was
14 made to Market Administrator offices for the ten pools
15 to recalculate.

16 Q. This was never passed on to the Market
17 Administrator's offices?

18 A. I don't believe so.

19 Q. How does that decision get made? You get
20 the data requested. And USDA had requested, in response
21 to this national hearing, the data request be sent to
22 the Washington office, right?

23 A. Yes.

24 Q. And a hearing that affects one marketing
25 order, is it usually the case that those requests for

1 data, sometimes they go to Washington, but they could
2 equally be sent to one of the economists or people at
3 the -- the individual MA offices, correct?

4 A. Correct.

5 Q. So in this hearing, to facilitate the
6 request for information on the individual marketing
7 areas, USDA requested that the request go to D.C.?

8 A. Yes.

9 Q. Okay. So when a request got sent into
10 D.C., what happened to it?

11 A. It came in to Dana usually, and then it
12 was shared among the government table, as well as
13 myself.

14 Q. Okay. When you say the government table,
15 are you referring to the folks over to my left, the
16 representatives from USDA, the marketing specialists --

17 A. Yes.

18 Q. -- and general counsel? Was the general
19 counsel involved as well?

20 A. No.

21 Q. Okay. So just the marketing specialists?

22 A. Yes.

23 Q. Okay.

24 MR. STEVENS: Your Honor, I'm going to
25 object, and the reason I'm going to object is

1 relevance. This question and answer and this --
2 this area has absolutely, absolutely nothing to
3 do with any of the proposals that are in this
4 hearing.

5 Now, we're not here -- anyone can ask the
6 Department how they make decisions, how they do
7 whatever they do. But in terms of this proposal
8 and this rulemaking, why are we wasting time
9 asking these questions?

10 That is my objection. Relevance.

11 JUDGE CLIFTON: Well, he didn't get the
12 data that he asked for, and he needs it for this
13 hearing.

14 MR. MILTNER: I would be happy to explain
15 for the record why this is relevant, why the
16 data that hasn't been provided is relevant to
17 the hearing.

18 JUDGE CLIFTON: You may.

19 MR. MILTNER: Thank you. There are two
20 reasons why the information on depooled milk,
21 both in terms of its occurrence after changes
22 were made to the marketing areas to provide a
23 disincentive for it to occur, the continuance of
24 it occurring, and the impact on producers is
25 relevant to the request or the proposal from

1 AIDA to adopt individual handler pools in all
2 marketing areas.

3 We have economists who will testify about
4 individual handler pools and why they provide
5 some superior benefits to the current marketwide
6 pooling, one of which is that it eliminates the
7 opportunity to depool milk as a result of the
8 disadvantageous price situation and eliminates
9 the impact on the producers resulting from that
10 opportunity.

11 Our economists would like to have this
12 information so they can provide a full opinion
13 as to whether individual handler pools, in fact,
14 offer some superior benefits to marketwide
15 pooling. So I'm not trying to go down a road
16 that is irrelevant.

17 It's also relevant because we have an
18 example of an area where USDA has held hearings
19 to address what was characterized as a problem
20 with the marketing areas. They made an attempt
21 to do so, adopted a solution that many people
22 thought was appropriate and others thought was
23 not a sufficient solution, and there continues
24 to be negative impacts on pooled producers.

25 So the magnitude of the continuing harm

1 to producers is extremely relevant to the
2 Department in whether they determine that
3 producer-handlers and exempt plants, if in fact
4 there is any -- any effect on producers, the
5 magnitude of those harms is relevant to the
6 decision the Department has to make.

7 So I don't intend to go down this road
8 for much longer, but I do want to find out how
9 we might be able to get this information.

10 JUDGE CLIFTON: What proposals are --
11 either contemplate the individual pooling or
12 oppose it?

13 MR. MILTNER: Proposal 25.

14 JUDGE CLIFTON: Proposal 25?

15 MR. MILTNER: Yes.

16 MR. STEVENS: All right. And I
17 appreciate your remarks, Ryan, and I'll take
18 them at face value as offered by you as a
19 proponent of a proposal.

20 On the other hand, you have put in the
21 record a document of your request and our
22 response. And in the response, it clearly tells
23 why that information, you know, is not being
24 made available. Now, you may disagree with that
25 certainly, which is your right. But the

1 Department has -- has made its decision with
2 respect to this.

3 That, of course, does not prevent you or
4 any of the proponents or opponents from using
5 any of the material that is up on the website
6 for your own purposes.

7 This gentleman does not have to introduce
8 it and have it become evidence in this hearing.
9 If you think it's appropriate for the Secretary
10 to hear this on behalf of your client, by all
11 means testify to it, enter it in and let it be
12 considered in conjunction with all the evidence
13 that the Secretary will consider in this
14 hearing.

15 JUDGE CLIFTON: However, it is
16 appropriate to continue to question this witness
17 with regard to the reliability of some of the
18 documents that have been posted, as indeed you
19 have.

20 MR. MILTNER: I can summarize. I
21 appreciate what you're saying, Garrett. And if
22 I could offer, your Honor, a couple of
23 responses?

24 First of all, the response from the
25 Department in -- in response to the specific

1 requests in the April 16th letter makes no
2 reference at all to my request 13. It says
3 items 8 through 12, and it refers to items 15
4 and 16, makes no reference at all to the
5 information about depooled milk.

6 Secondly, that e-mail states that -- I'm
7 going to quote this. Quote -- on the second
8 page -- Additionally, please know that every
9 data request regarding this hearing will be
10 posted, together with the data we are able to
11 provide, on our website. As always, we satisfy
12 all data requests to the extent we are able and
13 the decision to enter prepared data into the
14 record is ultimately at the discretion of the
15 party requesting the data.

16 I think that that last item is not
17 necessarily consistent with how data has been
18 entered in the past.

19 But what I want to find out, I want to
20 find out if, in fact, this data is not
21 available, or if the request was just simply not
22 made to the Market Administrators' offices.

23 MR. STEVENS: Well, I think clearly you
24 have the answer to that. Do we have any more
25 questions?

1 MR. MILTNER: I'd like to have that
2 answer stated again.

3 MR. STEVENS: No, he already stated it.
4 Asked and answered. Asked and answered. I
5 heard the witness say it. Everyone in this room
6 heard it, I believe.

7 MR. MILTNER: Then I have a follow-up.

8 Q. Which is, who made the decision not to
9 request the information -- not to forward this
10 information to the individual MA offices?

11 JUDGE CLIFTON: Before you answer, let me
12 hear if there's an objection.

13 MR. STEVENS: I would only tell the
14 witness, if he knows. If he doesn't know, I
15 guess he doesn't know.

16 A. Well, I don't know.

17 Q. So the data came to Dana, came to you,
18 came to another marketing specialist and you don't know
19 where it -- where it died?

20 MR. STEVENS: Objection, asked and
21 answered. We are repeating the same thing.
22 Ryan, he answered your question. You can ask it
23 ten times. I assume you'll get the same answer.

24 MR. MILTNER: And I will ask until I am
25 told not to ask anymore, because it is extremely

1 relevant to the kind of information that we need
2 to evaluate all the proposals, Garrett. I'm not
3 trying to --

4 MR. STEVENS: Well, you are trying to
5 force an answer out of him that he's not willing
6 to give you apparently, and I'm asking the judge
7 to not allow you to continue to ask -- ask the
8 same question, which has already been answered.

9 MR. MILTNER: Then I will move on.

10 MR. STEVENS: Thank you.

11 JUDGE CLIFTON: I didn't even have to
12 rule. This is easy. Thank you.

13 BY MR. MILTNER:

14 Q. If I may ask -- and I do not believe that
15 this has been asked and answered. Will the Department
16 submit in this hearing any additional evidence or
17 statistical data in response to item 13 in my letter
18 from AIDA dated April 16th?

19 A. I will have to contact the marketing area
20 offices for the ten orders and determine whether or not
21 they can recalculate the blends and how long it will
22 take.

23 Q. I would appreciate if you could check on
24 that immensely, and so would the members of my alliance.

25 MR. MILTNER: Your Honor, is a -- first

1 of all, at this point I'd like to move the
2 admission of Exhibit 21.

3 JUDGE CLIFTON: Is there any objection of
4 the admission into evidence of Exhibit 21?
5 Mr. English.

6 MR. ENGLISH: I don't want to object to
7 the admission of Exhibit 21, but I also don't
8 want this whole colloquy to pass without an
9 opportunity for some others to be heard.

10 We join in the government's objection
11 about the whole discussion of depooling and the
12 relevance to this proceeding.

13 JUDGE CLIFTON: For what reason?

14 MR. ENGLISH: For the reason that the
15 issues that are at hand here regarding
16 producer-handler regulation are a Class I issue,
17 and the regulation and the statute and the
18 Agricultural Agreement Act have to do with
19 uniform price as to handlers and as to producers
20 regarding Class I.

21 The Department then had an order for
22 manufactured milk orders that it has never
23 exercised and has not been requested to exercise
24 in this hearing, and that is an entirely
25 different issue as opposed to the issue about

1 Class I, and that's what's at issue here, and
2 the issue of depooling is irrelevant for that.

3 JUDGE CLIFTON: Do you want to respond
4 that that?

5 MR. MILTNER: Well, I would state I don't
6 need to respond directly. I would rely on my
7 prior statement about why it's relevant. It is
8 relevant to whether our proposal on individual
9 handler pools is an appropriate alternative for
10 the Federal Order system. It's been thoroughly
11 noticed.

12 And so to the extent that avoiding
13 depooling is a benefit of individual handler
14 pools, which a number of people have testified
15 to, including some of Mr. English's clients, in
16 the past, I think it's completely relevant.

17 JUDGE CLIFTON: Could you respond more
18 specifically to Mr. English's point that this is
19 all about Class I, and to use information about
20 incentives to Class II, III, IV milk to depool
21 is not helpful?

22 MR. MILTNER: Sure. Individual -- the
23 individual handler pool proposals clearly affect
24 Class I distributing plants. Individual handler
25 pools are an alternative to marketwide pooling,

1 which the Federal Order is currently employing.
2 The Department has to make a policy decision as
3 to which of the two is superior. During Federal
4 Order reform, they had that discussion.

5 It's been noticed and so the issue has
6 been reopened in this hearing, and the truth is
7 all classes of milk is relevant to how -- what
8 pooling model is adopted in the Federal Order.
9 It's not -- pooling of milk by its very nature
10 is not just a Class I matter. You have pool
11 returns from all uses of milk, or in some models
12 not all milk gets pooled.

13 And so the effects of manufacturing
14 handlers under a marketwide pool and their
15 impact on a producer return is relevant to
16 examining why an individual handler pool offers
17 benefits over a marketwide pool.

18 JUDGE CLIFTON: Thank you. Would you
19 yield to Mr. Vetne for a moment?

20 MR. MILTNER: I would.

21 JUDGE CLIFTON: Mr. Vetne.

22 MR. VETNE: My -- my clients are not
23 proponents of and may not support an individual
24 handler pool, but they also might because in
25 essence producer-handlers currently have their

1 own individual handler pools.

2 Having an individual handler pooling for
3 everybody simply extends the benefits and
4 burdens that producer-handlers, which are mostly
5 small, already enjoy.

6 I confess to the word gobbledygook coming
7 into my head when Mr. English addressed the
8 manufacturing order issue. I don't get it. But
9 what I do get is that this -- the proposals that
10 brought us here brought us here because the
11 proponents of Proposal Number 1 said that the
12 producers in the market are not getting enough
13 of a pool blend. It's unfair to producers.
14 That's National Milk Producers' primary concern,
15 that they take the burden of Class III and IV
16 and producer-handlers over here, just -- they're
17 not sharing in that burden, it's not a Class I
18 issue.

19 And clearly the Secretary noticed
20 individual handler pools. The question, I think
21 it's clearly relevant. But it's even more
22 relevant, if I might point to an oft overlooked
23 provision of the statute, and that's Section
24 608c(13) of the statute, which says, whenever
25 the Secretary adopts an order with which -- to

1 which handlers do not consent and -- handlers
2 have not consented to milk orders for the past
3 five or six decades -- the Secretary must make a
4 finding that this is the only practical
5 alternative, that -- you know, there must be a
6 weighing of options. And the option chosen must
7 be one that is inevitable. That's my read of
8 those words.

9 To my knowledge, it's never been
10 discussed in a milk order decision before. But
11 those are what the words say. And this
12 proposal, among other things, presents an
13 option. The proponents of Proposal Number 1
14 present an option. But the Secretary may adopt
15 any option only upon a determination that
16 there's no other practical alternative.

17 Having information on the impact of the
18 depooling probably permits some sort of a
19 comparative analysis, I certainly would think
20 so, that if depooling hurts the pool by 5 cents
21 and producer-handlers hurt the pool by a penny
22 and the Secretary does nothing to mitigate
23 5 cents, why is it the only practical
24 alternative to have a one penny solution?

25 So -- but I understand that the

1 witness -- that Dairy Programs is going to look
2 into this to see if it's available. I was there
3 at each of those three depooling hearings a few
4 years ago, and that identical, precise kind of
5 information was produced by the marketing areas
6 for each of those markets. Thank you.

7 JUDGE CLIFTON: The requests for
8 information to me are overwhelming. But,
9 Mr. Carman, I will appreciate you doing your
10 best on that issue.

11 MR. MILTNER: And I agree that there's
12 been voluminous data requested, but that the
13 data requested in support of our alternatives is
14 no more critical than the data that's been
15 requested in support of the other proposals, and
16 that's why I trust that they will see what they
17 can do to provide it for us. And we appreciate
18 that.

19 JUDGE CLIFTON: When you said no more
20 critical, that were no less critical.

21 MR. MILTNER: That were no less critical.
22 Thank you. And I believe the motion before your
23 Honor is to admit Exhibit 21.

24 JUDGE CLIFTON: Oh, yes. And I had asked
25 for objection. But I'll entertain any other

1 comments about Exhibit 21. Mr. Beshore.

2 MR. BESHORE: I just want to make a brief
3 comment on the request in Exhibit 21, which
4 has -- which is embodied in Exhibit 21 for all
5 this depooling and related information.

6 I think this is an example of the classic
7 age-old tactic in dialectics, okay, of erecting
8 a straw man so that one can strike it down.
9 Pooling or depooling of manufactured milk has
10 nothing to do with this hearing.

11 The subject is whether the Class I
12 proceeds of producer-handlers and exempt plants,
13 when they get pooled and when they don't. We've
14 gone on a huge tangent, and Mr. Miltner is
15 requesting Dairy Programs to go on a huge
16 tangent to strike down or erect or deal with the
17 straw man that has nothing to do with the
18 proceeding.

19 So I don't object to the exhibit, it's
20 communication. But the requests which are --
21 our requests don't even come anywhere near. I
22 mean, I can't even put them in the same ballpark
23 as the requests they made in terms of the impact
24 upon the parties being requested, in terms of
25 the work that would be required. They're not

1 even close.

2 It's an attempt to -- to divert the
3 subject of the hearing. And I don't think we
4 should go down that road, and I hope, your
5 Honor, as we go forward, will constrain us not
6 to go down that road.

7 MR. MILTNER: Since they don't object,
8 I'd like to move the admission of Exhibit 21 and
9 also note for the record that his
10 characterization of our request is his own
11 characterization, and we've already gone down
12 that path twice now.

13 JUDGE CLIFTON: All right. Any further
14 comment or objection to Exhibit 21 being
15 admitted into evidence? You know there isn't a
16 single sleepy person in here.

17 Exhibit 21 is hereby admitted.

18 MR. MILTNER: I don't believe that for a
19 second. Your Honor, I would note, depending on
20 what exhibits and what information is provided
21 by Dairy Programs, which Mr. Carman has given
22 his belief as to what may or may not be there,
23 we would reserve the right to review what we've
24 requested, and clearly identify what has not
25 been requested -- or not been provided once

1 Dairy Programs has provided -- admitted or
2 provided for the record all of the information
3 that it will introduce at this hearing.

4 And, finally, usually at the end of these
5 proceedings, we have the parties request
6 official notice of various documents, and we
7 will do the same.

8 And I don't intend to -- to interject
9 requests for official notice throughout the
10 proceeding, but I would at this point request
11 official notice of the document regarding the
12 volumes of milk not pooled due to the
13 disadvantageous price situation as it posted on
14 the USDA website, subject to the qualifications
15 that Mr. Carman discussed, that it's not audited
16 data, and subject to Mr. Stevens' statement that
17 we're still free to use that information as we
18 see fit on brief and in cross-examination.

19 JUDGE CLIFTON: Now, I do have a request
20 with regard to any requests that official notice
21 be taken, and that is that you produce a hard
22 copy. And you bring it here and you submit it
23 like any other exhibit, when you can.

24 Because, as we all know, items on
25 websites are subject to change and so forth.

1 I'm not saying this one is going to get changed.
2 But taking official notice of anything is more
3 practical if we've got a copy of it.

4 MR. MILTNER: I would be happy to provide
5 a tangible copy tomorrow morning.

6 JUDGE CLIFTON: That would be great. All
7 right. So we'll deal with the request that I
8 take official notice of that tomorrow.

9 So, Mr. Miltner, in follow up, you'll
10 have enough copies for all assembled?

11 MR. MILTNER: Probably.

12 JUDGE CLIFTON: Thank you. Yes,
13 Mr. Ricciardi.

14 CROSS-EXAMINATION

15 BY MR. RICCIARDI:

16 Q. Good afternoon, Mr. Carman. I'm Al
17 Ricciardi, here on behalf of AIDA.

18 MR. RICCIARDI: And I want to make one
19 note for the record. And that is Mr. Miltner
20 and I have now been attending these hearings
21 together for six years or more, and it's great
22 that he's apparently taken over my spot as a
23 lightning rod for this afternoon, so --

24 A. Which we haven't completed yet.

25 Q. Oh, yeah. I'm going to follow up and see

1 if I can do the best I can.

2 Mr. Carman, you mentioned during the
3 course of now your lengthy testimony that there had
4 been -- and I'll see if I got my quotation correct --
5 discussion in the trade essentially about
6 producer-handlers for the last year or so?

7 A. Longer than that.

8 Q. Okay. Let me ask you more specifically.
9 At Dairy Programs, isn't it true that as early as the
10 spring of '08, representatives of IDFA or National Milk
11 have met with Dairy Programs to talk about making these
12 kind of proposals?

13 A. I believe so.

14 Q. And those -- these proposals, at least
15 Proposals 1 and 2 and 26, were noticed along with all of
16 the other proposals in the Federal Register as of
17 April 9, 2009, correct?

18 A. Correct.

19 Q. Which is less than a month from the date
20 we started this hearing?

21 A. A few days less than a month, yes.

22 Q. Okay. With regard to the various
23 requests that have been made by AIDA for data, those
24 requests were submitted on April 16th, April 22nd,
25 April 24th, correct?

1 A. Correct.

2 Q. And I think Mr. Miltner went through this
3 a little bit with you, but let me see if I can
4 understand quickly the process. When the data requests
5 come in, they go through Dana Coale's office. Are they
6 then given to you to be submitted to the various MAs'
7 offices for response?

8 A. Generally, yes.

9 Q. And who makes the decision to -- whether
10 to submit or not to submit the responses as evidence at
11 the hearing?

12 A. I'm --

13 MR. STEVENS: I'm going to object because
14 I think this may be beyond the purview of this
15 witness' knowledge. But -- but I don't --
16 again, what -- what the process is in terms of
17 how decisions are made in the Department that
18 counsel's now inquiring about is something that
19 is internal to the operations of the Department.
20 It is an institution. It operates with
21 employees, and decisions are made by officials
22 of the Department, and the process of the
23 decision is something which is institutional and
24 is not limited to any one individual, sir.

25 JUDGE CLIFTON: Your response,

1 Mr. Ricciardi?

2 MR. RICCIARDI: It may be institutional,
3 your Honor, but I have the institutional
4 representative here that they've presented. I'm
5 entitled to know -- because of the short
6 duration of time that we have been shoehorned
7 into with regard to my clients responding to
8 these proposals, we need the data.

9 Mr. Miltner said the economists would
10 like it, they need it. And I want to know
11 whether we're going to get it and who makes the
12 decision as to whether we are getting it or not
13 getting it.

14 MR. STEVENS: Well, didn't we just go
15 through that with Mr. Miltner?

16 MR. RICCIARDI: We did. I'd like to know
17 specifically, however, what -- whether we're
18 going to actually get a response from the
19 Department to our reasonable requests so that we
20 can actually have our clients represented in a
21 due process fashion at this hearing.

22 JUDGE CLIFTON: Now, you've just asked a
23 different question.

24 MR. RICCIARDI: I think so. That --

25 JUDGE CLIFTON: This question now, rather

1 than how was that decision made, is, am I going
2 to get the data. Now, that's a much more
3 productive question and I'm glad you switched.

4 MR. RICCIARDI: Good.

5 JUDGE CLIFTON: But I like Mr. Miltner's
6 approach. He said, I want to wait and see what
7 it is the Department is going to give us, and I
8 reserve the right, basically, to bring this
9 subject up again if my requests have not been
10 met. Do you have a particular request in mind?

11 MR. RICCIARDI: No. You know what,
12 Judge? I will -- I think that is a fair way of
13 proceeding. And I will move on to another
14 question that I have.

15 JUDGE CLIFTON: Thank you.

16 BY MR. RICCIARDI:

17 Q. Thank you. Mr. Carman, let me ask you
18 some questions about a particular exhibit, if you could
19 find it. I know you've got a mass of them in front of
20 you now. Take a look for me at Exhibit Number 13 for a
21 moment.

22 A. I have a copy.

23 Q. Thank you. Some basic questions first
24 and then I have some other follow-ups. If, in fact --
25 and I apologize if this has been asked before. If, in

1 fact, there's an X on the document for a particular
2 month, what does that mean?

3 A. An X in a cell indicates that that plant
4 was -- had producer-handler regulatory status.

5 Q. As of that particular month?

6 A. For that month.

7 Q. And let's take the first page for 2005.
8 There are references to at least three plants in
9 different months where they say Closed. What does that
10 mean?

11 A. Operations ceased.

12 Q. The producer-handler went out of
13 business?

14 A. Yes.

15 Q. Okay. On that point, let's flip to the
16 last page for 2009. It says, Producer-Handler
17 Regulatory Status. On the other hand, I think it might
18 have been Mr. Beshore or English or both, you noted that
19 in some months, if it says ED, it means it's an exempt
20 distributor for that month, which means that it's an
21 exempt plant that produced 150,000 pounds or less?

22 A. Yes.

23 Q. So in reality, for example, take 2009,
24 the second reference, Dutchway Farm Market. For
25 January, February and March, it's an exempt plant, it's

1 not a producer-handler plant, correct?

2 A. Correct.

3 Q. So for 2009, we would take that off the
4 number of producer-handlers?

5 A. So far, yes.

6 Q. Okay. Same thing would be true with
7 Ronnybrook Farm Dairy?

8 A. Yes.

9 Q. And I know I just skipped over one. Same
10 would be true for Mapleline Farm Home Delivery Service,
11 Inc.?

12 A. Yes.

13 Q. All right.

14 JUDGE CLIFTON: Mr. Ricciardi, so the
15 record is clear, if you'll spell Dutchway?

16 MR. RICCIARDI: Hang on a second, Judge.
17 D-u-t-c-h-w-a-y.

18 JUDGE CLIFTON: All right. And if you'll
19 spell Mapleline?

20 MR. RICCIARDI: M-a-p-l-e-l-i-n-e.

21 JUDGE CLIFTON: And if you'll spell
22 Ronnybrook?

23 MR. RICCIARDI: Go back and find it
24 again, Judge. R-o-n-n-y-b-r-o-o-k.

25 JUDGE CLIFTON: Thank you.

1 MR. RICCIARDI: You're welcome.

2 Q. With regard to the same page, Wholesome
3 Milk Products, LLC, as of March that producer-handler
4 operation closed, correct?

5 A. Yes.

6 Q. So if we were to actually add up,
7 physically, the number of producer-handlers as of 2009
8 on this chart, part of Exhibit Number 13, we would have
9 to, at least from our math, the three distributing --
10 exempt distributing plants, and we would have to also,
11 currently at least, take Wholesome Milk Products, LLC
12 out of that addition, correct?

13 A. Correct.

14 Q. What would we do with Bush River Jerseys?
15 Because as you see in March it's a -- an --

16 A. Distributing plant or exempt plant,
17 150,000 pounds or less. It was not a producer-handler
18 during March.

19 Q. Okay. And do you know whether or not
20 it's a producer-handler as of April?

21 A. No.

22 Q. Because you haven't done the market
23 report yet?

24 A. Right.

25 Q. So if we were to look at any page where

1 there is a reference to a closed plant, we would have to
2 delete that particular producer-handler from our
3 addition for that year, and we'd do the same thing if it
4 was a distributing -- exempt distributing plant on any
5 page, wouldn't we?

6 A. Yes. I would point out that there are --
7 there are times when there is no indication of what the
8 facility is, and then the next month it shows up as a
9 producer-handler; i.e., it went from not existing to
10 being a producer-handler.

11 Q. Okay. Can you -- thank you very much.
12 Can you tell me, currently we have ten orders that
13 remain, correct, in the Federal Order System?

14 A. Yes.

15 Q. Of those ten orders, how many of them do
16 not allow a producer-handler to buy any milk and retain
17 its status for that month?

18 A. I believe there's three, Appalachian,
19 Southeast and Florida.

20 Q. Okay. And the largest amount that a
21 producer-handler can purchase in any one month in any of
22 the orders is 150,000 pounds, correct?

23 A. Correct.

24 Q. And with that, is 150,000 pounds the
25 amount that a producer-handler is able to purchase in

1 the other seven orders?

2 A. I believe that's correct.

3 Q. So it's either zero in three of the
4 orders or 150,000 pounds in seven of the orders?

5 A. Yes.

6 MR. RICCIARDI: I think I'm done for the
7 moment.

8 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
9 How's my witness doing? Are you wearing out?

10 THE WITNESS: I'm all right.

11 JUDGE CLIFTON: Okay. We'll keep going
12 until you holler uncle. Who else would have
13 questions for this witness? Please come
14 forward.

15 CROSS-EXAMINATION

16 BY MR. YALE:

17 Q. Benjamin F. Yale on behalf of Select Milk
18 Producers and Continental Dairy Products. Good
19 afternoon.

20 A. Good afternoon, Ben.

21 Q. First off, I'd like to draw your
22 attention on your Exhibit Number 9 in the heading. And
23 I'd just draw your attention to the words or the phrase,
24 by Product in that title. Is there a products breakdown
25 in addition to Order and year?

1 A. Not -- not in this table. But in the
2 past, we have produced a table with similar -- that
3 looks at all milk, 2 percent, whole milk.

4 Q. Okay. So that -- that would be the kind
5 of product one would be referring to, which would still
6 be a Class I product, is it not?

7 A. Yes.

8 Q. Okay, thank you. Now, in addition to the
9 information that you provided based on requests, there
10 is a -- a whole host of data available, made available
11 by USDA, on its website regarding dairy, is that
12 correct?

13 A. In Washington as well as the eight market
14 administrative offices.

15 JUDGE CLIFTON: Excuse me, Mr. Yale. You
16 are not quite as close to the microphone as you
17 were, Mr. Carman.

18 Q. He's getting away from me. And this
19 information is -- that you said is available by the
20 Market Administrator is available on the websites. And
21 by and large this information is audited, is that
22 correct?

23 A. By and large.

24 Q. Now, in addition to -- now, each month
25 the Market Administrators collect data from the

1 handlers, the co-ops and the producers, and they prepare
2 ultimately minimum prices that have to be paid by the
3 plants and paid to the producers. And the result of all
4 that spawns a whole lot of information, doesn't it?

5 A. Yes.

6 Q. And that includes the minimum prices by
7 order, is that correct?

8 A. By type of use.

9 Q. By type of use. It includes the pounds,
10 and depending on the various orders, the components of
11 each of the classes that is pooled --

12 A. Yes.

13 Q. -- is that right? And then it also
14 includes minimum prices that producers are to receive,
15 either in the form of a uniform skim -- or skim uniform
16 and uniform butterfat price or a component price, is
17 that right?

18 A. Four of the orders have fat and skim
19 uniform pricing. The other six would have a PPD.

20 Q. All right. And the result of that is
21 just a plethora of information in terms of number of
22 producers, pounds of milk, how it's used, what it's paid
23 for, by month and by year, is that correct?

24 A. It's a very rich data source.

25 Q. Now, those are reports that are kind of

1 routinely generated by the Market Administrators in the
2 furtherance of the specific task at hand in the AMS;
3 that is, to establish minimum prices and paid
4 producer-handler's price, right?

5 A. Yes.

6 Q. Now, in addition to that, there's other
7 reports, other research and other information that
8 either the Market Administrators perform or your office
9 performs for the benefit of the industry, is that
10 correct?

11 A. That's correct.

12 Q. One of those is a document called a
13 Packaged Fluid Milk Sales in Federal Milk Order Markets
14 by Size and Type of Container. Are you aware of that
15 report?

16 A. Yes, I'm aware of it.

17 Q. And what is that report?

18 A. Historically, every other year in, I
19 believe November, the Market Administrators are tasked
20 with assembling sales by type of container from each of
21 the regulated handlers.

22 Q. Okay. And this would indicate, like, the
23 size of the container, like whether it's a pint or a
24 gallon, is that correct?

25 A. Half pint.

1 Q. Half pint, right?

2 A. Bag in a box.

3 Q. Glass?

4 A. Whole -- yeah, gallons, half gallons,
5 yes.

6 Q. Flavored?

7 A. Yes.

8 Q. Okay. And on your website you have
9 information that goes back to the 1999 report, is
10 that -- do you know? If you don't know, I mean, does
11 that --

12 A. I haven't looked to see which -- what
13 data sets are out there, yes.

14 Q. If there was one for 1999, there would be
15 one for 2001, 2003, 2005 and 2007?

16 A. I think you need to stop at 2005.

17 Q. You do. And why is that?

18 A. 2007 hasn't been posted yet.

19 Q. Oh. So it's based on November of the
20 even years. You cut it off and report it through 2007,
21 is that the --

22 A. I don't think we've posted --

23 Q. As I look at my notes, I do not have a
24 2007, so you're correct. Thank you.

25 Now, one of those -- I have an exhibit

1 here I'd like to have marked as Exhibit Number 22.

2 JUDGE CLIFTON: All right. Let's go off
3 record while you hand those around.

4 (Off the record.)

5 JUDGE CLIFTON: All right, let's go back
6 on record. We're back on record. It's 5:27.
7 Mr. Yale, have we marked your exhibit yet?

8 (Exhibit 22 was marked for
9 identification.)

10 MR. YALE: Yes, we have. It's Exhibit
11 Number 22 and it's entitled Factors for
12 Converting Volumes Sold Into Number of Container
13 Units Sold.

14 JUDGE CLIFTON: And make sure that
15 microphone is very close to your mouth.

16 BY MR. YALE:

17 Q. Mr. Carman, you have in front of you
18 Exhibit Number 22?

19 A. Yes, I do.

20 Q. Have you seen this before?

21 A. Yes, I have.

22 Q. And what is this?

23 A. If you've got total weight, this is a way
24 of estimating the number of cartons, containers, based
25 on that total weight.

1 Q. And this -- this is found in one of the
2 volumes of the packaged fluid milk prices that I had --
3 or fluid milk sales on the containers that we had talked
4 about?

5 A. Yes.

6 Q. And so that if I, for example, look at
7 whole milk in gallon, if I have -- we talk in terms in
8 the producers and with plants and most of the Federal
9 Order statistics, most of the milk is referenced in
10 terms of a hundred pounds, is that correct?

11 A. Correct. So you take the hundred pounds
12 and divide by 8.6, would give you approximately the
13 number of containers of milk in a hundred pounds.

14 Q. And this is a fairly common ratio that's
15 used in the Market Administrators -- in these reports
16 and stuff that we see. If there is a conversion from
17 pounds to gallons, that's used, is that correct?

18 A. Right.

19 Q. All right.

20 MR. YALE: Now, I would move, while we're
21 at it so I don't forget, for Exhibit 22. If
22 people want to object later, that's fine. But I
23 want to get my motion in before I forget.

24 JUDGE CLIFTON: Let me ask now. Is there
25 any objection or any potential objection lurking

1 to Exhibit 22?

2 Exhibit 22 is hereby admitted.

3 Q. While we're talking about this data,
4 sometimes some numbers get adjusted going from what we
5 used to see with the Market Administrator to maybe
6 gallons and the like. There's another problem when we
7 look at totals, particularly in the month of February,
8 as we go from one year to the next, or comparing
9 sometimes month to month of February because of 28 to 29
10 days, is that correct?

11 A. That's correct.

12 Q. And does the Department have -- it does,
13 does it not, have a policy of adjusting fluid milk sales
14 data for calendar composition?

15 A. Yes.

16 Q. And that's on the website? That's
17 published on the website?

18 A. Yes.

19 Q. And that is used by the Department to
20 make those conversions so that we can more or less
21 compare apples to apples as we're looking at the data?

22 A. That's correct.

23 Q. Is there any other purpose for that?

24 A. I -- the software package is really from
25 the Bureau of Labor Statistics, so they may use it.

1 Q. Okay. Now, in addition to the data that
2 we talk about to compute the blend and the minimum price
3 and what the pool would be and what producers get,
4 there's also reports generated by the Market
5 Administrator that talk of the actual fluid milk
6 products sold in their market area or gross area,
7 they'll actually break it down by gallons of milk, white
8 milk and chocolate milk and 2 percent and that type of
9 thing, is that correct?

10 A. In that package?

11 Q. Yes. And that is what is found in the
12 sales of fluid milk products in all Federal marketing
13 orders, if we would go to one of those reports, is that
14 what shows up there?

15 A. I'm not familiar with what you're talking
16 about.

17 Q. Okay. Well, then, we won't go any
18 further. Don't make that a habit to answer that
19 question from now on, please.

20 We've talked about, within the Federal
21 Order, there are minimum prices that the Department
22 establishes for milk that plants have to pay, but I
23 think it's recognized in the industry that, in most
24 cases, that Class I handlers often pay more than those
25 minimum prices, is that right?

1 A. Yes.

2 Q. All right. And the -- does the Market
3 Administrator's office collect data regarding those
4 prices over the minimum prices?

5 A. There are two sets of data, if you will,
6 the co-op announced prices. That data is a little
7 questionable in the sense that there may not be a
8 verification that the handler actually paid that co-op
9 announced price.

10 There was also a set of information
11 that's collected that talks about the amount of milk --
12 or not the amount of milk, the incidence of the overall
13 premiums paid and what portion of the milk carried a
14 premium or some milk didn't have a premium.

15 Q. And that would be the over-order price
16 report?

17 A. Yes.

18 Q. And that would include like the high --
19 the low and the high and the average over-order price in
20 that market?

21 A. Yes.

22 Q. And then it would actually take the total
23 over-order money collected for Class I and divide that
24 by the total Class I sales to come up with an average
25 Class I over-order charge, is that right?

1 A. Yes.

2 Q. Now, what does -- these order-over
3 charges, what do those generally include or cover?

4 A. Some of them may include services
5 performed by the cooperative for the handler, such as
6 check writing, field services, weight and tests. A
7 co-op may be doing some or all of those. They stand
8 ready to provide an extra load of milk if needed that
9 there may be a charge or service for that, or it may be
10 just because that's the customer, so that's incorporated
11 in some of those charges.

12 Q. Now, this information on this -- these
13 announced Class I price and the others are based on a --
14 wherever the data is available, because there may be
15 some administrative reasons you can't display it, were
16 basically done on an order-by-order basis, is that
17 right?

18 A. Yes.

19 Q. And then you also have selected cities,
20 where you identify what those prices are?

21 A. Yeah. There's -- there's about 40
22 metropolitan areas that -- that contain the co-op
23 announced Class I price, and there's about 30 or 35
24 retail price series collected by the Market
25 Administrator. And when you put the two together, you

1 come up with about 25 or 26 where it's the co-op
2 announced price plus the retail fluid prices collected
3 by the market administrative offices.

4 Q. You do want to get out of here quicker
5 because you are about three questions ahead. So let me
6 just take that. In addition to the over-order prices,
7 you also have the Market Administrators collecting
8 retail price at each of the selected stores on a regular
9 basis, is that correct?

10 A. I believe it's the first ten days of the
11 month, not including Friday, Saturday or Sunday. They
12 identify the largest retail outlet, the second largest
13 retail outlet and the largest convenience store outlet
14 and identify an individual store for each of those three
15 entities, and then each month they go back to the same
16 store and collect the retail price.

17 JUDGE CLIFTON: Excuse me, Mr. Yale, can
18 those of you in the back still hear Mr. Carman?

19 AUDIENCE MEMBER: Yes.

20 JUDGE CLIFTON: Okay. Good.

21 MR. BROSCHE: Are these in reference to a
22 particular document that he sponsored? Because
23 I lost track of how this is connected to the
24 documents that he sponsored, because you hadn't
25 mentioned the document number.

1 MR. YALE: No, the purpose of this is to
2 identify documents and get into the record
3 information from an expert from the Department
4 of stuff that they publish on a regular basis
5 that we will use in this hearing.

6 MR. BROSCHE: Our cross-examination
7 doesn't have anything to do with what he's testifying
8 in direct.

9 MR. YALE: It has nothing to do with
10 the direct testimony.

11 MR. BROSCHE: That's a little unusual,
12 your Honor.

13 JUDGE CLIFTON: It's probably his only
14 chance to -- to give credibility to the
15 documents.

16 MR. BROSCHE: I don't want to stop
17 Mr. Yale. I was just trying to follow him and I
18 was having trouble following him.

19 MR. YALE: It's a common practice. I'm
20 just trying to follow that. It's data that's
21 going to be out there from the Department and I
22 think it's fair to the proponent or to the
23 hearing records to understand the source of this
24 data and how it's handled and the view of the
25 Department on it, because it's that it is not

1 prepared for anybody's side one way or the
2 other, it's just data that's out there.

3 BY MR. YALE:

4 Q. Now, this retail data, you've been
5 keeping that since what, January of 2001 in most cities,
6 is that about right, on a monthly basis?

7 A. In some cases, earlier than that.

8 Q. Okay. And that information is reported
9 on the website of USDA, is that right?

10 A. Correct.

11 Q. All right. And it collects that for
12 whole milk and 2 percent? Go ahead.

13 A. Whole milk, low fat milk.

14 Q. Okay. And when we talk about whole milk,
15 what is the butterfat content of that? Do you know,
16 what is the standards that you use?

17 A. The Food and Drug standard minimum is
18 3.25 percent milk fat. So to be within the standards
19 it's going to be a 3.25 or a little bit higher.

20 Q. And the reduced fat is?

21 A. 2 percent. I.e., 1.95 and 1 percent
22 would be .95, or approximately 1 percent. And I think
23 skim is not more than .25 percent fat.

24 Q. Okay. Now, I'm going to pose to you one
25 of the more difficult questions I have for you for the

1 rest of the night, so I phrase that, and that is, if we
2 have a -- we talked about a minimum Class I price that's
3 announced and we talked about these over-order premiums
4 that are there, that are out there by city, and we match
5 one of the two dozen cities that have both over-order
6 pricing published and retail pricing published, right?

7 If we wanted to convert, so that we can
8 compare on a gallon-by-gallon basis, the cost of the
9 milk under the minimum Federal Order price and the
10 over-order price combined as compared to the retail
11 price, how would one make that conversion to a gallon
12 price under the Federal Order prices for those minimum
13 prices that we stated?

14 A. The first adjustment would be to get the
15 raw milk down to a per gallon basis or to -- or the
16 other way, to inflate the per gallon price to a
17 hundredweight value. So the 8.6 for whole milk --

18 Q. Okay.

19 A. -- would be used 100 pounds of producer
20 raw milk, minimum price, divided by 8.6, would give you
21 the number of gallons there, so that dollar value
22 converted down to a cents per gallon of whole milk.

23 Q. All right. So you would either bring the
24 Federal Order price on to a gallon base and compare that
25 to the retail or take the retail and multiply that to a

1 per hundredweight basis?

2 A. Yes.

3 Q. And you would also have to adjust for the
4 fat to make sure that the minimum prices for the fat are
5 appropriately allocated, right?

6 A. Correct. Those are not the only costs
7 between the retail and the farm.

8 Q. We understand that.

9 A. Right.

10 Q. But you know there's -- there'll be
11 costs, for example, of transportation and costs for the
12 store operation and overhead and just a whole host of --

13 A. And other mandated costs.

14 Q. Right.

15 A. Such as national fluid milk --

16 Q. Right. Now, one cannot say that's all
17 profit to the retailer. That is -- that's just a spread
18 that would give some indication of what it cost to get
19 it from the farm to the retail consumer?

20 A. You have maximized the difference by
21 taking the minimum farm price of a hundredweight of milk
22 compared to the over-the-counter sale price of a gallon
23 of whole milk. All of that margin, there's a whole lot
24 of costs between there.

25 Q. That's right, and I would agree. We're

1 not trying to say that that can be identified to any one
2 thing. There's a whole lot of that goes on, hauling it
3 to the plant, processing at the plant, moving it to the
4 store, handling at the store, cash registers, retail
5 cashiers, all of that?

6 A. All of the various jobbers between the
7 plant, yes.

8 Q. Okay. But that computation, that's not
9 on the website. One would have to do that on their own,
10 is that right?

11 A. Yes.

12 Q. And I'm not making that data request, by
13 the way.

14 A. That's because my spreadsheet is not up
15 to date.

16 Q. All right. I want to move on to some
17 other data that's out there regarding some of these, so
18 we have -- but we do have a series of reports out there
19 that one could obtain for those years by specific city,
20 these retail prices?

21 A. As collected by the Market Administrator.

22 Q. Right.

23 A. They're not as robust as Bureau of Labor
24 Statistics retail price.

25 Q. What do you mean by "not as robust"?

1 A. They are a very specific time of the
2 month for an individual outlet. There may be
3 differences for a -- in the Washington area, walking
4 into a giant store, the prices could be different from
5 one counter to another. Doesn't -- just because the
6 outlet, they may have a different price between Maryland
7 and Virginia --

8 Q. Right.

9 A. -- or the District of Columbia.

10 Q. But it provides a number that, over the
11 periods of years, gives you some kind of -- at least to
12 be able to identify trends and some general information?

13 A. It's a good indication of trends. It
14 does -- it may not be an absolute.

15 Q. Right. One would not be able to say that
16 this is what milk is, I guess, being sold for in this
17 market in this period of time as an absolute?

18 A. It will tell you what milk was being sold
19 for in that outlet on that day.

20 Q. That day, right. Okay. Now, I want to
21 go to some other information that's reported by the
22 Market Administrator. We said the Market Administrator,
23 in the collecting of the data as regards what not only
24 just the minimum prices the plants have to pay, but is
25 also able to obtain the over-order prices?

1 Let's look at the producer side. It has
2 the minimum prices that plants must pay producers
3 because of the data that it receives. It's also -- the
4 Market Administrators are able to collect what is called
5 a mailbox price, is that correct?

6 A. Correct.

7 Q. And how would you define a mailbox price?

8 A. It's what -- the net value for the sale
9 of a hundredweight of milk received at the mailbox.

10 Q. And there is -- that is available for all
11 of the marketing areas other than Arizona, is that
12 correct?

13 A. Be careful with the mailbox series. It
14 does not match up with the marketing area. For example,
15 the Appalachian is five Appalachian states. It does not
16 relate to the mail -- the marketing area of Appalachian.

17 Q. It talks about the -- it talks about the
18 average price paid to suppliers that supply the market
19 area, which could be from outside of those five states?

20 A. Yes. Well, in fact, there are two
21 mailbox prices for the Appalachian. There's a mailbox
22 price that's generated by the Appalachian on their
23 website. It is not the same as the Appalachian state
24 marketing areas published from Washington. They're
25 different.

1 Q. And who computes the one -- does the
2 Market Administrator compute both of them, or just the
3 one?

4 A. The data for the Appalachian states would
5 be assembled in Washington. It would include milk that
6 was produced and marketed on other orders, but within
7 those five states.

8 For example, the Southeast or the Mideast
9 could well have had milk that was reported to those and
10 pooled on those two orders, but produced in that
11 five-state region.

12 Q. And the one -- the other one, like for
13 milk for Appalachian that's produced by the Market
14 Administrator, that reflects the average price received
15 by producers supplying?

16 A. Yes.

17 Q. So that could include states outside of
18 the Appalachian marketing area?

19 A. Outside of those five states, yes.

20 Q. Okay.

21 A. Wisconsin might be included.

22 Q. Right. I see that is out of another
23 department, but I just wanted to see whether you --
24 Dairy Programs is aware of and uses or has any knowledge
25 of it. And that a sister agency within USDA is the

1 Economic Research Service?

2 A. I'm aware of that organization, yeah.

3 Q. And one of the things that it produces is
4 a number reflecting the monthly cost of production by
5 various -- certain states for producing milk. Are you
6 aware of that?

7 A. Yes.

8 Q. All right. There is no cost of
9 production or any numbers prepared by USDA at this time
10 by marketing area that would reflect what -- any number
11 that shows what the cost of production for milk going
12 into a marketing area?

13 A. Not that I'm aware of.

14 Q. So the best data that would be available
15 is the data from the states that are in that particular
16 marketing area for the moment that's produced by ERS?

17 A. It's data available. There may be some
18 other farm accounting cost data that the extension
19 service of an individual state may put together. Or
20 there may be some panel surveys, for example, the FAPRI
21 that Texas A&M runs.

22 MR. YALE: So I think that's it, your
23 Honor. I think based upon your announcement,
24 I've prepared to do it a different way. We'll
25 try to have copies of the documents we want, the

1 notice made available, and then we'll make that
2 request at that time.

3 JUDGE CLIFTON: Good. Thank you very
4 much, Mr. Yale. I know it's a burden on the
5 person that wants the Secretary to take official
6 notice or judicial notice, but I think it's
7 practical.

8 MR. YALE: Yeah, it is. Well, it's not
9 impractical. But I think its gives better
10 notice to the parties of, really, where the data
11 is as opposed to kind of a carte blanche. Thank
12 you, very much.

13 JUDGE CLIFTON: Very good. You're
14 welcome. All right. We need to take our
15 temperature. It's 5:49 and all we have yet to
16 do is finish this witness and finish Dr. Cryan
17 and start Dr. Yonkers, so -- and that's just to
18 keep up with what we thought we'd do this
19 morning.

20 Let me ask. What's the status of the
21 remaining USDA exhibits?

22 MR. STEVENS: Are we on the record?

23 JUDGE CLIFTON: We are.

24 MR. STEVENS: Give me a minute, your
25 Honor.

1 JUDGE CLIFTON: Let's go off record for
2 just a moment.

3 (Off the record.)

4 JUDGE CLIFTON: Let's go back on record.
5 We're back on the record at 5:52. Mr. Stevens.

6 MR. STEVENS: All of the exhibits that --

7 JUDGE CLIFTON: Move the microphone
8 closer.

9 MR. STEVENS: All of the exhibits that
10 Mr. Carman has prepared up to this point we have
11 here and he has introduced them, with the
12 exception of a couple of items that he has
13 prepared that either are now or very soon going
14 up on the website.

15 The additional requests that have been
16 made of parties, the present thinking is from
17 the government --

18 JUDGE CLIFTON: Before you go to that,
19 before you go to those --

20 MR. STEVENS: Yes.

21 JUDGE CLIFTON: -- talk to me a little
22 more about the ones that are going to be here
23 today. Are those the same ones that you are
24 saying are about to go on the website?

25 MR. STEVENS: No. The ones that we have

1 in front of us, 5 through 20, we are going to
2 move into admission at the appropriate time at
3 the completion -- I was waiting for the
4 completion of the cross-examination. If there
5 is more cross-examination, then we will wait and
6 move those in.

7 That is the state of the presentation of
8 the government witness. There are other
9 outstanding requests for information, which as I
10 understand it from talking with the witness
11 earlier, are being completed as quickly as he is
12 able to do them. He's certainly not able to
13 complete them when he's up here on the stand.
14 That's number one.

15 JUDGE CLIFTON: Well, now, wait. I
16 misunderstood an earlier representation you had.

17 MR. STEVENS: All right.

18 JUDGE CLIFTON: I thought there was a
19 representation by Mr. Carman, in answer to
20 somebody's question, that we were getting more
21 copies today of things that he had prepared,
22 that they were being copied.

23 MR. STEVENS: Let me clarify that. Let
24 me clarify that. As I understand it, the
25 additional copies that were being made -- all

1 the copies that were being made today are now in
2 the hearing room and have been used by the
3 parties. We are talking about Exhibits 5
4 through 20.

5 There are no additional copies of any
6 other exhibits, other than exhibits -- well,
7 documents that are the result of requests of
8 parties that Mr. Carman has completed work on,
9 and that will either be up on the website -- I
10 doubt that they will be up today, but they may
11 well be up tomorrow, and so those websites
12 become in the public area and they will be
13 available for anyone here or anyone else to view
14 and to use as they choose.

15 There are other requests which are in --
16 are being worked on as we speak and are not
17 completed yet, and I understand those to be some
18 of the materials that Mr. Miltner is talking
19 about, that the Department is trying to get
20 those completed as quickly as possible. And
21 when they are completed, they will be put up on
22 the website and they will be available for the
23 parties for their use as they choose.

24 It is not our intention to introduce any
25 more evidence other than what we have introduced

1 to this point.

2 JUDGE CLIFTON: All right. Now, let me
3 ask a question. If something shows up on the
4 website that, for example, Mr. Miltner wants to
5 use, will he be permitted to call Mr. Carman as
6 to what went into compiling the information
7 that's -- that's represented there and how it is
8 to be interpreted?

9 MR. STEVENS: It is our intention to make
10 the information available to the parties for
11 their use in this hearing. It is also our
12 intention that Mr. Carman may well be available
13 at a future time to explain the future documents
14 that they may use with the understanding that
15 they are not going to be a government witness --
16 I mean, they are not going to be government
17 exhibits.

18 Let me correct what I said. They are not
19 going to be exhibits that we enter into
20 evidence, but if they need explanation to the
21 extent Mr. -- Mr. Carman is available -- I mean,
22 is available, because he is working on exhibits
23 and he's trying to complete this material,
24 exhibit -- I keep saying exhibits. I'm talking
25 about data requests, voluminous data requests

1 that he is working on and others are working on
2 to try and complete.

3 And that is ongoing. And certainly we
4 want the record to reflect what is contained in
5 those documents with Mr. Carman's view being
6 expressed, but not as the sponsoring witness.

7 JUDGE CLIFTON: So as soon as we finish
8 cross-examination of Mr. Carman on what we have
9 so far, then he may step down as your witness?

10 MR. STEVENS: That is our intention, that
11 he step down and he go and complete the rest of
12 the information requests as quickly as it can be
13 done and get them up on the website.

14 JUDGE CLIFTON: All right. Now, I will
15 ask, any other questions that are appropriate
16 for me to ask Mr. Stevens, if you will ask them
17 to me. Mr. Carroll.

18 MR. CARROLL: I would.

19 JUDGE CLIFTON: Oh, yes, please go to the
20 podium and identify yourself again.

21 MR. CARROLL: I think if I might say so,
22 this is a bit of a loose arrangement. I'm not
23 being critical at all because I realize this is
24 a massive job, and I have great confidence in
25 Mr. Carman, but nevertheless, it is a problem

1 for us at the hearing to be at this stage with
2 this problem.

3 Number one, I think he should be -- he
4 would be available as a witness at our call if
5 we find that we need him so we do not have to
6 wait for his determination as to how he thinks
7 his work is going. I'm a little bit concerned
8 about websites as being a source. As we all
9 know, it may not be admissible as such.

10 And I would think that the Department
11 would produce requisite copies of whatever these
12 requests have been in hard copy form so that we
13 can all have them available and everybody knows
14 what we're talking about.

15 Thank you very much, your Honor.

16 JUDGE CLIFTON: Thank you, Mr. Carroll.

17 MR. STEVENS: Your Honor, may I just --
18 he makes a very interesting point, and I did
19 neglect to say that when the -- when the
20 materials would be going up on the website,
21 copies of those materials will be presented to
22 the -- to the requester, so that there is a hard
23 copy. It is going to the requester. It is not
24 a document that we're going to sponsor admission
25 of in the hearing.

1 If the requester wants to bring the
2 copies, make the copies, distribute the copies
3 and do that, that's fine. We have no problem
4 with that.

5 JUDGE CLIFTON: I have a question that
6 doesn't relate to this at all that occurred to
7 me. How quickly is each day's transcript going
8 to be on the website? I'll come back to that
9 question when we're off the record.

10 Mr. Ricciardi.

11 MR. RICCIARDI: Your Honor, let me
12 reiterate the concern. First of all, I'll join
13 in some of the comments that were made by
14 Mr. Carroll, but let me reiterate some of the
15 concerns that I raised, and Mr. Miltner also
16 raised.

17 It's clear from this testimony that the
18 proponents of Proposals 1 and 2 have basically
19 been talking to the Department for a year.
20 We've had notice of this hearing for less than a
21 month. We've requested the documents that are
22 needed for us to both bring in evidence
23 regarding those proposals and to support our own
24 counterproposals.

25 And we're sitting here, as I stand up, at

1 6:00 p.m. Eastern Daylight Time, if I know where
2 I am today, and I do not have any representation
3 made concerning, one, whether the documents are
4 going to be provided, and two, when they're
5 going to be provided.

6 I also am concerned about what I hear
7 from the government table, because the purpose
8 in the past and the procedure in the past has
9 always been that the government was providing
10 the data requested by the various proponents or
11 interested parties. The government wasn't
12 sponsoring anything, the government wasn't
13 taking any position. They were providing the
14 data for use by the proponents,
15 counterproponents in the hearing itself. It
16 sounds like I'm hearing something different than
17 that.

18 And my clients are at risk of potentially
19 being put out of business. They have due
20 process rights. And I don't care what we're
21 using as the regulatory basis for what we're
22 doing here, the constitution occurs and is in
23 place in this building. And we are very
24 concerned about what's going on.

25 JUDGE CLIFTON: Mr. Stevens, in that

1 regard, let me just ask. Is it odd to mass
2 produce the responses to the requests that are
3 represented in 5 through 20 and not to do the
4 same for the others? And let's go off record
5 for just a moment.

6 (Off the record.)

7 JUDGE CLIFTON: Okay, let's go back on
8 record. We're back on record at 6:07.
9 Mr. Stevens.

10 MR. STEVENS: Your Honor, I guess I -- I
11 just want the record to clearly reflect that the
12 Department gets requests from many people in
13 terms of rulemaking hearings, and this hearing
14 is a perfect example where when -- when -- and
15 even before a hearing. Because of course, as we
16 described ex parte, and as we described the
17 way -- as everyone in this room knows how the
18 Department operates in term of rulemaking, there
19 are discussions before a Notice of Hearing is
20 issued.

21 But there was a listening session here.
22 There was a lot of exchange in the industry
23 about this issue prior to the issuance of this
24 hearing. And so it wasn't like anyone was
25 particularly surprised that this issue was under

1 consideration and may well be coming up. So we
2 are now in -- in that area.

3 Requests were made. As Mr. Carman
4 testified, he responded by looking at data and
5 then made determinations as to what exhibits the
6 Department would put together to assist the
7 parties in this hearing.

8 Requests were made which are being --
9 have been answered, are being answered and will
10 all be -- all the requests will be answered.
11 The information will either be given over or an
12 explanation will be given as to why it is not
13 being given over. And as to the information
14 that is on the website, which is all of the
15 information, that is available for all of the
16 parties to use as they choose.

17 The fact that Mr. Carman puts in certain
18 exhibits is only based on the fact that he and
19 the Department have determined that this
20 information seems to be appropriate for this
21 hearing and would help the parties to assist
22 them in the conduct of the hearing.

23 As to the requests of others that are
24 responded to, as Mr. Miltner suggested and as
25 the Exhibit, I guess, 21 shows, a request was

1 made. Certain data is being prepared. Certain
2 data, there are some concerns or difficulties
3 with it, and those are expressed in that e-mail.
4 The information will be provided. It will be
5 put up on the website. It will be made
6 available in hard copy to the requesters.

7 What they choose to do with that
8 information is -- is clearly up to them in terms
9 of this hearing. The timing of it is just a
10 matter of -- of the voluminous nature of the
11 request and the attempts of the Department to
12 answer all the requests of the parties, to
13 provide the information it asked for.

14 That is the sum and total of it. And so
15 the eventuality is, all of that information will
16 be up on the website. Hard copies will be
17 delivered and responses will be given to the
18 requesters as to what information will not be
19 made available. That's it. One minute.

20 And so we -- we offer that as an
21 explanation of why the exhibits that we have now
22 on the table are ones that we would move into
23 admission at the completion of
24 cross-examination, and further that Mr. Carman
25 and the people of the Department will be working

1 to complete, as quickly as they can, the
2 information requests. And they will respond to
3 the requesters, and they will put the
4 information up on the website.

5 JUDGE CLIFTON: Thank you, Mr. Stevens.
6 Mr. English, before I call on you, hold on just
7 a second. I want to just announce something
8 about when the transcript will be available on
9 the website.

10 The contract between the court reporter
11 company, which is Ace-Merit, LLC, and AMS is
12 that five business days following the end of the
13 hearing the electronic version of the transcript
14 in searchable PDF format will be provided to
15 AMS. Now, it'll take a practical amount of time
16 then for AMS to check it all out, make sure it's
17 all PDF searchable and put it on the website.

18 So if any of you need, for the purpose of
19 this hearing, any portion of the transcript on
20 an expedited basis, please make that request of
21 the court reporter here and make your own
22 contract with them for that expedited portion of
23 the transcript.

24 If you can wait until it goes on the
25 website because all you need it for is your

1 brief, great. But if you need it for your
2 experts or you need it to prepare
3 cross-examination or anything of the like,
4 you'll need to make arrangements with the court
5 reporter.

6 If you need to make those arrangements
7 and we're not stopping -- we're not going off
8 the record so that you can talk to the court
9 reporter, alert me that you need to make a
10 request of the court reporter, and we'll take a
11 little two-minute, stand-up break so that you
12 can do that. Mr. English.

13 MR. ENGLISH: Thank you, your Honor.
14 Charles English. I let it pass once, this
15 coincidence, but the second suggestion it's not
16 a coincidence, the second time.

17 Counsel for AIDA has now twice intimated
18 that their due process rights are being violated
19 and has twice emphasized the concept of the
20 hearing notice being published in the Federal
21 Register on April 9th. I would note, of course,
22 that it was signed before that. It was up on
23 the website for public inspection before it's
24 published in the Federal Register. It's well
25 known the Federal Register takes some time to

1 get it in. It was actually signed on April 3rd.

2 But going back in time, I believe the
3 Department notified the members of the industry
4 as early as February 4th that they had received
5 proposals from IDFA and from National Milk
6 Producers, and there was a public proceeding of
7 which counsel of AIDA appeared on March 20th,
8 well before April 9th.

9 I would note, in addition, that Counsel
10 John Carroll here submitted on March 16th his
11 request for data. That is to say, he didn't
12 wait a month until April 16th to submit a
13 request, which is probably why his data requests
14 are already responded to. Get them in, they get
15 responded to a little more quickly. It is the
16 case that the due process rights have not been
17 violated. People have known long enough.
18 They've had an opportunity to make requests.

19 To wait a week after the hearing notice
20 is published to submit three voluminous, and
21 frankly unprecedented requests, for data and the
22 other things, is not what is contemplated. And
23 we disagree strongly with that characterization.

24 JUDGE CLIFTON: Ms. Bryson.

25 MS. BRYSON: Thank you, your Honor. I'd

1 just like to make it clear for the record, as we
2 all know, that the purpose of this Federal
3 rulemaking proceeding is to collect evidence.
4 We have been told repeatedly that USDA has not
5 made a decision about any of the alternatives
6 that have been noticed and that's entirely
7 appropriate.

8 We have also been advised repeatedly that
9 USDA will make a decision based on the fair
10 market value information that is introduced at
11 this hearing. And so we have many people who
12 are coming here to present evidence in order to
13 make sure that there's a complete record. We
14 have no definition from the Department about
15 what constitutes disorderly marketing condition.
16 We are told that the government will make the
17 decision based on what is presented in this
18 record.

19 In those situations, it is really
20 important, I think, for all of the alternatives
21 that have been noticed to be entitled to factual
22 information that is vetted by -- prepared by the
23 Department and presented at this hearing.

24 The idea that there might be some
25 information that's posted on a website, which we

1 do not have the opportunity to talk with the
2 USDA about, cross-examine in the process that's
3 been happening here this afternoon, is -- makes
4 it virtually impossible to create a record which
5 fairly presents to the Department, as it says it
6 desires, the information that's relevant to this
7 subject.

8 We are here at this hearing today because
9 this is the date that USDA picked to schedule
10 it. All of our requests for data were very
11 appropriate in terms of being submitted on time,
12 given the decision by USDA to notice our
13 alternatives as proposals that would be
14 considered on a factual basis at this hearing.

15 Our request is that we have the same
16 quality of evidence provided in response to our
17 data requests as has been provided and produced
18 so far this afternoon for Proposals 1 and 2.
19 Thank you.

20 JUDGE CLIFTON: Thank you, Ms. Bryson.
21 Mr. Stevens, do you wish to respond?

22 MR. STEVENS: Not in any other way than
23 to say that the information will be provided to
24 the requesters.

25 JUDGE CLIFTON: Mr. Carroll.

1 MR. CARROLL: I just want to be certain
2 that I haven't misunderstood what's just
3 happened. The -- the Department has submitted
4 evidence for some proposals and failed to submit
5 evidence for other proposals. And I'm just
6 wondering what that means for the fairness of
7 the hearing? If they want to respond to that?

8 JUDGE CLIFTON: Mr. Stevens, I have to
9 add my concern. I haven't been to very many
10 milk rulemaking hearings, but in every one, the
11 government witness provided all the government
12 statistics, no matter who asked for them.
13 Copies of all of the handouts, the proposed
14 exhibits, were available for everyone who came
15 to the hearing to pick up in the back of the
16 room.

17 I understand that one reason this hearing
18 is so difficult is that it is so controversial.
19 But that makes it even more important that it be
20 evenly handled.

21 So I request that -- I know Mr. Carman is
22 going to have tremendous demands on his time.
23 He can't both be compiling data and testifying.
24 He'll have to give us his schedule. I think all
25 proponents have a right if they want to wait

1 until all of the government's statistics are in
2 evidence before they proceed. It may make a
3 difference to their experts.

4 I understand that the -- that Dairy
5 Programs was comfortable with just using 5
6 through 20, but I'm not comfortable with the
7 other statistical data gathered by Dairy
8 Programs being treated in a different way than 5
9 through 20 have been treated.

10 So it may slow us down a bit to have
11 Mr. Carman having to do -- and I -- I've said, I
12 think the requests are overwhelming, and I do.
13 But unless you can persuade me, Mr. Stevens,
14 that the reason a request is not being responded
15 to is that it's irrelevant and that it's merely
16 designed for delay or some other inappropriate
17 reason, then I think we need to have Mr. Carman
18 present it the same way he's presented the
19 others.

20 If, for example, let's say, some of the
21 experts, Dr. Cryan or Dr. Yonkers, present what
22 they have prepared and reserve the right to come
23 back and testify again when the rest of the data
24 is available, in that way we can keep moving.
25 But if, for example, Dr. Cryan said, well, I've

1 prepared my statement, but I want to wait to see
2 what the other evidence is before I commit
3 myself as an expert, then I would understand
4 that.

5 So, Mr. Stevens, I'll entertain any
6 comments you have. I may be mistaken, but
7 that's how it looks to me.

8 MR. STEVENS: I appreciate that, your
9 Honor. My -- my thought as you were speaking
10 was that it is true that -- that certain
11 requests were made and certain information is --
12 is before us now in exhibits and other
13 information is still being prepared. There is
14 something to the point that if you do ask for it
15 earlier, it will be provided. That is a point
16 which is -- I don't think can be rebutted.

17 But that's fine. Let's just accept it
18 for what it is and say that we should all
19 postpone the hearing until all of this evidence
20 is presented by Mr. -- Mr. Carman that has been
21 requested by the parties.

22 Well, the first point is that if people
23 request information from the Department of the
24 nature that we're speaking of now, it doesn't
25 mean necessarily that it -- that they will

1 introduce -- that they will want it introduced
2 into evidence in this proceeding.

3 In other words, I am certainly aware of
4 instances where parties have asked the
5 Department to prepare -- prepare special runs of
6 information from the Market Administrators from
7 the data of the Department and, having received
8 it, decide not to use it in a hearing.

9 That's their choice. That's their right,
10 certainly. And so some of that is involved
11 here, I believe. But I don't -- but I don't
12 know. And I don't want to speak for any party.
13 And it may be that all of the information that
14 Mr. Miltner has requested, they want it to be
15 put on this record and to present it and to have
16 a government witness present it of the same
17 nature that this other evidence has come up.

18 I think it is true that -- it is true
19 that not only the requests of Mr. Miltner, but
20 other requests that may have come in at a later
21 time, with respect to other requests in time,
22 are being respond -- are being responded to in
23 the same way that we are now speaking about
24 Mr. Miltner's request, that it goes up on the
25 website, that it -- that it is available, that

1 they get a hard copy, that they are available to
2 use it in the hearing as they wish.

3 It is, I think as much as anything, a
4 matter of the timing of when it is received and
5 how long it takes to prepare it and what should
6 then be done with it. Because if we -- if we
7 are in the position now of stopping this hearing
8 for every request that might even come up in
9 this hearing, that it then has to be prepared
10 and Mr. Carman has to get up and testify about
11 it, and if it has to be admitted through him as
12 opposed to through the proponent or opponent who
13 wants to use the testimony, I submit to you,
14 your Honor, that this hearing will never end, it
15 will never end.

16 JUDGE CLIFTON: I'd have to agree with
17 you there.

18 MR. STEVENS: All right. And if we take
19 those points into -- what I'm saying, and take
20 those into mind, there are reasons why some
21 requests are treated somewhat differently than
22 others because of the timing of them, because of
23 the voluminous nature of them, because of the
24 constraints of, one, on the conduct of the
25 hearing in terms of Congressional mandates or

1 any other -- any other constraints that are put
2 on these rulemaking hearings. So we have this
3 reality that we're dealing with.

4 The Department, for its part, I think,
5 and I certainly concur in saying that any -- any
6 implication that the Department is not engaging
7 in due process in this is -- is giving the
8 characterization of a suer patent (phonetic).
9 All it is is just as a matter of putting on this
10 record something that is not necessary.

11 Everyone here wants to look at the facts
12 on the record. Above all, Mr. Carman wants to
13 respond to the requests of the parties and get
14 the information in this record that the
15 Department needs to make a decision.

16 It isn't all presented by him. It can be
17 presented by the individual parties. The point
18 is that it goes in the record, that it is
19 here -- that it is here for the Department to
20 review.

21 JUDGE CLIFTON: I think, however, if
22 Mr. Carman is the author of a report, only
23 Mr. Carman can answer questions about what does
24 this mean, where did this data come from, is
25 this reliable and so forth.

1 MR. STEVENS: And we have offered him up
2 to do that. He is available to do that.

3 JUDGE CLIFTON: Okay. All right.
4 Mr. Miltner.

5 MR. MILTNER: I will be brief. My
6 understanding, and the understanding of the
7 people with which I am working, is that we will
8 proceed exactly as you described, Judge, that
9 Mr. Carman will be available to explain the
10 information that's presented. Whether it is
11 technically sponsored by the Department or
12 sponsored by the party who's requested it, I
13 think is immaterial as long as we have somebody
14 to talk about the fact that it has been
15 compiled, how it's been compiled or if there's
16 no response to the request, why that response
17 has not been provided. That needs to be part of
18 the record in every instance.

19 And that's what we want. But I think
20 it's important to talk about the timing here
21 just once more because it's been suggested, or
22 at least implied, that we sat on our requests or
23 we should have gotten them in sooner. Until the
24 hearing notice was made available -- and yes, I
25 was noticed by USDA on April 7th that the

1 hearing notice was going to be posted to their
2 website that day, but until that time, all that
3 was before the Department were requests from
4 National Milk Producers Federation, IDFA, to
5 eliminate producer-handlers and to put -- expand
6 the exempt plant limitation.

7 There were counterproposals that were
8 heard at a prehearing session, and USDA
9 maintained that no decision had been made to go
10 for a hearing. They were weighing all of the
11 options and would make a decision as to whether
12 a hearing should be held.

13 So to waste my client's time and money
14 and effort to submit data requests before we
15 even knew that our three alternatives were going
16 to be noticed for hearing would have been
17 imprudent. And as soon as we had notice that
18 our proposals were going to -- first we had
19 notice that a hearing was going to be called at
20 all, and, second, that our counterproposals were
21 going to be offered. And we moved expeditiously
22 within the time frames that were set forth.

23 And I understand under the Farm Bill we
24 have different time frames and they're making
25 everybody work a little bit differently than

1 they used to.

2 But I take exception to the suggestion
3 that we should have moved quicker or differently
4 because we're trying, believe it or not, to get
5 this done as quickly as we can, but we need to
6 have a full record. Thank you.

7 JUDGE CLIFTON: All right. Don't leave
8 yet. Is your client then willing to pay for the
9 mass reproduction if you want to use the data?

10 MR. MILTNER: Yeah, I don't think that
11 that's consistent with how it's ever been done
12 in the past. Before, requests of parties have
13 been compiled by USDA, they've been printed by
14 USDA. They've been testified to by the party
15 who's compiled them and available for
16 examination.

17 And so no, I don't think that's
18 appropriate to put the cost of reproduction on
19 the party requesting it. And I think it's
20 thoroughly inconsistent with how it's been done
21 in the past.

22 JUDGE CLIFTON: Thank you. All right.
23 Does anybody else want -- Mr. Vetne.

24 My next topic after we finish this topic
25 is going to be how long do we work tonight.

1 MR. VETNE: Since we don't have any
2 data -- since there's data outstanding, I move
3 to adjourn.

4 Besides that, I am -- I am disturbed by
5 some -- some parts of this. In the past --
6 unfortunately, in the past the opportunity to
7 ask USDA for data specific to a hearing, data
8 that your client might want to see, is something
9 that was known only to a small group of regular
10 practitioners. It wasn't something that was
11 known generally to the public.

12 Now we have it, you know, available to
13 everybody and people can finally take advantage
14 of it. There's not just a few that can exploit
15 a process that only they know about. That --
16 that is good.

17 And I think, you know, the Department's
18 done -- done a heck of a job in preparing for
19 this hearing and Mr. Carman has done a heck of a
20 job in explaining his exhibits. I'm very
21 pleased with that.

22 I have some data requests outstanding.
23 What concerns me the most -- and yes, these data
24 requests in the past have always been if it's
25 available and we can do it in the time, we'll

1 get it for you and we will introduce it so that
2 everybody can ask the questions.

3 In fact, the risk in the past has been,
4 once you ask for a piece of information, you
5 don't have a choice. It's going to be in the
6 record. And if it turns out to be -- have a bad
7 result to your client, you know, that's the risk
8 you take when you ask for that information.

9 JUDGE CLIFTON: I was thinking that. I
10 was thinking if it's not good for Mr. Miltner's
11 clients, it's good for somebody else.

12 MR. VETNE: Exactly. But what concerns
13 me most about this, the dialogue -- and the
14 dialogue that we've had here is that Exhibits 5
15 through 20 have been -- been characterized as
16 okay, we think these are important and the
17 government is sponsoring these exhibits. Which
18 leads -- leads me to wonder whether the
19 government has determined that Exhibits 5
20 through 20 are more important for the process
21 that they're just beginning to undertake than
22 whatever comes later. Well, what -- there
23 has -- there is a difference, by the way, in the
24 Notice of Hearing here.

25 I mean, Mr. Carman is one of the people

1 who's going to be involved in the
2 decision-making process, as is Garrett Stevens,
3 as is everybody on this table off to my left, I
4 believe.

5 The hearing notices for about 30 years
6 now have said, here are the people that are
7 going to be involved in making decisions and you
8 can't have ex-parte communication with these
9 decision-making people.

10 For the first time in 30 years, that
11 paragraph was not introduced with the phrase
12 that said, these people are going to be involved
13 in decision making. It just says, don't talk to
14 these people ex parte. So now I don't even know
15 what that means, if some of these people are
16 involved or not involved.

17 What I -- what does disturb me is that
18 people who might be involved have judged that
19 some exhibits prepared by the government are
20 going to be weightier and more important and
21 more relevant than something that other people
22 requested. Thank you.

23 JUDGE CLIFTON: Don't leave. Is your
24 client prepared to pay for the duplicating so
25 that everyone can have a copy of the response to

1 your requests?

2 MR. VETNE: I had not come to this
3 hearing prepared for that. I have three small
4 business clients. The way it's always been done
5 in the past, and the way I anticipated it would
6 be done, is the copies would be prepared, the
7 government would introduce them all at once or
8 when they got around to it, and it'd be -- that
9 everybody would be treated the same.

10 Some of these exhibits, 5 through 20,
11 we've been told are in response to industry
12 requests, proponents' requests. We have
13 requests outstanding. We don't have those yet.
14 I haven't gotten an e-mail saying they can't do
15 it, which I usually get, or parts of it, or it
16 would be too hard to do this on an annual basis,
17 but how about we give you a representative
18 month. That's fine. Okay. I want to cut down
19 your work, but I want to know sort of how this
20 looks. That's been the dialogue in the past
21 him.

22 So I'm assuming, since I didn't get the
23 kind of e-mail that Ryan got, that the
24 information I requested on behalf of my clients
25 will eventually get here. And I'm hoping that

1 the Department -- oh, oh, I've got a skeptical
2 look from him, my peripheral vision. You know.
3 And I'm hoping that the Department will make
4 that available to us and everybody the same way
5 they've made these available and have done so in
6 the past.

7 JUDGE CLIFTON: Thank you. Mr. Beshore.

8 MR. BESHORE: I just want to make one
9 comment in response specifically to something
10 Mr. Vetne said, and it's the way -- the
11 direction of this dialogue, whatever it is, has
12 gone and I'm very concerned about it.

13 Mr. Carman has testified under oath that
14 none of these exhibits were prepared for or
15 against any proposal in this hearing. That's
16 the testimony under oath. Mr. Vetne just said
17 that it appears that these have been presented
18 for or against certain proposals, that they've
19 been slanted in some way in terms of what was
20 prepared. And I think that's completely
21 uncalled for. And it's a -- you know, an insult
22 to the witness. And I think it's very
23 inappropriate.

24 That's the direction that has gone, the
25 Department in some way is slanting what they're

1 doing. And that's not -- that's not the case.

2 Just one other note. This -- the fact
3 that information prepared by the Market
4 Administrator offices or the Department has been
5 required to be offered by parties as opposed to
6 the government has occurred in more than one
7 hearing that I've been a part of. And that's
8 not something that is -- you know, that's never
9 happened or that's out of -- out of bounds or
10 whatever.

11 Usually there is a statistical witness
12 from the Market Administrator's office who
13 presents, you know, exhibits, or from
14 Washington, D.C. in some cases, in national
15 hearings who presents exhibits.

16 But it's not unheard of that data is
17 presented, having been prepared by the Market
18 Administrators or AMS by industry witnesses who
19 say they received it, here it is.

20 JUDGE CLIFTON: Thank you, Mr. Beshore.
21 Mr. Yale.

22 MR. YALE: I have a proposal, and the
23 proposal is that we finish for the day and we
24 see how this all plays out in actual delivery of
25 data and the like, rather than -- seems like

1 we're kind of on a theoretical basis right now.
2 That's not going to get us anywhere.

3 And I think many of us, at least myself,
4 I'm starting to get tired and hungry, which
5 means I don't think as well as I do otherwise.
6 Not to suggest I'm not thinking well, but I'm
7 thinking it may go downhill pretty quick here
8 and I think we need to move on. You said 6:00.
9 It's 6:30. I would suggest, however, sometime
10 either tomorrow morning or in two minute -- at
11 some point during these -- the session, I think
12 that you realistically need to look at the
13 witnesses who want to testify on certain days
14 and start to plug those in.

15 I did some rough there and it looks like
16 maybe Thursday and Friday is already filled up
17 overwhelmingly. And I think we need to look at
18 that and start playing this thing through, that
19 we may be agreeing to more witnesses than we can
20 handle. I don't know, maybe we can handle them.
21 But I think we need to kind of start actually
22 saying they're here, what time they're going to
23 take. I think that's really what we ought to be
24 doing in this case and go from there.

25 JUDGE CLIFTON: All right. Thank you,

1 Mr. Yale. Mr. English, would you come to the
2 podium for a minute?

3 MR. ENGLISH: Yes, your Honor. Charles
4 English.

5 JUDGE CLIFTON: Do you want to present
6 any more evidence tonight, assuming that we stop
7 questioning Mr. Carman?

8 MR. ENGLISH: Well, actually, I think the
9 next witness is National Milk Producers. So I
10 will let them speak for themselves.

11 JUDGE CLIFTON: Mr. Brosch.

12 MR. BROSCH: Well, we have Dr. Cryan.
13 Dr. Cryan is here and he's ready to testify and
14 we'll move to go on. It depends on your Honor
15 and everyone else in the room. But we certainly
16 don't want to hold up the hearing. I don't even
17 want to talk very much. Because your Honor, I
18 think I've calculated about 85 percent of the
19 discussion today has been by lawyers and not by
20 witnesses. So I want to stop that. I want to
21 move on.

22 JUDGE CLIFTON: All right. Thank you.
23 I'm about to take a vote as to whether we take a
24 short break and then come back and proceed with
25 Dr. Cryan's testimony after we see if there is

1 any more cross-examination for Mr. Carman. But
2 let's do that first. Does anyone else have any
3 more questions tonight for Dr. Carman -- for
4 Mr. Carman? Are you a doctor?

5 THE WITNESS: No.

6 JUDGE CLIFTON: Mr. Carman.

7 AUDIENCE MEMBER: Honorary degree.

8 JUDGE CLIFTON: Mr. Carroll.

9 MR. CARROLL: I have no questions for
10 Mr. Carman, but I have a comment on the last
11 suggestion. I don't think this is the time of
12 day to start the most major witness on a
13 proponent. And we couldn't do justice to it
14 tonight. I move we adjourn.

15 JUDGE CLIFTON: Okay. We have a motion
16 to adjourn. You know, I'm particularly in favor
17 of it, because even though I would really like
18 to push, I know most of the people here did not
19 get lunch before we started at 1:00. And
20 therefore, it's getting late. All in favor of
21 adjournment raise your hands. All opposed?

22 We will adjourn. We'll go off record.
23 I'll see you tomorrow morning at 8:00. We now
24 go off record at 6:41.

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PROCEEDINGS ADJOURNED AT 6:41 p.m.

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C E R T I F I C A T E

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

S. Diane Farrell, RMR, CRR