UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

IN Re:	X	FEBRUARY 24, 2004
	X	9:00 a.m.
MILK IN THE APPALACHIAN	X	DOCKET NOS. AO-388-A15,
AND SOUTHEAST MARKETING	X	AO-366-A44 and DA-03-11
AREAS; NOTICE OF HEARING	X	
ON PROPOSED AMENDMENTS	X	WESTIN ATLANTA HOTEL
TO TENTATIVE MARKETING	X	4736 BEST ROAD
AGREEMENTS AND ORDERS	X	ATLANTA, GA

VOLUME II OF IV

APPEARANCES:

JUDGE PRESIDING: HON. VICTOR W. PALMER
USDA

USDA: MS. SHARLENE DESKINS

USDA/OGC

USDA/AMS/DAIRY PROGRAMS: MS. ANTOINETTE M. CARTER
MR. JACK ROWER
MR. BRAD STOKER

OTHERS PRESENT:

MR. MARVIN BESHORE SOUTHERN MARKETING AGENCY, INC.	MR. JEFF HITCHELL KROGER COMPANY
AL RICCIARDI SARA FARMS AND MICHAEL SUMNERS	MR. CHARLES ENGLISH THELAND, REED & CREEST
MR. GARY LEE PRAIRIE FARMS	MR. EARNEST YATES MR. WILLIAM CURLEY DEAN FARMS
MR. PAUL CHREST MR. CARL CONOBER CONSULTANTS	MR. JOHN VETNE SOUTHEAST MILK, INC.
REPORTER:	JANICE ADDINGTON
CONTRACTOR (not present):	R & S TYPING SERVICE

I N D E X

P R O C E E D I N G S

FEBRUARY 24, 2004:

THE COURT: Good morning.

MR. BESHORE: Good morning, Your Honor. Before Mr. Hollon takes the stand, I would just like to make one announcement. For those who had the pre-distributed copies of the exhibit set yesterday, one, we discovered last evening that one of the exhibits - which is Item 6 - had some data error problems in it. It is removed and will not be part of the exhibit in the hearing record, so - - the hearing record notes nothing about it, but those who have the pre-distributed set, just pull out the page that is Item 6. The official copy, it is not there, and when Mr. Hollon presents his statement, there are actually two sentences that will be deleted because of that.

Your Honor has given us numbers for the pre-marking of Mr. Hollon's statement, as Exhibit 47 and Exhibit 48.

(Whereupon, the exhibit referred to was identified for the record as Proponent's Exhibit Numbers 47 and 48.)

With that, I would like to call Elvin Hollon for Proponents.

Whereupon

ELVIN HOLLON,

having been first duly sworn, was called as witness herein and was examined as follows:

EXAMINATION

BY MR. BESHORE, ESQUIRE:

Q. Please state your name and address, Mr. Hollon.

A. My name is Elvin Hollon. My address is Post Office Box 909700, Kansas City, Missouri, 64190.

Q. What is your current employment position with - -

A. I work for Dairy Farmers of America. I am the Director of Fluid Marketing and Economic Analysis for Dairy Farmers of America.

Q. Could you briefly relate for us your professional training and education and background?

A. I have a Bachelor's Degree from Louisiana State University in Dairy Science Manufacturing, and a Master's Degree in Agriculture Economics from Louisiana State University. I have been employed by Dairy Farmers of America or its predecessor since 1979. I spent the first five years of my career in the corporate offices of AMPI, working with economic data relative to the Dairy industry, as well as various marketing projects across AMPI's operating division.

From 1984 to 1996, I worked for the Morning Glory Farms Division of AMPI, where there, I was involved in the day to day buying and selling and negotiating of milk. Our operating division ran half a dozen cheese plants. We participating in common marketing agencies in several markets, and it was my principle job responsibility to manage the customer relationships with our fluid customers, and to deal with those common marketing agencies. And in that capacity also, I worked with Federal Milk Order hearings on a national basis and in the upper mid-west and mid-east regions.

I spent two years with ANPI Southern Region in Arlington, Texas where again, I worked with common marketing agencies and day to day marketing projects. And now, I am on the corporate staff of Dairy Farmers of America where my day to day job duties deal with forecasting of milk prices, economic analysis as part of the dairy industry - deal with regulatory Federal Order agencies and the U.S.D.A agencies, and day to day marketing issues that crop up between DFA’s business units.

Q. Are your day to day responsibilities nationwide for Dairy Farmers of America?

A. They are. We have business in all states and milk arrangements and regulatory interactions all over the country.

Q. You previously testified in Federal Order hearings and other venues as an expert?

A. I have.

MR. BESHORE: Your Honor, I would offer Mr. Hollon to testify as an expert in agricultural economics and dairy marketing.

THE COURT: Does anybody want to Voir Dire Mr. Hollon? Apparently no. He is so qualified. Go ahead, sir.

Q. Mr. Hollon, let's turn first to what has been marked as Exhibit 48, which is the exhibit set to accompany your statement. I would like to review briefly the exhibits so that we have an idea of what the exhibits are before you discuss them in the context of your testimony.

By the way, the exhibits are identified as Item numbers - 1 and sequentially - in Exhibit 48. Is that correct?

A. That is correct.

Q. So let's begin with Exhibit 1 of Item 48 - what is that?

A. Simply a listing of the names and addresses of the component cooperatives for the proposals that we are supporting. These are individual members of the Southern Marketing Agency.

Q. Okay. Item 2 of Exhibit 48 is what?

A. A list of the proponent cooperatives and the milk deliveries on Federal Orders 5 and 7, both by each individual cooperative and then within the Southern Marketing Agency members, market milk on behalf of other entities. And so there is a summation of the volumes in their market - - also on behalf of other entities, and then a lump sum total of all the producer milk marketed by the Southern Marketing Agency in Orders 5 and 7.

Q. And that data is for the month of November, 2003 - is that correct?

A. That is correct.

Q. Item 3 of Exhibit 48?

A. Item 3 is a list of the handlers in the proposed Southeast Order, taken from market administrator statistics in November, 2003, and it designates the SMA members that have a relationship of some sort with each of those handlers.

Q. By relationship, I take it you mean a supply relationship?

A. A supply relationship, that is right. That is what this is designed to mean, and proponent cooperatives, so it had all the proponent cooperatives.

Q. Item 4 of Exhibit 48?

A. Item 4 is a list of the pool distributing plants that were part of Federal Order 5 in January of 1996 and in December of 2003, and is noting that the ownership changes - whether that be a buy, sell, close, open, re-name, purchase. The intent of this exhibit is to show some of the differences in the market and the market structure from

January of ’96 to December of 2003.

Q. Item 5 has two pages, 5A and 5B?

A. Correct.

Q. Can you explain what that data is?

A. 5A and B are, again, a similar comparison for February 7, showing a 1996 period, a December 2003 period, and showing the pool distributing plants that were associated with the Order in both periods, and what the changes in their ownership or operational status might be, again, designed to show some of the differences in the market structure from ’96 to ’03.

Q. Okay. Item 7 of Exhibit 43 is a one-page document, and what does that represent?

A. It is just simply a listing of the pool supply plants that were operating in the Order in January of ’96 and December 2003 and, again, some of the changes in those businesses.

Q. Item 8 in Exhibit 48?

A. Is a list of the cooperative associations as handlers, taken from Market Administrator statistics for Federal Order 5 and Federal Order 7 in ’96 and ’03 - again, designed to show some of the changes in the structure of the industry over that time.

Q. Now in 1996, was Federal Order 5 in existence?

A. It was not, so the data reflects Federal Order 11 and Federal Order 46, which I think were the Tennessee Valley Order and the Louisville/Lexington, EvansvilleOrder.

Q. Which were the applicable Orders in that geographic area in 1996?

A. That is correct.

Q. Let’s move, then, to Item 9 of Exhibit 48, which is a one-page table.

A. It is a list of Grade A Milk Producers by states, from 1996 and in 2003, and this data was taken by an annual survey published by a Dr. Ken Olsen. 1996, he was working for the American Farm Bureau. Now he is a private consultant, and his data is considered the most accurate representation of dairy farms count in the state. It is done by contacting the state regulatory agency that issues dairy permits, and is designed to show another example of structural change in the marketplace.

Q. And while this data was privately compiled by Dr. Olsen, has his data recently been published as official U.S.D.A data?

A. It has, with this year and the February Milk Production report, this data has been published as part of the NASS publication.

Q. What is Item 10 of Exhibit 48?

A. Milk production by states in the Southeast Region,taken directly from the NASS Milk Production Report.

Q. Mass, being the…

A. National Agriculture Statistical Service, a division of U.S.D.A charged with collecting and publishing data about agriculture throughout the United States.

Q. Thank you. Item 11, Exhibit 48 is a map?

A. It is a map of Federal Order 5's marketing area, Federal Order 7's marketing area, and on this map, are listings of the seven largest customers - based on terms of dollars sales - of the proponent cooperatives, and where their plants are located throughout the marketing area. This data is regularly published through the Market Administrator's publications, and for many of the - - is available at their web sites. So it is readily-known public information.

Q. And the time set there is November, 2003?

A. That is correct.

Q. Another map is Item 12 of Exhibit 48 - what is that exhibit?

A. This is a map of all of the Federal Milk Marketing Order areas in the United States, and it shows as one unit the Proposed Southeast Order - where it would fit in the surrounding orders and what those boundaries might be, what states might be encompassed by the proposed Southeast Order.

Q. Just a point of clarification on Item 12 - there are proposals 3 and 4 in the hearing which would propose to expand the marketing area into certain counties of Virginia. Are those proposed additional counties reflected in the proposed Southeast Marketing Area on Item 12?

A. They are not proposed on this map. We do have a later exhibit that shows those geographies.

Q. Item 13 of Exhibit 48 is a one page chart. Would you describe that, please?

A. This is a collection of comparative statistics about Federal Milk Marketing Orders. The majority of the columns comes from the Annual Federal Order Publication. The first column on the left is all of the existing Federal Orders, and then they are compared to statistics such as number of pool plants, number of supply plants, total plants, a population estimate for each Order, the marketing area in terms of square miles, some distance data that was derived by us in putting together this table, showing distances furthest point to point within the Order, distances between major population centers, number of states, Class I producer milk, total producer milk and total number of producers, and again, comparative statistics that we will use in our statement to talk about our proposed new Order.

Q. Item 14 of Exhibit 48 has two pages identified as 14A and 14B. Please describe that data.

A. This is a listing of the major metropolitan areas in each of the two markets. This comes from census data in the Appalachian area. These are listed in alphabetical order. In Federal Order 7, also the major metropolitan census areas that, again, come from census data and it will be used in our statement to talk about some of the major population centers within the proposed Southeast Order.

Q. So 14A lists those areas for Order 5 and 14B, for Order 7?

A. That is correct.

Q. Item 15 of Exhibit 48 is another map. Would you describe that please?

A. Taken from the proposed geography and the metropolitan census areas, and it lists the 15 largest in the two marketing areas, puts them on a map.

Q. And they are depicted by a star on the exhibit?

A. That is correct.

Q. Item 16 is a one-page chart in Exhibit 48, and what does that represent?

A. This is a collection of data from Market Administrator statistics, that points out within each Federal Order the sources of milk by state where that can be - - sorry, both producers and - - Item 17 is by pound, where that detail can be shown individually. It is where there are - due to confidentiality reasons as outlined by both of the Market Administrator witnesses yesterday - is summed in perhaps another line, and the purpose of this, again, is to show the sources of milk supply pool producers for the two Orders.

Q. And the time period for that data is December 2003?

A. December 2003 - that is correct.

Q. And Item 16 is the number of producers, and Item 17 is volumes?

A. That is correct.

Q. Would you move, then, to Item 18 of Exhibit 48 and describe that?

A. Item 18 is a listing of - - it is sorted by Order and distributing plants, and by state. So down the left side would be the states with the - - under each state, the cities that have distributing plants, that are customers of the proponent cooperatives - - and where was delivery of producer milk that came from areas outside of the marketing area.

In this table, monthly - January, February, March, April, May through the course of the year - the sources of milk are - C designates a Central Order as being a supply point or source of supply. M is the Mideast Order, Order 33 being a source of supply. N, being the Northeast Order, Order 1 as a source of supply. And S, Southwest Order as a source of supply.

Perhaps it is easiest to understand this table if you view it in light of the next item, Item 19, which is a map. That map is a graphic depiction of this table, with the sources of supply being denoted by stars. In Texas, that star would be the Southwest Order. In Kansas, that star would be the Central Order. In Indiana, that star would be the Mideast Order. And there is a star on the Pennsylvania/Maryland border - that would be Order 1.

The blocks associated with each star gives where actually milk deliveries were made from those sources into the proposed Southeast Order, and then you can drill back down into the detail, going back to Item 18, and goes - if you desire - city by city and distance source by distance source.

Q. Move then to Item 20 of Exhibit 48, which is a one-page chart.

A. This is a one-page chart that is taken from Market Administrator data for the period 2000 through 2003. This data would come primarily from the Annual Summary Data as outlined yesterday by Mr. Duprey and Mr. Gooch. It goes within each year, and within each year Federal Orders 5 and 7, and then within each Order, states from which there was milk delivered into the proposed Southeast Order.

There are some 30 different states that had one or more months of delivery into the various Orders.

Q. Would you look at the first column of dated data on Item 20 - what month does that represent? I think there may be a typographical error.

A. That is a typographical error. That first month should be May of 2000, not December 2000 repeated twice.

Q. So for the four years, there are the months of May and December in each of the years, 2000 through 2003, represented on Item 20 of Exhibit 48?

A. That is correct. Those are the typical months that are published in Market Administrator statistics for locations of source producer milk.

Q. The data was presented yesterday by the Market Administrator - the underlying data.

A. Yes, it was.

Q. Okay. Could you turn, then, to Item 21 of Exhibit 48, which has five pages identified sequentially as Items 21A through 21E, and describe each of those maps, please?

A. Items A, B, C and D are depictions of deliveries to Orders 5 or 7 or both, and it would be in either May or December of 2000. B would be 2001, C would be 2002, D would be 2003. On each map, the color coding is the same. If a state is in yellow only, that meant that deliveries out of that state came only to Federal Order 7. If the state is blue, that meant that deliveries came to Federal Order 5 only. If the color is red, it came to every state in both Federal Orders 5 and 7.

The last chart, Chart E, would be for every - - each of the years, 2001, '02, '03, and again, the same color coding scheme holds. So there is some differentiation over the course of the year - some states are in the mix in one year and not in the next, but over time, shows the distribution of the 30 states and where their milk went. This is a graphic depiction of the table in Item 20.

Q. Let's move, then, to Item 22 - a one-page chart.

A. The one-page chart is designed to show for 2003 the combined utilization of producer milk in Federal Orders 5 and 7, and then combined. So there would be three columns.

For example, the Appalachian Order had 4.4 billion pounds of Class I and was 70.36 percent Class I. Had a total producer milk pounds of 6.3 billion. And the same comparison for the Southeast Order and then a combination of the two.

Q. And those are annual figures for the year 2003?

A. That is true, and those came, again, from Market Administrator's Statistical Summary.

Q. Item 22 of Exhibit 48 is another map - describe that for us, please.

A. This map - I think it was also published yesterday in Mr. Duprey’s set of exhibits as requested by the proponent cooperatives. It shows the states in Federal Orders 5 and 7, with their boundaries in the heavy black. Each of the marks, either a triangle or a circle, represents the location of a pool distributing plants. Circles represent Federal Order 5 plants. Blue circles are Federal Order 5 plants with sales into Federal Order 7. Red circles are Federal Order 5 plants with no sales into Federal Order 7. Triangles represent Federal Order 7 plants. Blue triangles represent those plants with sales into Federal Order 7 only, and red triangles represent those plants that have sales into Federal Order 7 and 5.

Q. Turn then to Item 24, which is a two-page chart of data - 24A and 245B - and please describe that exhibit.

A. 24A is a table that shows the Class 1 package milk disposition by pool plants, so the data is from Market Administrator data. It is dispositioned by any Order 5 pool plant or any Order 7 pool plant. It is broken down, then, in Southeast Order 7 plants and by year - 2001, ’02, ’03. And the first third of the page is Southeast plants. The total disposition by pool plants, plus in-area and a percent, what goes to Order 5, and a percentage.

Then the Appalachian plants - what is the total, what is the in-area, what is the percent, sales to Order 7 percent.

Then a combination. You might say that if you took the circles and the triangles from the map before, this would begin to break down what some of those sales to - - might be. Again, this is dispositioned by pool plants in Orders 5 and 7.

Q. Turn to Exhibit 25, which is also a two-page chart, identified as 25A and 25B.

A. This chart is similar in makeup to the chart in 24, but the difference is that the data it is displaying is Class 1 package milk disposition in the marketing area. So this would be sourced from any plant into the marketing area. If you remember, the tables published at the very back of the Market Administrator statistic package for each year has a complete list of all handlers with distribution into the area, whether it be a very small amount of pounds or a very large amount of pounds. That is what this table is designed to show. It shows again, broken down into thirds, with one third by in-area of sales for February 7th, another by in-area sales by Federal Order 5 and then a combination, and it shows what is in-area by pool plants in each of the two markets.

Q. So essentially, on those exhibits, if you look in the far right column, numbers that are in the 94, 95 percent area show that that proportion of the total in-area distribution comes - - in the combined area, comes from Order 5 or Order 7 plants.

A. That is correct - well in excess of 90 percent.

Q. Let's turn, then, to Item 26 of Exhibit 48 - a one-page…

A. Item 26 is a list of the non-pool plants located in current Federal Order 5 September of 2003. There is a list of those plants by name, by city, by state, by pool status, and some information about the product mix that may be in those plants.

Item 27 is a similar listing of plants, names, cities, states, status, product mix for Federal Order 7, and it is for January of 2004.

Q. Item 28 of Exhibit 48 is a one-page chart -

A. Is a list of the proponent cooperatives with their milk deliveries and producer numbers, on both Federal Orders 5 and 7, and combined, and then with other cooperatives who have relationships of some sort with the proponent cooperatives - not broken down by any degree of detail, but summed into the bottom, into the total Federal Order. And so there would be 2,233 SMA member/producers in December of 2003 on Federal Order 5, with…

THE COURT: Off the record for a second…

OFF THE RECORD

THE COURT: Back on the record.

EXAMINATION CONTINUES

BY MR. BESHORE:

THE WITNESS: With 344 million pounds of milk and total percent when you include - - I'm sorry, the total Federal Order then was 323,268 farms and 552 million on Federal Order 5, and it would show the percentage that SMA represents of the Appalachian Order 5 in December - 68.3 percent of the producers and 62 percent of the volume. And the same combinations for Federal Order 7, and then the combination of the two.

Q. Item 29 of Exhibit 48 is a one-page chart - could you describe that, please?

A. Yes. This is a one-page chart that is designed to give some idea of the geographic relationship of the major marketing areas within the proposed Southeast Order. It takes - - if you divide the page in half, top to bottom, the top half would be the largest metropolitan areas in Federal Order 5. For example, the single largest is the Charlotte/Gastonia/Rock Hill area. The city with the nearest Federal Order 7 distributing plant is in Brazelton, Georgia, 170 miles away. And the second closest city is Atlanta, Georgia, 215 miles away.

If you look similarly in Federal Order 7, the smallest of the six largest would be Little Rock. The city with the nearest Federal Order 5 distributing plant would be Madisonville, Kentucky, 363 miles away, and the second nearest, Evansville, Indiana, 449 miles away.

Q. Okay. Please turn then to Item 30 of Exhibit 48 which is a one-page map.

A. This is a similar map with the - - this has the 12 largest population centers, taken from the chart before. The red line down the middle points out that closest to that line are significant of the major population centers, and the relationship of overlapping route disposition - which we will show in our statement - up and down this line, based again on the mileages and distribution patterns from process plants.

Q. So the MSA's identified, or the largest population centers identified in Item 30 are those listed in Item 29?

A. That is correct.

Q. Turn to Item 31, which is also a one-page…

A. One more thing - that the stars are different colors. the black stars would have little to no interaction, and the silver stars would have interaction between the two plants, in terms of their sales patterns.

Q. Number 31?

A. Item 31 simply highlights in a different way that area of concentration. This is the map that shows the triangles and the circles in it, with the concentration of processing plants along the line that separates the two Orders - the Order boundaries now.

Q. Item 32, Exhibit 48 is also a one-page map, and please describe that information.

A. This data is taken from various Federal Order Market Administrator publications from each Order, and within it, it shows Class 1 distribution on routes in the marketing area by pool and non-pool plants. So for example, in Federal Order 1 in the upper right, there are 764 monthly million pounds of distribution by pool plants. In Federal Order 1, there were 27 million pounds of distribution by non-pool plants, 791 million pounds by all, and the non-pool plants distributed 3.4 percent of the Class 1 distribution within that Federal Order.

So the red number, 3.4 percent in Order 1, 6.8 in 33, 18.7 in 32, 7.1 in 126, 17.8 in Federal Order 7, 7.6 in Federal Order 5, 12.7 in Federal Order 6, and - - shows that in each Order, what that is. Of significance is that, of the 17.8 percent that is in Federal Order 7, nearly two thirds of it comes from Federal Order 5 plants.

Q. Item 33 of Exhibit 48 is a one-page chart. What does that represent?

A. A different cut of the summation of classifications of producer milk between the two Orders,and by year on an annual basis, and then combined. This is all data that comes from MarketAdministrator annual statistics.

Q. Item 34 of Exhibit 48?

A. This is a calculation, based solely on a simple weighted average. There is no allowances made for reserves or for audit adjustments or for any of the other complications that go through a pool every single month. But it simply takes the pounds of producer milk and the blend price, and does a simple weighting average to get a combined Federal Order 5 and 7 blend price, which would say is a reasonable proxy for what that combined blend price might be.

And then the last column to the right would show what the difference between the announced effective price that month and what our proxy blend might be for that particular month. It shows, for example, in January, the potential spread for Federal Order 5 blend would have been 29 cents lower, Federal Order 7 would have been 21 cents higher in January 2000, or the spread between the two was 50 cents. December of '03, that same calculation would have had a reduction of the Order 5 blend of eight cents and an increase in the Order 7 blend of seven cents, or spread between the two, of 15 cents.

Q. Turn to Item 35 of Exhibit 48 and describe that one-page chart, please.

A. This chart is simply trying to show what the

Class 1 utilization differences are in the first three columns between Federal Orders 5 and 7, and what the producer blend price difference is, and we will develop some more data off of this chart in our statement. It is a comparison drawn directly again from analysis of market data.

Q. Item 36 of Exhibit 48 is a one-page chart or table, and would you tell us what that data represents and what the source is?

A. This is the total pooled milk from all sources through the Southeast Marketing Agency, and some monthly compilation beginning April of '02 and ending in December of ’03, and it is designed to give a reasonable snapshot of what a month’s pool by the agency would look like, in terms of total pounds.

Q. Item 37 of Exhibit 48 is a one-page chart. By the way, what is the source of Item 36?

A. Southeast Marketing Agency data.

Q. Thank you. Now Item 37 of Exhibit 48, a one-page chart - -

A. Item 37 is a chart that is used to support several of our points and proposals dealing with transportation pool. The columns monthly, four years, January of 2000 through December of ’03. The second column is the beginning balance in the transportation pool - that is a published number each month. The third column is what the assessments are for each month in Federal Order 5, and in months where the assessment was waived, we have inserted for purposes of our chart what the assessment would have been that month. So there is an assessment in every month. If you will remember, I think in Mr. Gooch's exhibits yesterday, there were some months where the Transportation Credit was waived. For our purposes we have un-waived that and assumed that it was collected.

The fourth column says if hypothetically, the Transportation Credit in Order 5 was increased by half a cent to be equal to that of Order 7, then that would be that many additional dollars.

The next column, actual Transportation Credit fund credits paid is - - in the months where there was a disbursement, what was the dollar amount of that disbursement.

The next column, in Federal Order 7 - - I'm sorry, the next column says in Federal Order 7, if there was a shortage, if the Transportation Credits were prorated, what was the amount of that proration. That is a number that is published each month in the Federal Order 7 statistics.

And then the last column is an ending balance. So in general, you would look at this much the way you would look at your checkbook. You start out with a balance, you maybe make a deposit or two, you write a couple of checks and you subtract the amount, and you end up with the ending balance at the end of the period.

What this table - which again, we will refer to in our testimony - is, is a hypothetical example, but it does show that if the assessments were collected in every month for a combined Order, and if the amount that was paid and the shortfalls were made up, that we would run out of money.

Q. And that is at an assessment rate of seven cents?

A. At an assessment rate of seven cents.

Q. Turn then to Item 38 of Exhibit 48, which is a one-page map of the Commonwealth of Virginia.

A. This map shows the geographies that are being proposed by the proponent cooperatives to add to the marketing area from the state of Virginia. They will be detailed out in our proposal, but Item 38 simply shows the counties. The light gray counties are already a part of Federal Order 5, and the darker gray counties are additional counties that the proponent cooperatives would propose to be added to the marketing area.

Item 39, each of the numbers 1, 2, and 3 shows the location of distributing plants that we would expect to be regulated by the inclusion of these counties into the marketing area.

Q. Turn to Item 40 of Exhibit 48, which is a one-page chart.

A. This chart, we will also make reference to in our testimony, dealing with pointing out some of the problems with the existing Transportation Credit pool and fund. It is designed to attempt to show why, when one Order prorates its credit and another Order does not, that you make some monetary decisions that perhaps are not the soundest for the overall market, but for the point of…

THE COURT: Let's go off the record for a moment.

OFF THE RECORD

THE COURT: Back on the record. Mr. Beshore, you were somewhere with the witness before we stopped because of noise in the adjoining room.

MR. BESHORE: Thank you.

EXAMINATION RESUMES

BY MR. BESHORE, ESQUIRE:

Q. Mr. Hollon, you were addressing Item 40 of Exhibit 48. Could you just pick up perhaps from the top, and describe this exhibit?

THE COURT: Did you complete 39?

THE WITNESS: Yes, sir.

THE COURT: Okay, fine - Item 40.

THE WITNESS: Item 40 is an exhibit designed to show some of the calculations you would make in determining how the transportation pool dollars would affect your decision to supply a market. Some of the assumptions that go in this decision would be first of all, whether or not a particular Order is prorating or not prorating - do they have enough money to fund the transportation credit in its entirety, or do they not have enough money.

There are certain assumptions that are used in this example - distance, Sulfur Springs to Atlanta, Sulfur Springs to Greenville, South Carolina, a 50 thousand pound load, 70 percent Class 1 at the destination - those are all data that you need to use to compute the formula as it is published in the Order language for transportation credit.

So just to run through one example, to Atlanta with no proration, there is enough money to fund the entire credit. The distance is 718 miles, the Order language says that you get no payment for the first 85 miles, so there is 633 miles left to go. The rate - .0035 per mile - gives you 2.2155. Reduce it by the difference in the Class 1 differential between the two locations gives you 2.1155. You have got 35 thousand pounds of Class 1 on the load, so you multiply those two numbers and you get 740 dollars. There is enough money to fund the entire 740 dollars, so you would collect a credit.

I might wish I had done this example a little differently, so I am going to do that verbally, so if you have a pencil you might want to add this line in.

Q. In the blank spot -

A. In the blank spot, if you will write the number 660, and then let me tell what that number represents. I get a credit back from the transportation pool of 740 dollars. I have a haul bill of 718 miles times a dollar 95 a mile. Put down in the footnotes the cost of hauling is generally quoted at one eighty to one ninety-five. So I have used a dollar 95 per mile, times 718 miles. My hauler is expecting to get paid 14 hundred dollars. I have got 740 dollars worth of credit, so my bill left in my hand is 660 dollars.

If I did a similar calculation for the middle column, the bill I have left in my hand would be a thousand and thirty dollars. And if I did a similar calculation for the third column, the bill I have left in my hand is 660 dollars - I'm sorry, 760 dollars. That is an important difference.

So if I am then in charge of trying to decide where I am going to make a delivery in order to try to do it for the least cost, I would decide to drive right on through Atlanta and go to Greenville, because there is not enough money in the Federal Order 7 pool to return me, as much as there is in the Federal Order 5 pool.

Again, we will develop some more thoughts around this in our testimony.

THE COURT: Let's now recess for a few minutes. Maybe that noise will go away.

MR. BESHORE: Can we take the last…

THE COURT: You want to try the last one? Okay. Go ahead.

Q. Item 41, the final item in Exhibit 48 is a map, and would you describe that, please, Mr. Hollon?

A. This map, again, is the underlying - - is the Federal Order boundaries, red being Federal Order 5 county boundary lines and blue being Federal Order 7. On this map are the circles and triangles that we refer to as the various distributing plants within the boundary. And the circle around each - - perhaps it is easiest to see it additionally if you would go over to Louisiana, and down in the southwest corner of Louisiana, there is a single triangle. That would be Lafayette, Louisiana, and there is a circle around Lafayette which you can much easier see in that part of the exhibit, that is the distribution range around each plant, and that is a distribution range of 250 miles.

In our workings back and forth in the pool, we think that is a reasonable range for a distributing plant to sell its product. So then if you apply those circles around every circle or every triangle, you would find that that would be an expected pattern of distribution. And if you were to run your finger up and down the line between the blue counties and the red counties, you would see that the circles get much more intent. I will admit that this graphic is a lot more impressive when you do fly-ins and power points, so you have to close your eyes and kind of visualize that part. But clearly, the distribution overlap up and down the line that separates the two Order boundaries is the most, and is a graphic representation of what that competition might be.

THE COURT: Let's recess now.

OFF THE RECORD

THE COURT: Mr. Beshore, you were just going through the Exhibits 48, and you finished Item 41. Is there anything further you want to take up on that?

MR. BESHORE: No. I would just, at this time, like to ask Mr. Hollon to proceed with his Direct testimony.

THE COURT: Is there any request to Voir Dire on Exhibit 48 before we start his testimony? Mr. English?

MR. ENGLISH: No, Your Honor. I think it would make more sense to hear the testimony. Obviously there will be enough questions, I am sure, on these very comprehensive exhibits, but…

THE COURT: So we are not offering them at this time? We are just introducing…

MR. ENGLISH: Even if you did, they are admissible, but it is just a question of…

MR. BESHORE: We are going to offer it, but I will just withhold the offer until a later…

THE COURT: Alright, we will do that. It has been introduced, and now we are going to introduce Exhibit 47, which is his written statement, and what, if anything, do you want to say about 47 before he starts reading it?

MR. BESHORE: I do not want to say anything. I just want to give Mr. Hollon the opportunity to proceed now with his statement, which has been pre-marked as Exhibit 47. I would note in line with what we stated yesterday at the beginning of the hearing, Mr. Hollon may - - well, we will note at least one place and perhaps a couple others, changes from the text of the pre-distributed Exhibit 47, and when he notes changes, they will prevail over the exhibit.

Otherwise, the text of the exhibit will be the record.

THE COURT: Very well. Go ahead, Mr. Hollon.

THE WITNESS: Testimony of Proponent Cooperatives, Southern Marketing Agency, Inc., Milking Marketing Order Hearing, Docket Number AO-388-A15 and AO-366-A44, DA-03011, Atlanta, Georgia, February 23, 2004.

My name is Elvin Hollon. I am the Director, fluid Marketing/Economic Analysis for Dairy Farmers of America, Inc. My business address is P.O. Box 909700, Kansas City, Missouri, 64910.

This testimony is being presented by Southeast Marketing Agency, Inc. in support of proposal number 1, number 2 and number 3 as contained in the Notice of Hearing. With regard to the producer milk definition proposal dealing with dual pooling - proposal 6 - and the proposal refining the definition of a producer/handler - proposal 7 - we support their intent and language, but only as they would be included in our own proposal 1 through 3. We oppose proposals 5 and 8.

THE COURT: Pull that mic out just a little bit more. We are still getting a little ring.

THE WITNESS: I would also add at this point that we will have separate statements for those proposals, and we will present those at a later time.

We oppose proposals 5 and 8.

It is being presented on behalf of the member producers of the six proponent cooperatives who are currently supplying plants that would be fully regulated distributing plants under the proposed Southeast Federal Milk Marketing Order.

Southern Marketing Agency, Inc. is a common marketing agency for cooperative member producers who supply pool distributing plants regulated under the Appalachian Federal Order 1005 and the Southeast Federal Order 1007. Southern Marketing Agency, Inc. performs a common pooling of certain costs and returns for member producers supplying Appalachian Federal Order 1005 and Southeast Federal Order 1007 pool plants.

The producers that I am representing in these proceedings are members of the following cooperative organizations listed in Exhibit 48, Item 1, SMA 010 Proponent Cooperatives - Arkansas Dairy Cooperative Association, Inc., Diary Farmers of America, Inc. and Dairymen's Marketing Cooperative, Inc., Lone Star Milk Producers, Inc., Maryland and Virginia Milk Producers Cooperative Association, Inc., and Southeast Milk, Inc.

As shown in Exhibit 48, Item 2, SMA020 Producer Milk Deliveries Proponent Cooperatives and Others, the membership of these six proponent cooperatives for November 2003 account for approximately 734 million pounds of producer milk, which likely will be pooled, on the Southeast Federal Order. This represents approximately 66.62 percent of the total producer milk that will be pooled on the proposed Southeast Order.

As shown in Exhibit 48, Item 2, SMA020, these proponent cooperatives also market the milk of other cooperatives whose member milk will be pooled on the proposed Southeast Order.

THE COURT: Let's go off the record for a moment.

OFF THE RECORD

THE COURT: We took an interruption, so you would you proceed where you left off, sir.

THE WITNESS: As shown in Exhibit 48, Item 2, SMA020, these proponent cooperatives also market the milk of other cooperatives whose member milk will be pooled on the proposed Southeast Order. Thus in total for the month of November 2003, the proponent cooperatives market approximately 871 million pounds of producer milk that will likely be pooled on the proposed Southeast Federal Order. This would represent approximately 79.07 percent of the total producer milk that will be pooled on the proposed Southeast Order.

As Exhibit 48, Item 3, SMA030 Proponent Cooperatives Supplying Pool Distributing Plants Proposed Southeast Federal Order, November 2003 indicates, one or more of these proponent cooperatives supply each of the 52 plants that will be fully regulated pool distributing plants under the proposed Southeast Order. The last column of this Exhibit indicates the 30 plants to which the proponent cooperatives market milk of other cooperatives.

Regulatory Flexibility Act - this notice of this hearing invites parties to present evidence of the probably regulatory and information impact of the hearing proposals on small businesses, which are defined in the hearing notice as a dairy farm with less than 750 dollars in gross revenue. Per this definition, the majority of farms represented by the proponents are small businesses. In this regard, the cooperatives that I represent certainly agree with the Agricultural Marketing Service that the Regulatory Flexibility Act applies to these proposals.

A major object of the RFA is to seek greater participation by individuals and small businesses when rules affecting them are proposed. To achieve this objective, the RFA encourages Federal Agencies to utilize the innovative administrative procedure in dealing with individuals and small businesses that may be unnecessarily and adversely affected by Federal regulations.

The cooperative associations that I represent are the marketing agent for their member/owners. Any factors, including the provisions of Federal Milk Marketing Orders, that affect these cooperatives - whether favorably or adversely - translate directly into a similar affect on the numerous small businesses of its member/owners. Hence, we are here representing basic small businesses - the family owned and operated diary farmers. These member/owners depend upon their cooperative not only to represent their marketing interest, but also to advocate their concerns about laws and regulations that apply to them. Without this representation, many of the individuals and small businesses that comprise the membership would be unable to participate effectively in the Federal rule-making process.

The proponent cooperatives' member/owners appreciate the expressed interest of Congress when it enacted the RFA. The legislative history of the RFA stresses that the benefits of the RFA are to be applied liberally to organizations such as these cooperatives whose memberships is comprised of individuals and small businesses. The history emphasizes that the size, dominance or even nationwide activities of an organization are not to exclude that organization from being defined as small under the provisions of the RFA. For example, in specifying that nationwide organizations such as YMCAs fall under the RFA, Congress stated that the primary concern is the "structure and operating characteristics of the organization at the local, as well as the national, level." Certainly the individual member/owner structure and operating characteristics of cooperatives clearly entitles us to present testimony and evidence on behalf of members about the effects of the proposed regulation.

Proposal Number 1, Merger of Orders - proponent cooperatives strongly support the adoption of proposal number 1 as contained in the notice of this hearing. That proposal will result in the merger into a single Southeast Federal Milk Marketing Order of all the territory now contained within the Appalachian Federal Order 1005 and the current Southeast Order 1007.

Our purpose at this proceeding is to prove that what are now defined as the separate Appalachian Order 1005 and the Southeast Order 1007, together form a common milk market, commonly supplied, and thus deserving of a common blend price. Measures of commonality like how much milk has moved between Orders, both bulk and packaged, presume that Orders never impact how milk moves, nor place any limits on the free flow of milk. Orders do impact milk movements and do place some limits on the free flow of milk. This is an unavoidable consequence of regulation.

The drawing of a line always means something is on the other side of the line. Lines mean differences and differences change the way markets are structured, how they are supplied and most importantly, who shares in the proceeds from Order operations. There is thus generated a fallacy - common milk markets share milk and since we don't see the milk being shared as much as we think it should, there must be no common market. The fallacy in this particular marketing situation is generated in the milk movement limiting impact of the Orders themselves. "If it should it would, since it doesn't, it shouldn't", discounts the possibility of "It doesn't because it can't, but it would if it could."

Interstate Commerce - Adoption of a Federal milk marketing order in the area is contingent upon the showing that there is interstate commerce involved in the marketing of milk in the proposed marketing areas. In this regard, we believe that the record will clearly show the substantial degree of interstate commerce involved in the area. Briefly, such commerce is demonstrated clearly in Exhibits 38-41 for the Southeast Order, and Exhibits 7 - 10 for the Appalachian Order. These exhibits show in-area packaged milk sale and sources of producer milk supply by state and county. Such evidence clearly shows the interstate movement of both bulk and packaged milk products being made within, into and out of the proposed marketing area.

Changes In Market Structure - As reflective of the consolidation of Federal Milk Marketing Orders effective January 1, 2000, there has been a trend toward fewer Federal Milk Marketing Orders as fluid milk processors increasingly serve larger geographic areas. With respect to the proposed Southeast Marketing area, this is certainly the case. Processors have significantly increased their sales areas over the past years, thus increasing the need for, and this proposal for the merger of the Appalachian

Federal Order 1006 and the Southeast Federal Order 1007.

Significant changes in market structure have occurred since the implementation of the final rule on January 1, 2000 which supports the conclusion that maintaining separate Appalachian Federal Order 1005 and Southeast Federal Order 1007 is no longer appropriate.

Proponent cooperatives will submit a number of documents that provide an overview of some of the structural and market changes that have occurred in this area over the last several years. In as much as a portion of the marketing and market structure data used in the Order reform process to determine the consolidation of Orders were from as early as 1996, the comparisons that we submit here are largely between January 1996 and December 2003. Some data are annual comparisons between 1996 and 2003. The current market has functioned since January 1, 2000, but its provisions and supporting rationale is rooted in the 1996 database. Today, eight years later, our evidence shows that marketing conditions have changed significantly and warrant a new hearing to modernize and change the terms of the Order to reflect the dynamics of the new market.

Pointing to a number of the statistics as shown in Exhibit 48, Item 4, SMA040 Pool Distributing Plants Appalachian Order Number 1005, and Exhibit 48, Item 5, SMA050 Pool Distributing Plants Southeast Order Number

1007, in January 1996, there were 72 physical plant facilities which were, or would become, fully regulated distributing plants on the Appalachian and Southeast Orders. In December 2003, there were just 52 physical plant facilities remaining that were fully regulated distributing plants on the Orders - a decline of 27.8 percent.

Of the plants existing in both periods, more than two thirds have experienced at least one ownership change during that time, and some of those plants have experienced several ownership changes. In reviewing the plant operation and ownership histories, it is interesting to note that of all the full regulated distributing plants pooled on the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 in December 2003, only seven plants not owned by a grocery store company have experienced no ownership change in the last eight years.

As an additional measure…

THE COURT: I know it is very disconcerting to even try to just read through it. We are reading along with you with the paper, so we can follow along. I do not know what else I can say. We are still getting noise from the other side.

Go ahead, Mr. Beshore.

MR. BESHORE: The next paragraph relating to Item 6 has been withdrawn with the exhibit, correct?

THE COURT: On Page 9 of the written statement, we would strike out the next to the last paragraph.

MR. BESHORE: Correct - one sentence related to the exhibit that has not been offered.

THE COURT: Right. Everybody understand that? So you go on to the next one, Exhibit 48, Item 7.

THE WITNESS: Exhibit 48, Item 7, SMA070 Pool Supply Plants, Regulation and Operation Changes, January 1996 to December 2003, Appalachian and Southeast Orders lists the regulation and operational changes in supply plants pooled on the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 for the January 1996 to December 2003 period. As shown in the exhibit, there are one fourth fewer supply plants pooled on the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 in December 2003. Two of these plants - Louisville, Kentucky and Greeneville, Tennessee - are operated only seasonally. Since December of 2003, the Greeneville plant has been sold to a private concern.

Exhibit 48, Item 8, SMA080 Cooperative Associations as Handlers Regulations Changes, 1996 to 2003 Appalachian and Southeast Orders lists the cooperative associations who have pooled milk on the Appalachian Federal Order 1005 and the Southeast Federal Order 1007. This exhibit highlights the considerable changes that have occurred between 1996 and 2003. Sixteen cooperative associations delivered milk to plants pooled on what would have been predecessor Federal Orders to the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 during 1996, and fourteen cooperative associations delivered milk to these Orders during 2003. However, only six cooperatives delivered milk in both 1996 and 2003. Eight of the cooperative handlers pooling milk in 1996 no longer exist, and four cooperatives have been newly formed, either as start-ups or were formed via the merger of one or more predecessor cooperatives. The other new cooperatives delivering milk in 2003 versus 1996 demonstrate the extent to which the milk shed for the southeast has expanded.

As shown in Exhibit 48, Item 9, SMA090, Grade A Milk Producers by States, Southeast Region, June 1996 and June 2003, producer numbers in the region continue their long term trend of decline. Grade A milk producers in the eleven southeastern states outside of Florida declined from 11,712 to 7,180 between 1996 and 2003 - a reduction in excess of one third. The drop in the number of producers in the region is also highlighted by the drop in the number of producers pooled on the current Appalachian and Southeast Orders. According to the March 12, 1999 decision of the Secretary, over 8,180 producers were expected to be pooled on the consolidated Appalachian and Southeast

Federal Orders in December 1996 and January 1997. Today, as shown in Exhibit 48, Item 16, SMA150, Location of Producers Pooled, Appalachian Order 1005 and Southeast Order 1007, December 2003, even after the addition of a number of producers, many of which are farms located physically outside of the marketing area, only 7,243 producers served the two Orders during December 2003.

As shown in Exhibit 48, Item 10, SMA100 Milk Production by States, Southeast Region Annual 1996 and 2003, Million Pounds, milk production in the region has also continued its long-term trend of decline. Milk production in the eleven southeastern states outside of Florida declined from 13,518 million pounds in 1996 to 10,671 million pounds in 2003 - a decline of 21.06 percent. This significant decline in the number of Grade A milk producers, and the declining volume of milk production in the region, coupled with an increase in population within the marketing area, has led to major expansion in the milk shed for the southeast. There were 9,071,901,486 pounds of Class I producer milk pooled on the combined Orders 5 and 7 during 2003. With milk production totaling 10,671 million pounds in 2003 for the eleven states referenced, this means at least 85 percent of the Grade A milk production on an annual basis is needed in Class 1. This acute milk deficit, with milk production insufficient to even provide a sufficient reserve above the Class 1 needs, is a condition unique to the southeast. Any regulatory structure that causes one load of milk to go underutilized in the region must be evaluated critically and changed to allow the most efficient use of the limited supplies.

As the record will demonstrate, the southeast has experienced substantial and substantive changes in the market and its structure. The number of distributing plants has declined dramatically. A substantial reduction in the number of pool supply plants is also evident. Producer numbers within the area have declined even more rapidly and the milk shed has increased in geographic size accordingly. Cooperatives have experienced substantial consolidation and have together formed Southern Marketing Agency, Inc., as an extension of the cooperatives' moves to consolidate and seek out enhanced marketing and logistics efficiencies.

Any analysis using the traditional structure, conduct and performance models would point to a southeastern market very much unlike that which existed just seven or eight years ago. As the southeast market structure has changed by consolidation of operations at the producer, handler and cooperative levels, so should the Federal Order Program consolidate the two southeast region Orders to reflect these new structural realities.

In December 2001, two new national fluid milk distributing companies were formed, which represent a substantial increase in the market concentration of fluid milk processing in the southeastern United States. The market concentration of these two companies represents in the area of 40 percent of the milk purchases by pool distributing plants in the proposed Southeast Order. Market concentration of this magnitude is unprecedented in the fluid milk business. The consolidation of control and decision making on the operation of such a large proportion of the Class 1 processing and distribution across the region only expands and magnifies the need to dissolve the current boundary between the two Orders.

Exhibit 48, Item 11, SMA110, Top Seven Handlers, SMA November 2003 shows the location of the top seven - in terms of dollar sales - Appalachian Federal Order 1005 or Southeast Federal Order 1007 pool distributing plants owned by the top seven fluid milk companies, which are supplied by the Southern Marketing Agency, Inc. member cooperatives. This map graphically displays the market concentration resulting with the formation of two national fluid milk distributing companies in December 2001.

In April 2002, five cooperative associations formed a new marketing agency in common, whose principle purpose is to cooperate fully in supplying and increasing the efficiencies in supplying the fluid milk needs of the southeastern United States, outside of Florida. Since that time, a sixth cooperative has joined the Southern Marketing Agency, Inc.

Southern Marketing Agency, Inc., as we have mentioned, pools and redistributes the costs and returns from serving the single fluid milk market currently defined by much of the Appalachian Federal Order 1005 and the current Southeast Federal Order 1007. Southern Marketing Agency, Inc. considers the entirety of this area to be one market, in terms of distribution or revenues, allocation and pooling of marketing costs, and measurement of milk supply and demand. The annual milk budgets developed by Southern Marketing Agency, Inc. considers the combined Appalachian Federal Order 1005 and Southeast Federal Order 1007, for purposes of assessing needs for supplemental supplies, disposal of seasonal surplus supplies, and the direction and assignment of agency/producer/member supplies.

The next paragraph will be struck, beginning with the reference to Exhibit 48, Item 6 and including the first two words of the next page, Page 15.

Since the implementation of the final rule January 2000, structural changes have also occurred outside the marketing areas of the Appalachian Federal Order 1005 and the Southeast Federal Order 1007, which impact the supply and demand for milk in the area, and the manner in which the single market is serviced. The establishment of large farms in areas outside the southeast, and which are or can be associated with the southeast, cannot be overlooked. Milk from these large farms can be delivered to locations in either of the current two marketing Orders every week of every month, and represent a regular out-of-area supplemental supply for both Orders.

The continued existence of the two Federal Milk Marketing Orders across a single fluid milk market inhibits market efficiency in supplying and balancing the market, creates unjustified blend price differences, encourages uneconomic movements of milk, and results in the inequitable sharing of the Class 1 proceeds of the single market.

The Proposed Southeast Order - The proposed merged Southeast Federal milk marketing order, which establishes a classified milk pricing system at reasonable levels and a market-wide pool for distributing the returns from milk sold at such prices uniformly among producers, will continue to provide the needed market stability in the proposed Southeast marketing area. The proposed Southeast Order will enhance the achievement of market stability that was provided for by the two individual orders that are to be merged.

An environment of stable and orderly marketing conditions throughout the proposed Southeast Marketing area depends on the continuation of a classified pricing plan, based on audited utilization of all Grade A milk purchased by handlers from producers and on an equitable division among all producers of the proceeds obtained from the sale of their milk under the classified pricing plan.

Under the proposed Southeast Federal order, all producers who supply the market will be assured that their milk will be sold at reasonable minimum prices applicable to the classified uses of milk provided for by the order. Producers will share pro rata in the returns from such sales in the respective classes, including the lower priced uses of reserve milk supplies not needed for fluid use. Handlers will be assured that their competitors will pay for milk at not less than the minimum prices set by the order and that such prices will apply whether the milk comes from farms in the Southeast area, or other states, without regard to whether the milk is disposed of inside or outside the marketing area.

Detailed information provided on a continuing basis under the order will contribute to the maintenance of stable and orderly marketing conditions in the area. The availability of complete and accurate market information will continue to be of substantial benefit to producers, cooperatives and handlers alike.

A regional Federal order for the proposed

Southeast marketing area will further stabilize and help improve milk marketing conditions in the area. The proposed Order is in the public interest, in that it will continue to establish orderly marketing conditions for producers and handlers, relative to the milk distributed in their proposed marketing area, and will help assure a continuing adequate supply of high quality milk for consumers. Moreover, the proposed Order will continue to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937, as amended, by providing for:

1-The establishment of uniform minimum prices to handlers for milk received from producers, according to a classified plan based upon the utilization made of the milk.

2- A regular and dependable procedure that affords all interested parties the opportunity to participate, through public hearing, in the determination of changes that may be required in the marketing plan, in order to ensure an orderly market.

3- An impartial audit of handlers' records to verify the payment of required prices.

4- A system for verifying the accuracy of the weight and butterfat content of milk purchased.

5- Uniform returns to producers supplying the market based upon an equal sharing among all such producers of the returns from the order prices for both the higher-valued

Class 1 milk and the lower returns from the sale of reserve milk that cannot be marketed for fluid use, and

6- Market-wide information on receipts, sales, prices and other related data concerning milk marketing.

General Provision - The proposed Southeast Order should incorporate by reference, as do each of the two current orders, certain terms, definitions, administrative provisions and other provisions that are included in Part 1000 of the Code of Federal Regulations. These are provisions that are common to all Federal milk marketing orders. Proponent cooperatives will make no proposals in these proceedings to modify these common provisions of the proposed Southeast Order.

A detailed discussion of the need and basis for incorporating these general provisions in each of the current orders is contained in the final decision issued by the Under Secretary on March 12, 1999 and published April 2, 1999 (64 FR 16026). The conclusions reached in that decision with respect to these general provisions are equally applicable under current marketing conditions in the proposed Southeast marketing area.

Provisions Effected by Other Pending Proceedings - Proponent cooperatives recognize that there currently are other proceedings underway that may result in changes to the current Appalachian Order Number 1005 and the Southeast

Order Number 1007. Such proceedings would include the Class III and IV Classifications (Northeast et, al.) DA-03-08, and the proposals for a public hearing to amend the Fluid Milk Product definition in all Federal Milk Orders. Proponent Cooperatives believe that any such changes proposed by the Secretary as a result of those proceedings, if approved by producers, should apply also in the proposed Southeast Order Number 1007.

Proposed Southeast Marketing Area - The proposed Southeast Federal Order 1007 marketing area, as shown in Exhibit 48, Item 12, SMA115, Federal Milk Order Marketing Areas, would include all of the current marketing areas of the Appalachian Federal Order Number 1005 and the Southeast Federal Order Number 1007. There would be 869 counties and two cities located within this proposed marketing area.

Geography - The proposed Southeast marketing area is described geographically as follows - all counties or parishes in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee, four Florida counties, 20 Indiana counties, 103 Kentucky counties, 44 Missouri counties, eight counties and two cities in Virginia and two West Virginia counties.

As shown in Exhibit 48, Item 12, SMA115 Federal Milk Order Marketing Areas, the proposed Southeast marketing area spans the southeastern area of the United

States from the Gulf of Mexico and the Alabama/Georgia/Florida border to central Missouri, Illinois, Indiana, northeastern Kentucky, West Virginia and Virginia to the north, and from the Atlantic Ocean west to Texas, Oklahoma and Kansas. Measuring the extreme dimensions, this marketing area extends about 575 miles north to south from central Missouri to southern Louisiana and 750 miles west to east from Louisiana's border with Texas to the Atlantic Ocean coast in southern Georgia.

The proposed Southeast marketing area would be contiguous to four other marketing areas - the Florida Order to the southeast, the Southwest Order to the west, the Central Order to the northwest and the Mid-east Order to the north.

Natural boundaries and barriers around the proposed Southeast marketing area would be formed by the unregulated counties in Missouri, West Virginia and the unregulated areas in Virginia to the north, the almost 600 mile coastline of Georgia, North Carolina and South Carolina on the Atlantic Ocean, and the western Florida, Alabama, Mississippi and Louisiana almost 600 mile coastline along the Gulf of Mexico.

Moving from the south to the north of the proposed Southeast marketing area, climates range from humid subtropical in the coastal areas, to warm and humid or humid and continental to temperate. Warm, humid summers and mild winters are typical in this area. These types of climates can severely limit the production level of dairy herds in the summer.

As shown in Exhibit 48, Item 13, SMA130 Comparative Statistics Federal Order Marketing Areas, the proposed southeast marketing area, at 451,198 square miles, would rank it first in marketing area coverage, but its length and breadth would be no greater than other nearby and adjacent Federal Orders. In terms of square miles, the proposed Southeast Federal Order 1007 would be only approximately 10 percent larger than the current Central Federal Order 1032.

Population - As shown in Exhibit 48, Item 13, SMA130 Comparative Statistics Federal Order Marketing Areas, the total population estimate for the proposed southeast marketing area would be 47.5 million pounds. A population of 47.5 million people within the proposed southeast marketing area would represent approximately 20.5 percent of the total population within all Federal Order marketing areas. The proposed Southeast Order would rank second, after the Northeast Federal Order Number 1001, among all Federal Orders. The population density of the proposed Southeast Order at 105.3 people per square mile is very much at the average of 106.2 people per square miles for all Federal Orders.

As shown in Exhibit 48, Item 14A and B, SMA140 MSA's located within the proposed southeast marketing area, there are 66 Metropolitan Statistical Areas (MSA's) within the proposed marketing area, containing almost two thirds of the area's population. There are 16 within the proposed marketing area that have populations of 500,000 or more. They are Atlanta MSA, located about 60 miles south of the current Southeast-Appalachian marketing area boundary with a population of 4.11 million. Charlotte, North Carolina MSA located near the South Carolina border, about 250 miles west of the Atlantic coast with a population of 1.5 million. New Orleans, Louisiana MSA is the third largest, with 1.34 million people. Greensboro-Winston-Salem-High Point, North Carolina is fourth largest MSA with a population of 1.25 million. Nashville, Tennessee MSA is the fifth largest MSA in the area, with a population of 1.23 million. The Raleigh-Durham-Chapel Hill, with 1.19 million people is the sixth largest MSA in the proposed area. The Memphis, Tennessee MSA with 1.14 million is the seventh largest MSA in the proposed area. The Louisville, Kentucky MSA, with 1.03 million people, is the eighth largest MSA in the proposed area. Greenville, South Carolina at 0.962 million, Birmingham, Alabama at 0.921 million, Knoxville, Tennessee at 0.687 million, Baton Rouge, Louisiana at 0.603

million, Little Rock, Arkansas at .584 million, Charleston, South Carolina at 0.549 million, Mobile, Alabama at 0.540 million, and Columbia, S. Carolina at 0.537 million make up the ninth through sixteenth largest MSA's in the marketing area. These 16 MSA's represent about 62.5 percent of the total population within the proposed marketing area.

Exhibit 48, Item 15, SMA141 Orders 5 and 7 Marketing Areas, 15 Largest MSA's shows the location of the 15 largest MSA's located within the current Appalachian Order 1005 and the Southeast Order 1007 marketing areas.

Producer Milk - As shown in Exhibit 48, Item 16, SMA150 Location of Producers Pooled, Appalachian Order 1005 and Southeast Order 1007, and Exhibit 48, Item 17, SMA151, Location of Producer Milk Pooled, Appalachian Order Number 1005 and Southeast Order 1007, for the month of December 2003, some 7,243 producers from 28 states pooled 1.172 billion pounds of producer milk on the Appalachian Federal Order Number 1005 and the Southeast Federal Order Number 1007. Producers located in 15 of the 28 states pooled milk on both the Appalachian Order Number 1005 and the Southeast Order Number 1007. These states include Alabama, Georgia, Illinois, Indiana, Kentucky, Maryland, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Florida, Kansas, and Texas.

Exhibits 10 for the Appalachian Order and 41 for the Southeast Order shows the location by county of producer milk pooled on the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 for the month of December 2003. This map displays the many areas of concentration of producer milk pooled on the orders. These charts also clearly show how the milk shed has expanded over the four years.

As shown in Exhibit 48, Item 17, SMA151 Location of Producer Milk Pooled Appalachian Order 1005 and Southeast Order 1007, 42.92 percent of the volume of producer milk pooled on the Appalachian Order was from producers who are located within the marketing area. As presented in the final decision of March 12, 1999, this compares to the 71 percent from which the then-proposed Appalachian Order in December 1996. Similarly, as shown in the exhibit, 56.01 percent of the volume of producer milk pooled on the Southeast Order was from producers who are located within the marketing area. Again, as presented in the final decision of March 12, 1999, this compares to the 85 percent from within the then-proposed Southeast Order in January 1997. The producer milk supply from within the two Orders at that time was in excess of 78 percent. The expansion of the milk shed for the Appalachian and Southeast Orders, as well as the substantial increase in the percentage of milk pooled on the two orders originating from producers located outside the marketing area, both greatly exceed what was contemplated in the Secretary's final decision on Order reform. This growth in supply area and proportion of milk pooled on the Orders from producers located outside the marketing represents a major change in the structure of milk procurement for the Orders, versus the structure which existed when the Secretary formulated the decision establishing separate Appalachian and Southeast Orders.

As shown in Exhibit 48, Item 17, SMA151 Location of Producer Milk Pooled Appalachian Order 1005 and Southeast Order 1007, approximately 53.14 percent of the producer milk pooled on the Appalachian and Southeast Orders was from producers who are located within the proposed consolidated marketing area. This is at least 25 percentage points lower than the 78 percent for the combined two Orders in December 1996. The geographic source of supply for the proposed Southeast Order has expanded greatly over the past eight years.

Exhibit 48, Item 18, SMA152, Delivery Location of Other Producer Milk Located in Other Marketing Areas Calendar Year 2003 and Exhibit 48, Item 19, SMA153 Southern Marketing Agency, Inc. Primary Sources of Supplemental Milk Supplies provides tabular and graphical data regarding the four major source groups of outside the marketing areas supplies, which provide a significant and necessary supplement to the producer milk supplies located within the marketing area. Although each supplemental milk location may represent one or more states, and from multiple handlers, they have been grouped into supply sources representing milk originating from the Northeast Order area (Order 1) noted as "N" on the table, milk originating from the Mideast Order Area (Order 33) noted as "M" on the table, milk originating in the Central Order area (Order 32) noted as "C" on the table, and milk originating in the Southwest Order area (Order 126) noted as "S" on the table. Following the tabular record is a map pictorial which displays the approximate area within the proposed Southeast Order area to which the milk was delivered during 2003. As can be seen from the table and map depiction, much of the outside supplemental milk supplies can and does service plants located in and pooled in both the current Southeast and Appalachian Orders.

Milk originating in the Northeast Order served plants in Virginia, the Carolinas, Georgia and Tennessee. Milk originating in the Mideast Order area served plants in Kentucky, Indiana, Tennessee, Virginia, the Carolinas, Georgia, Alabama and Missouri. It is interesting to note - and more than a little telling - that milk originating in the Mideast Order area, from farms located in one of two adjacent counties in northwestern Indiana, served pool distributing plants located in Springfield, Missouri and Florence, South Carolina in the same month, August 2003. Springfield, Missouri and Florence, South Carolina represent the near-full east-west breadth of the proposed Southeast Order. Milk originating the Central Order served plants in Kentucky, Tennessee, Missouri and Arkansas. Milk originating in the Southwest Order area served plants in Kentucky, Tennessee, Arkansas, South Carolina, Louisiana, Georgia, Alabama and Missouri.

Milk from the Southwest Order marketing area served plants in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee. Milk from this area served plants located in both Louisville, Kentucky and the New Orleans, Louisiana in two months of the year 2003, those being September and October. This represents market coverage from milk from the Southwest Order at virtually the full north-south span of the proposed Order.

Exhibit 48, Item 20, SMA154 States and producer Milk Deliveries to Orders 5 and 7, and Exhibit 48, Item 21A through E, SMA155 States Delivering Producer Milk to Orders 5 and/or 7, May and December 2000, 2001, 2002, 2003 and May and/or December All Years shows the source of producer milk by state for each of the current Southeast and Appalachian Order, utilizing published milk source data from the market Administrators for the months of May and December 2000, 2001, 2002, 2003. Producer milk originated in 30 states for the two Orders in one or more of the eight months cited, with only seven of those 30 states serving only one of the two Orders over that time. Some states served both Orders all eight months. Some states served one of the Orders at one time and the other Order during a different period. Substantially, the milk shed for the Southeast and Appalachian Orders extends eastward from a north/south line extending from the upper Midwest through the Great Plains, to the Southern Plains to the Desert Southeast, and south of line from the Upper Midwest through the great Lakes states to New York. Virtually every state in that area serves as a supply region for the southeast and further, virtually every state in that area can, and has, provided supplies which can serve any part of the 2 current Orders.

There have been some changes in the states that supply various parts of the proposed Southeast marketing area, as shown in the state source map for 2003 versus previous years. Notably, milk in the Plains states has not moved as often to what is now the Appalachian area. The cooperatives supplying the Orders, working through their marketing agency in common, have restructured the logical, economic and rational delivery points for these distant supplies, thus minimizing to the extent possible the miles milk moves to serve the market.

Undoubtedly, there is substantial and significant overlap in the pool plants that can be and are serviced from outside the proposed marketing area producer milk supplies, as well as significant and substantial overlap in the delivery of producer milk produced within the proposed marketing area.

As shown in Exhibit 48, Item 16, SMA150 Location of Producers Pooled in the Appalachian Order 1005 and Southeast Order 1007, the volume of producer milk received from producers located within the marketing area was supplied by 72.54 percent of the total number of producers whose milk was pooled on either of the two orders.

Using data for the month of October 2003 as shown in Exhibit 48, Item 13, SMA130 Comparative Statistics Federal Order Marketing Areas, producer milk that would have been pooled on the proposed Southeast Order at 1,122 million pounds, would rank the proposed Southeast Order second in size among all Federal Orders. Similar data on number of producers would, however, rank the proposed Southeast Order at fourth in size among all Federal Orders.

The volume of producer milk in October 2003 that would have been pooled on the proposed Southeast Order would represent approximately 15.8 percent of the total producer milk pooled on all Federal Orders that month.

Utilization - According to the Market

Administrators' published December 2003 pool statistics for handlers who would be fully regulated under the proposed Southeast Order, the Class I utilization percentages for the current Appalachian and Southeast orders were 69.19 and 64.66 percent, respectively. The combined Class I utilization for the proposed Southeast Order for December 2003 would have been 66.79 percent, based on 783.1 million pounds of producer milk used in Class I out of 1,172.4 million total producer milk pounds pooled.

As shown in Exhibit 48, Item 22, SMA170 Utilization of Producer Milk, 2003 Appalachian Order 1005, Southeast Order 1007, and Combined Federal Order 1007, for the year 2003, the Class I utilization percentages for the current Appalachian and Southeast Orders were 70.36 and 65.47 percent respectively. The combined Class I utilization for the proposed Southeast Order for the year 2003 would have been 67.77 percent, based on 9,071.9 million pounds of producer milk - -

THE COURT: Off the record.

OFF THE RECORD

THE COURT: Back on the record.

THE WITNESS: The combined Class I utilization for the proposed Southeast Order for the year 2003 would have been 67.77 percent, based on 9,071.9 million pounds of producer milk used in Class I, out of 13,385.7 million pounds of total producer milk pounds pooled.

As shown in Exhibit 48, Item 13, SMA130 Comparative Statistics Federal Order Marketing Areas, the combined Class I utilization for the proposed Southeast Order for the month of October 2003 would rank it as the second highest Class I utilization of all Federal Orders. The proposed Southeast Order would also rank second in the volume of Class I producer milk among all Federal Orders and that volume would represent approximately 19.5 percent of the total Class I producer milk on all Federal Orders.

As shown in Exhibit 48, Item 22, SMA170 Utilization of Producer Milk, 2003 Appalachian Order 1005, Southeast Order 1007, and Combined Federal Order 1007, the combined Class II utilization for the proposed Southeast Order for the year 2003 would have been 12.07 percent, based on 1,615.2 million pounds of producer milk used in Class II. The Appalachian and current Southeast Orders were 14.41 and 9.97 respectively.

The exhibit shows that the combined Class III utilization for the proposed Southeast Order for the year 2003 would have been 12.75 percent, based on 1,706.6 million pounds of producer milk used in Class III. The Appalachian and current Southeast Orders were 7.11 and 17.79 percent respectively.

Lastly, the exhibit shows that the combined Class

IV utilization for the proposed Southeast Order for the year 2003 would have been 7.41 percent, based on 991.9 million pounds of producer milk used in Class IV. The Appalachian and current Southeast Orders were 8.12 and 6.78 respectively.

Pool Plants - Using distributing plant lists as published by the Market Administrator for December 2003 for the Appalachian Order Number 1005, Exhibit - I don't have this one marked, so they will have to go back and give it to me, 52 distributing plants would be expected to be associated with the proposed southeast marketing area. This compares to the 79 distributing plants that were expected, at the time of the final decision in 1999, to be associated with the consolidated Appalachian and Southeast Orders January 2000.

This list of distributing plants that would be associated with the proposed Southeast Order is also presented in Exhibit 48, Item 3, SMA030 Proponents Cooperatives Supplying Pool Distributing Plants Proposed Southeast Federal Order, November 2003. As indicated in this Exhibit, all expected pool distributing plants are supplied by the proponent cooperative associations.

As shown in Exhibit 48, Item 22, SMA155 Map Pool Distributing Plants, Federal Order 1005 and 1007, November 2003, all but two of the distributing plants are located within the proposed marketing area. The two distributing plants located outside the area are located in the unregulated area in the state of Virginia.

As shown in Exhibit 48, Item 4, SMA040 Pool Distributing Plants Appalachian Order 1005, and Exhibit 48, Item 5, SMA050 Pool Distributing Plants Southeast Order 1007, since January 1996, 20 fewer distributing plants would be pooled on the proposed Southeast Federal Order - a 27.7 percent reduction during the last eight years. Since January 2000, seven distributing plants in the proposed marketing area have gone out of business - a 11.9 percent reduction in just the last 48 months.

As shown in Exhibit 48, Item 24, SMA180 A and B Class I Packaged Milk Disposition by Pool Plants, Southeast Order 1007 and Appalachian Federal Order 1005, the 52 plants expected to be fully regulated under the proposed Southeast Federal Order had Class I route distribution totaling 773.4 million pounds for the month of December 2003, with 86.58 percent made within the proposed marketing area.

As shown in Exhibit 48, Item 25, SMA190A and B, Class I Packaged Milk Disposition in the Marketing Areas, Southeast Federal Order Number 1007 and Appalachian Federal Order Number 1005, total in-area Class I route disposition in December 2003 by all plants was 711.5 million pounds, with 94.11 percent made by the 52 plants expected to be fully regulated under the proposed Southeast Order.

As shown in Exhibit 48, Item 7, SMA070 Pool supply Plants, Regulation and Operations Changes, January 1996 to December 2003, Appalachian and Southeast Order, only six pool supply plants are expected to be associated with the proposed Southeast marketing area. All but one of the supply plants are located within the proposed Southeast Order marketing area. As the Appalachian annual statistics show, Exhibit 10 for the Appalachian Order and 41 for the Southeast Order, two of these supply plants - Greeneville, Tennessee and Louisville, Kentucky - are seasonal operations only. As of December 2003, the Greeneville operation was sold to a private concern and will no longer be a seasonal balancing facility.

The one pool supply plant that is located outside the proposed Southeast Order marketing area is one that is located in the unregulated area within the state of Virginia. As proposed, this is the only area outside the proposed Southeast Order marketing area in which a pool supply plant operated by a cooperative may be located.

As shown in Exhibit 48, Item 13, SMA130 Comparative Statistics Federal Order Marketing Areas, the total number of plants expected to be pool plants under the proposed Southeast Order would represent approximately 14.6 percent of the total number of plants that are currently pool plants under Federal Order regulation. The proposed Southeast Order would rank third in the total number of pool plants regulated under the order.

The current language in Order 7 regarding the pooling of distributing plants based on the plants being located within the marketing area, should be maintained. Since the middle 1980's, distributing plants in the southeast have been locked in as a pool plant in the order in which they are physically located in a number of the predecessor orders to the current Orders 5 and 7. The current Orders 5 and 7 provide in Section 7E that two or more plants operated by the same handler may qualify as pool plants, as long as together, they meet the in-area and Class I utilization requirements specified in 7A. There is substantial evidence to continue this procedure and for pooling distributing plants in general, based on their physical location.

As we have shown and will show, there is substantial competition between and amongst distributing plants located and pooled in the two Order areas. An important element of the total Class I milk cost to a plant is the competitive price which must be paid to producers who supply a plant or plants. Differences in milk-check prices to producers, either as a result of differences in Over Order prices or as a result of differences in the underlying Federal Order uniform prices, can result in unequal Class I milk costs to competing handlers. As we have shown and will show, differences in over order prices can, in fact, be a result of the differences in the underlying Federal Order uniform prices. Handler Class I cost equity is most easily preserved when Federal Order uniform prices to producers are equitable and rational in light of the various plants which may be drawing from a group of producers similarly situated.

Plants located within the marketing area of the proposed Southeast Order supply approximately 95 percent of the fluid milk products distributed on routes in the proposed combined marketing area, signifying a significant and substantial amount of competition between the plants that are expected to be regulated under the proposed Southeast Order The five percent of the fluid milk distributed on routes in the marketing area from other non-pool plants suggests that the competition for sales in the marketing area is predominately between the pool plants currently regulated under the two Orders. A portion of the remaining five percent of route disposition comes from non-pool plants located within the marketing area, leaving a very teeny slice of competition between handlers regulated under the proposed Southeast Order and handlers pooled on other orders, or partially regulated plants located outside the proposed marketing area. Since all but two of the pool plants currently regulated under the two Orders are located within the proposed Southeast Order marketing area, and the two plants located outside the marketing area are proposed to be included within the marketing area, as described in Proposal Number 3, it is reasonable to conclude that those plants located within the marketing area constitute the vast majority of fluid milk sales competition, and since they are virtually all located within the marketing area, should thus be subject to the same Federal Order uniform price, subject to the same producer qualification criteria, and subject to the same pool plant qualification criteria. This would be accomplished by consolidating the two Orders and preserving the current regulatory status of plants that are located within the marketing area, but may distribute a plurality of their fluid milk outside the proposed marketing area. This problem is most typically limited to plants on the fringe of the marketing area.

Distributing plants represent a significant capital investment generally made in a large single time period, and then in smaller but continuous increments over the life of the facility. From time to time, market considerations such as population shifts, changes in milk shed location, consolidation in ownership of processing capacity, and retail ownership can have negative and positive effects on the return potential of those capital investments. Lock-in provisions help to preserve the viability of those investments for the benefit of both the distributing plant and dairy farmers.

The plants that are most frequently subject to lock-in provisions are those on the edge of the market that may shift regulation due to product mix or to the distribution pattern out of the plant. Occasionally, a border plant may serve a larger population center located out of the marketing area, and if the calculations are on the fence, a series of retail promotions in that location may cause a regulatory change in the plants' status. Most times these changes are discovered on audit after the fact. When this occurs, the after the fact billing adjustments can be very expensive, result in difficult negotiating postures for both buyer and seller, and generally lead to a deterioration in the business relationship.

Lock in language provides for corrective action from a regulatory standpoint that cannot be easily accommodated by the market. We feel that the current language has proved beneficial to our membership, marketing efforts and customer relationships, and is not opposed by any party in the hearing that we are aware of, and therefore should be continued.

Plants located near one another typically seek supplies from a common group or groups of producers. As previously stated, disorderly conditions can occur if plants procuring milk from these common groups of producers cannot offer a commensurate Federal Order blend price. In order to insure that these plants - all of which are in competition with other plants similarly situated and which are in competition for producer supplies - continue to have a common blend price, with differences based only on plant location adjustment, plants located within the proposed geographical area of the Southeast Order should be pooled together, and should remain pooled together even if they have a plurality of route disposition outside the marketing area.

In summary, it is our testimony that all plants that are currently pool plants - both distributing plants and supply plants - under the separate Orders 5 and 7 - should be afforded the pool plant status under the proposed Southeast Order. The only plant for which a proposed change in regulatory status is contemplated would be the plant impacted in Proposal Number 3.

Fluid Per Capita Consumption - Total Packaged Class I fluid milk disposition with the proposed Southeast marketing area, by all plants - pool and non-pool - as shown in Exhibit 48, Item 25, SMA190A and B, Class I Packaged Milk Disposition in the Federal Marketing Areas, Southeast Federal Order Number 1007 and Appalachian Federal

Order Number 1005, would have averaged 690 million pounds per month for the year 2003. Based on a population estimate of 47.5 million people within the proposed marketing area, per capita consumption of packaged fluid milk disposed within the marketing area would have averaged 14.5 pounds per month.

Other Plants - Located within the proposed Southeast marketing area, as shown in Exhibit 48, Item 26, SMA200 Non-pool Plants Located Within the Appalachian Federal Order Number 1005, September 2003, and Exhibit 48, Item 27, SMA205 Non-pool Plants Located within the Southeast Federal Order Number 1007, September 2003, are 50 non-pool dairy plants. Included within this number of plants are 14 exempt distributing plants, three partially regulated distributing plants, and one producer/handler plant.

Of the proposed Southeast Marketing area's remaining 32 non-pool plants, 13 manufacture cheese, 12 manufacture ice cream, two are commercial food processors, two manufacture butter, one manufactures culture products, and one each manufactures powder and packaged condensed products.

Cooperative Associations - As shown in the Market Administrator's Annual Statistical Summary for 2003, Exhibit 10 for the Appalachian Order and 41 for the Southeast Order during the month of December 2003, 13 cooperative associations represented producer members who marketed producer milk that would have been pooled on the proposed Southeast Federal Order. Exhibit 48, Item 27, SMA210, Southern Marketing Agency, Inc., Number of Producers and Producer Milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003 is a listing of those cooperative associations.

Exhibit 48, Item 27, SMA210 Southern Marketing Agency, Inc. Number of Producers and Producer Milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003 also those that Dairy Farmers of America, Inc. represented 48.9 percent of the total producer milk supply that was pooled on the Appalachian and Southeast Orders during December 2003. For the same month, Maryland and Virginia Milk Producers Association, Inc. represented 9.3 percent of the total producer milk pooled on the Appalachian and Southeast Orders. Of the eight other cooperative associations with member milk that would have been pooled on the proposed Southeast Order, five such cooperatives market their member milk either to, or on the behalf of, Dairy Farmers of American Inc. or Maryland Virginia Milk Producers Association Inc.

As shown in Exhibit 48, Item 27, SMA201 Southern Marketing Agency, Inc. Number of Producers and Producer Milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003, the five member cooperatives of Southern Marketing Agency, Inc. represented 5,242 members who marketed 66.22 percent of the total producer milk that would have been pooled on the proposed Southeast Order during the month of November 2003. Further, as shown in Exhibit 48, Item 2, SMA020 producer Milk Deliveries Proponent Cooperatives and Others, SMA marketed 79.07 percent of the total producer milk that would have been pooled on the proposed Southeast Order during the month of November 2003.

Criteria for Consolidation - The criteria for consolidation of Federal Milk Marketing Orders that were used in the final rule are considered here in determining whether a sufficient degree of association in terms of sales, procurement, and structural relationships exists that will warrant the consolidation of the Appalachian Federal Order Number 1005 and the Southeast Federal Order Number 1007. Those criteria are considered as follows:

Overlapping Route Disposition - the movement of Class I packaged milk between Federal Milk Marketing Orders indicates that plants from more than one Federal Order are in competition with each other for Class I sales within the areas. In addition, a degree of Overlap that results in the regulatory status of plants shifting between orders created disorderly conditions in changing price relationships between competing handlers and neighboring producers.

Distances of major population centers of the Appalachian Federal Order and the Southeast Federal Order are generally within the reasonable distribution areas of pool distributing plants regulated under the other Order. As shown in Exhibit 48, Item 29, SMA220 Distance of Major Population Centers, Federal Orders 5 and 7 to Nearby Plants Located in the Adjacent Marketing Area, the Appalachian Federal Order Number 1005 largest six MSA's are located from 95 miles to 311 miles from the nearest city with a Southeast Federal Order Number 1007 distributing plant. These MSA's are located from 140 miles to 356 miles from the second nearest city with a Southeast Federal Order Number 1007 distributing plant.

The Southeast Federal Order Number 1007 largest six MSA's are located from 112 miles to 477 miles from the nearest city with an Appalachian Federal Order Number 1005 distributing plant. These MSA's are located from 140 miles to 581 miles from the second nearest city with an Appalachian Federal Order Number 1005 distributing plant.

Eight of the 12 largest MSA's in the proposed Southeast Order marketing area are within the normal distribution distance of the nearest pool distributing plant, located within the marketing area of the other order, signifying significant and substantial overlap in the sales area of the proposed Southeast Order.

As illustrated in Exhibit 48, Item 30, SMA230 Orders 5 and 7 Marketing Area, 12 Largest Population Centers, two thirds of the largest population centers in the combined marketing area fall along the corridor of competition which currently is the border of the two orders. That corridor is graphically shown in Exhibit 48, Item 31, SMA235 Corridor of Greatest Fluid Milk Sales.

Section II-1 - Consolidation of the Marketing Areas, 1 Overlapping Route Disposition of the Final Decision in Federal Milk Marketing Order Reform states that overlapping route disposition is the “criterion considered to be the most important”. As demonstrated from the evidence, the area of greatest competition for fluid milk sales in the entire southeast is the corridor along the border between Orders 5 and 7. The evidence demonstrates substantial and ever-increasing competition between Order 5 and Order 7 handlers, and substantial increases in this competition for fluid milk sales since the Secretary’s final decision establishing separate Appalachian and Southeast Orders. The existence of such a significant area of fluid milk sales competition suggest the removal of the border between the orders, not the preservation of such border.

Within the marketing areas of the Southeast Federal Order 1007 and the Appalachian Federal Order 1005, there is substantial and significant competition for sales between plants regulated under the two orders. Exhibit 48, Item 22, SMA175 Map Pool Distributing Plants, Federal Order 1005 and 1007, November 2003, shows the location of those distributing plants located within the two orders. Currently there are some 16 Federal Order Number 1005 pool distributing plants, of a total of 24 with Class I route disposition into the Southeast Federal Order 1007 marketing area, while some seven Federal Order Number 1007 pool distributing plants have Class I route disposition into the Appalachian Federal Order Number 1005 marketing area.

As shown in Exhibit 48, Item 25, SMA190A and B, Class I Packaged Milk Disposition in the Marketing Areas, Southeast Federal Order Number 1007 and Appalachian Federal Order Number 1005, Class I disposition on routes inside the Southeast Federal Order Number 1007 area by Appalachian Federal Order Number 1005 pool plants for the year 2003 was 11.25 percent of the total Class I route disposition by all plants in the Southeast Federal Order 1007 marketing area. From data contained in this exhibit, Class I route disposition by Appalachian Federal Order Number 1005 pool plants was 63.9 percent of the total Class I route disposition in the Southeast Federal Order Number 1007 marketing area by all non-pool plants. When considering Class I route disposition into the nearby and adjacent area, that is western Kentucky, Nashville, Tennessee, northern Alabama, Atlanta, Georgia, and Savannah, Georgia of the Southeast Federal Order Number 1007, Class I route disposition by Appalachian Federal Order Number 1005 pool plants could equal as much as one fourth of the total route disposition in that nearby and adjacent portion of the Southeast Federal Order 1007 marketing area.

Class I route disposition in the Southeast Federal Order Number 1007 marketing area by Appalachian Federal Order Number 1005 pool plants has increased in total by 11.1 percent since January 2000. Each year to year comparison also shows an increase in this relationship. The increase was 5.9 percent in 2001 from 2000, 2.1 percent in 2002 from 2001, and 1.9 percent in 2003 from 2002.

As shown in Exhibit 48, Item 25, SMA190A and B, Class I Packaged milk Disposition in the Marketing Areas, Southeast Federal Order Number 1007 and Appalachian Federal Order Number 1005, for the month of December 2003, the 52 pool distributing plants that are expected to be fully regulated under the proposed Southeast Order supplied 94.11 percent of the total Class I route disposition by all plants within the proposed Southeast marketing area.

As shown in the exhibit, Class I route disposition by pool plants averaged over 94 percent for each of the years 2000, 2001, 2002, 2003. This high a percentage supplied by pool plants indicates that the proposed Southeast marketing area is an extremely self-reliant marketing area, in terms of Class I processing and distribution, with only slightly more than five percent of total route disposition within the marketing area being delivered from non-pool plants.

As previously stated, 11.25 percent of the total route disposition in the current Southeast Order marketing area came from Appalachian order pool plants during 2003, representing almost two thirds of the route disposition in the current Southeast Order marketing area from all non-pool plants. The route disposition association - overlap, if you will - from Order 5 pool plants into the Order 7 area exceeds the portion of route disposition into other nearby or adjacent Orders from all non-pool sources. Exhibit 48, Item 32, SMA236 Class I Distribution on Routes in the Marketing Area Pool and Non-pool plants, Selected Orders Million Pounds, November 2003 shows the portion of all route dispositions in the marketing areas from all non-pool sources for the Florida, Northeast, Central, Mideast and Southwest Federal Order for the month of November 2003.

The route disposition portion of Order 5 plants into the Order 7 marketing area exceeded the portion of route disposition from all non-pool sources into the Northeast Order area at 3.4 percent from all non-pool sources, the Mideast Order area at 6.8 percent from all non-pool sources, the Southwest Order area at 7.1 percent from all non-pool sources, and approached the amount distributed in the Florida area, which had 12.7 percent of its total route disposition from all non-pool sources. Only the Central Order had significantly greater route disposition from all non-pool plants than did Order 5 plants have into the Order 7 area.

Located within the current Appalachian Federal Order Number 1005 is a distributing plant which has a greater proportion of its total Class I route distribution into the Southeast Federal Order Number 1007 marketing area than into the Appalachian Federal Order Number 1005 area. The plant remains locked in as a pool plant under the Appalachian Federal Order Number 1005, so long as it maintains at least 25 percent of its total Class I route disposition into the Appalachian Federal Order Number 1005 marketing area.

Overlapping areas of Milk Supply - This criterion applies principally to areas in which major proportions of the milk supply are shared between more than one order. The competitive factors affecting the cost of a handler's milk supply are influenced by the location of the supply. The pooling of milk produced within the same procurement area under the same order facilitates the uniform pricing of producer milk.

There is a substantial and significant overlap of the supply of producer milk for the current Appalachian Federal Order Number 1005 and Southeast Federal Order 1007. As shown in Exhibits 38 through 41 for the Southeast and 7 through 10 for the Appalachian Order, over the past four years, producers located within the marketing areas of the two orders in southern Indiana, central Kentucky, central Tennessee, central North Carolina, western South Carolina and central and southern Georgia have supplied milk to plants regulated under each of the two orders. Likewise, milk from producers located in the Central Order area serve fluid milk plants located and pooled under both the Appalachian and Southeast Order, as do producers located in the Southwest Order. Outside the marketing areas of the two orders, producers located in northwestern Indiana and south central Pennsylvania have also supplied milk to the plants regulated under each of the orders. Our knowledge of the market tells us that nearly all of the milk produced within the marketing area stays within the boundaries of the proposed Southeast Order - not that remarkable, since the area is a deficit market.

As shown in Exhibit 48, Item 16, SMA150 Location of Producers Pooled, Appalachian Order 1005 and Southeast Order 1007 for the month of December 2003, producers located in 28 states supplied milk to either the Appalachian Order Number 1005 or the Southeast Order Number

1007 pool handlers. Producers from 16 of these states provided milk to both Appalachian and Southeast Order handlers with 13 of these states located wholly or partially within the proposed Southeast marketing area. For December 2003, 72.54 percent of the producers were located within the proposed Southeast marketing area.

As shown in Exhibit 48, Item 17, SMA151 Location of producer Milk Pooled, Appalachian Order 1005 and Southeast Order 1007 for the month of December 2003, producer milk located in 28 states was supplied to either the Appalachian Order 1005 or the Southeast Order 1007 pool handlers. Producer milk from 16 of these states supplied milk to both Appalachian and Southeast Order handlers. For December 2003, producers who are located within the proposed Southeast marketing area supplied 53.14 percent of the producer milk, but these producers represented 72.54 percent of the number of producers supplying the order. Obviously the producer milk pooled on the orders from outside the marketing area originated on farms of larger than the average size for all producers on the orders. Of the milk supplied from outside the marketing area, much of it came from a few pockets of milk supply, populated by large farms. Much of this out of area reserve supply delivered regularly to handlers in both orders. Adoption of our proposal would make this supply function operate more efficiently and less costly.

Number of handlers within a market - Formation of larger size marketing areas is a stabilizing factor. Shifts of milk and/or plants between order markets becomes less of a disruptive factor in larger markets. Also the existence of Federal Order markets with handlers too few in number to allow meaningful statistics to be published without disclosing proprietary information should be avoided.

As previously shown, during the month of December 2003, there were 52 distributing plants that were regulated under the Appalachian Federal Order 1005 or Southeast Federal Order Number 1007. These are the same distributing plants that are expected to be pool distributing plants under our proposed Southeast Federal Order Number 1007. Fifty of these plants are located within the proposed Southeast marketing area, with the remaining two located in the unregulated area of the state of Virginia.

The combination of the two orders into the proposed Southeast Order will provide stability within the area, will minimize the shifting of milk and/or plants between markets, and will foster the release of meaningful statistics without disclosing proprietary information.

Natural Boundaries - Natural boundaries and barriers, such as mountains and deserts, often inhibit the movement of milk between areas, and generally reflect a lack of population, limiting the range of the consumption area and lack of milk production. Therefore, they have an effect on the placement of marketing area boundaries. In addition, for the purposes of market consolidation, large unregulated areas and political boundaries also should be considered a type of natural barrier.

In reviewing the marketing area of the proposed Southeast Federal Order Number 1007, as depicted in Exhibit 48, Item 12, SMA115 Federal Milk Order Marketing Areas, it is clear that a substantial portion of the boundary of the proposed marketing area is formed by natural boundaries or barriers. To the south is almost 600 miles of coastline along the Gulf of Mexico. To the east is almost 600 miles of the coastline of the Atlantic Ocean, and to the north are the unregulated areas of central Missouri, West Virginia and Virginia.

Cooperative Associations Service Areas - Cooperative membership is an indication of market association and provides support for the consolidation of marketing areas. The proposed Southeast Federal Order marketing area represents the service area of the Southeast Council of Dairy Farmers of America, Inc. As shown in Exhibit 48, Item 27, SMA210 Southern Marketing Agency, Inc. Number of Producers and Producer milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003, for the month of December 2003, DFA member producer milk represented 48.9 percent of the total producer milk and 58 percent of the producers that were pooled on the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 and therefore, would have been pooled on the proposed Southeast Order.

As previously discussed, the proposed Southeast Federal Order marketing area represents the service area of the Southern Marketing Agency, Inc. As shown in Exhibit 48, Item 27, SMA201 Southern Marketing Agency, Inc., Number of Producers and producer Milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003, for the month of December 2003, SMA's cooperative member milk represented 66.22 percent of the total producer milk and 72.31 percent of the producers that would have been pooled on the proposed Southeast Order.

Also, as shown in Exhibit 48, Item 27, SMA210 Southern Marketing Agency, Inc., Number of Producers and Producer Milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003, during the month of December 2003, there were eight other cooperatives other than SMA cooperatives that would have had member milk pooled on the proposed Southeast Order. Of these eight, five were delivering milk to or for the account of an SMA member cooperative.

The cooperatives represented by Southern Marketing Agency, Inc. for the month of December 2003 marketed 62.32 percent of the total producer milk pooled on the Appalachian Federal Order Number 1005 and 69.68 percent of the total producer milk pooled on the Southeast Federal Order Number 1007. On a combined order basis, including the other cooperative milk marketed by a Southern Marketing Agency, Inc. cooperative, Southern Marketing Agency, Inc. cooperatives would have marketed approximately 78 percent of the total producer milk that would have been pooled on the proposed Southeast Order.

Provisions Common to Existing Orders - The regulatory provisions of the Appalachian Federal Order Number 1005 and the Southeast Federal Order Number 1007 are similar in most all respects except for the qualification provisions for producer milk and a producer. Here, they differ only slightly.

While not a Federal Milk Marketing Order regulatory provision, the common pooling of costs and returns for member milk that would be pooled on the proposed Southeast Order by the Southern Marketing Agency, Inc. cooperatives does recognize similar marketing conditions within the proposed Southeast Order and provides further justification for the consolidation of the Appalachian and Southeast Orders.

THE COURT: Let's stop here for a second. I am just wondering what is a good time to recess. He has covered half the statement. I was thinking of recessing now. Of course the room next door has become quiet except for the breaking down of tables that I hear.

They just broke for lunch, so would you like to continue while they are at lunch?

MR. BESHORE: Let's go.

THE COURT: Okay, go ahead.

THE WITNESS: Milk Utilization in Common Dairy Products - Utilization of milk in similar manufactured products has been considered to be an important criterion in determining the consolidation of existing Federal Milk Marketing Orders. As shown in Exhibit 48, Item 33, SMA250 Utilization of Producer Milk, Appalachian and Southeast Federal Orders, 2000, 2001, 2002 and 2003, the difference in the Class I utilization under the Appalachian and Southeast Orders, except for some seasonal variations, has remained relatively unchanged in 2001, 2002 and 2003. As shown in the exhibit, they were 5.08 points different for the year 2001, 4.49 points different for the year 2002, and 4.89 points different for the year 2003.

For the year 2003, the Class II, III, and IV utilization under the Appalachian Federal Order Number 1005 was 14.41, 7.11, and 8.12 percent respectfully, while utilization under the Southeast Federal Order Number 1007 was 9.97, 17.79, and 6.8 percent respectfully. Class II and Class IV utilization predominates under the Appalachian Federal Order…

THE COURT: Off the record again.

OFF THE RECORD

THE WITNESS: As shown in Exhibit 48, Item 33, SMA250 Utilization of Producer Milk, Appalachian and Southeast Federal Orders, 2000, 2001, 2002 and 2003, the difference in the Class I utilization under the Appalachian and Southeast Orders, except for some seasonal variations, has

remained relatively unchanged in 2001, 2002 and 2003. As shown in the exhibit, they were 5.08 points different for the year 2001, 4.49 points different for the year 2002, and 4.89 points different for the year 2003.

For the year 2003, the Class II, III, and IV utilization under the Appalachian Federal Order Number 1005 was 14.41, 7.11, and 8.12 percent respectfully, while utilization under the Southeast Federal Order Number 1007 was 9.97, 17.79, and 6.8 percent respectively. Class II and Class IV utilization predominates under the Appalachian Federal Order, while Class III usage is predominate under the Southeast Order.

A significant portion of the Class II usage difference between the Appalachian Federal Order and the Southeast Federal Order can be accounted for by the fact that there are at least three Appalachian Order distributing plants that are significant makers of Class II products that are distributed in the Southeast Federal Order marketing area.

The higher usage of producer milk in Class III under the Southeast Federal Order is related to the usage of reserve milk in the major production areas of southern Missouri and northern Arkansas. Reserve milk disposition in these areas is primarily in cheese. However, during the peak surplus disposal periods, all of the seasonal balancing capacity of these plants is fully utilized, regardless of product classification. So it seems reasonable that, since all of the market uses and needs this capacity at the peak balancing period, it should also share the returns equally during the remainder of the year.

Disruptive Marketing Conditions - Blend Price Differences - The differences in the Class I , Class II, Class III and Class IV utilization of producer milk pooled under the Southeast Federal Order Number 1007 and the Appalachian Federal Order Number 1005 leads to significant blend price differences which contributes to the disruptive marketing conditions in those areas of common producer milk supply.

Exhibit 48, Item 34 - SMA255, Computation of Weighted Average Blend Price, Combined Appalachian and Southeast Federal Order shows the differences in blend prices between the Appalachian Federal Order 1005 and the Southeast Order 1007 by months, for the period January 2000 to date. This exhibit also shows a combined Federal Order 5 and 7 weighted average Blend Price for the period, and the variation of the combined blend price from the actual Appalachian Federal Order 1005 and Southeast Order 1007 blend prices. The significant price differences as shown in the exhibit contribute to the disruptive marketing conditions in the proposed Southeast marketing area.

The difference in the Class I utilization of producer milk pooled on the two orders is due primarily to a disproportionate burdening of the balancing of the supply of milk necessary to meet the two orders' needs by the Southeast Federal Order Number 1007 pool. Producer milk pooled on the Southeast Federal Order Number 1007 is shifted to the Appalachian Federal Order Number 1005 to meet its needs during the fall.

The difference in the Class II utilization of producer milk pooled on the two orders is due primarily to the existence of at least three Appalachian Federal Order pool distributing plants who have significant Class II operations and who supply a portion of the Class II needs of their operations or stores in the Southeast Order marketing area.

The difference in the Class III and IV utilizations of producer milk pooled on the two orders is primarily a result of the usage of reserve milk at Class III cheese operations in the northwestern Arkansas and southern Missouri supply area of the Southeast Order. In the common producer milk supply areas of the two orders, the disposition of reserve producer milk to Class III and IV usage is similar. However due to the difference in prices for the two use Classes, significant blend price differences do occur.

Since the differences in blend prices between the current Orders 1005 and 1007 are borne largely from differences in uses and prices in the manufacturing classes, and not primarily from differences in Class I milk utilization, pooling additional milk on the higher blend price order to lower its blend price is ill advised. Under the current market structure, the blend price advantage enjoyed by Order 1005 producers over Order 1007 producers would be erased, with modest increases in the Class III price. Such was the case in August and September 2003 when Order 7 had a higher uniform price than Order 5, despite a Class I utilization percentage that was greater in Order 5 than in Order 7. As such, the blend price inequities and distributions that now exist would simply be flip-flopped and would continue. If additional milk had been pooled on Order 1005 to blend down the uniform price so that it equals the Order 1007 blend price, and such a change in the Class III Class IV price relationship were to occur, the blend price inequity issue would be magnified, with Order 1007 having a higher Class I utilization, and additional pool revenues from the higher Class III price. This concern is always present - that is, there is always a group of producers who feel disadvantaged by the blend price relationship. When class price relationships change, the emotion simply shifts to the other order, even though there is little change in the supply demand patterns in the everyday functioning of the market.

The existence of the separate orders, which divide a single fluid milk market, oftentimes encourages this perpetual attempt to equalize the order blend prices by shifting supplies back and forth between orders. Inherent in this attempt to equalize the orders' blend prices by shifting pooled milk is the hopeful predicting of the relationships of the Class II, Class III and Class IV prices, market uses of Class I, and the determination of which supplies to ship on to or off of one of the orders, and the cost associated with doing this. Such a system is disorderly on its face. Others have suggested that the disruptive blend price differences have resulted from an Order 5 uniform price that has most often exceeded the Order 7 uniform price. The disruptive blend price differences would be just as acute if the Order 7 uniform price was regularly greater than the Order 5 uniform price. The inherent problem is that the uniform prices are not equal across this single fluid milk market.

To help minimize the disruptive market conditions resulting from the blend price differences which have occurred, beginning April 2002, the member cooperatives of the Southern Marketing Agency, Inc. began the common pooling of costs and returns to supply member customers regulated under the Appalachian Federal Order 1005 and the Southeast Order 1007. While this procedure has helped resolve the disruptive price differences between the members of the cooperatives involved, it will not equally share the burden for all producer milk pooled on the two Federal Orders. Only a merger of the Southeast Order 1007 and the Appalachian Federal Order 1005 will resolve the inequities that exist.

Transportation Pool Differences - The current system of two Transportation Credit Balancing funds, with differing levels of payout, has resulted in disorderly marketing conditions, manifested in two ways.

As shown in Exhibit 29, the Transportation Credit

Balancing funds have not been adequately funded, nor are funds drawn paid to suppliers in an equal manner. The Transportation Credit Balancing fund in Order 7 has been exhausted in each year, 2001, 2002 and 2003, while the Order 5 Transportation Credit Balancing fund has been sufficiently funded to pay virtually all claims requested since 2000. The Market Administrator for Order 7 has had to prorate payments from the fund, while the Market Administrator for Order 5 has not.

I would point out that in December of 2003, this situation changed and the Order 5 Transportation Credit Balancing fund was prorated.

The first instance in disorderly marketing is in unequal cost of milk. The inequity and payout between the two Transportation Credit Balancing funds has resulted in unequal supplemental milk cost to handlers regulated by the two orders. Handlers procuring milk for Order 5 have been reimbursed at 100 percent of their claimed credits, while handlers procuring supplemental milk for Order 7 have reimbursed at approximately 50 percent of their claimed credits. This inequity results in an unequal regulated cost of milk and equal cost of milk for handlers similarly situated is a hallmark of Federal Order regulations. The two current orders share a common milk shed with producers, especially producers outside the marketing areas, regularly serving both current orders. Exhibit 48, Item 18, SMA152, Delivery Location of Other Producer Milk Located in Other Marketing Areas Calendar Year 2003 and Exhibit 48, Item 19, SMA153, Southern Marketing Agency, Inc. Primary Source of Supplemental Milk Supplies - a table - depicts the four major sources of outside the marketing areas supplemental supply for the current Orders 5 and 7, and the area those supplemental supplies service. As can be seen, each of the four major sources of outside the marketing areas supplemental supplies services plants located in and regulated under both Orders 5 and 7. This milk suffers the loss when the two current Orders' Transportation Credit Balancing fund payments are not sufficient, or suffers inequities in returns when the payouts of the two orders' funds are not equal. Much of the milk that is currently procured outside the marketing areas can serve both current orders, and as such, milk should be treated equitably with regard to the Transportation Credit Balancing fund payments such milk is entitled to under the Order program. The second instance of disorderly marketing is in encouraging uneconomic movements of milk and in limiting economic movements of milk. The inequity in payout between the two Transportation Credit Balancing funds has resulted in milk moving further distances that would be required if a single Transportation Credit Balancing fund were instituted.

Exhibit 48, Item 40, SMA281 Comparison of Transportation Credit Fund Payments, Federal order 1005 versus 1007, When Order 7 Prorates and Order 5 Does not, describes how milk moves to the current Order 5 in deference to Order 7, purely for the purpose of garnering the higher transportation credit payout available in Order 5. Since the same milk from outside the marketing area can serve both Atlanta and Greenville, the economic and rational way to route the milk would be to serve the nearest plant, dominoing local and distant milk to fill the demand. Rather, as a result of the inequity in payout between the two Transportation Credit Balancing funds, milk will move farther than necessary.

Milk from the middle Atlantic region can economically well into the current Order 7 to service plants there. However, during the time when Order 7 is prorating transportation credits, the milk does not move beyond the borders of Order 5, since the return to this milk would be reduced precipitously when earning only a partial transportation credit on Order 7.

Achievements of Order Consolidation - the proposed consolidation of Appalachian Federal Order 1005 and the Southeast Federal Order 1007, creating a new Southeast Federal Order Number 1007, would result in the following -

One - Consolidation of the Appalachian and Southeast Orders would resolve a disruptive producer blend pricing issue which currently occurs in the common supply areas of the Appalachian and Southeast orders. With similar Class I utilizations under the two orders, such a divergence of producer blend prices is primarily the result of the differences in Class II, Class III and Class IV usage under the two orders. Class II and Class IV usage is predominate under the Appalachian Federal Order, while Class II usage is predominate under the Southeast Order. Because of different prices for each class, the contribution to the order blend price varies substantially between the two orders.

Measuring blend price disparities with percentage differences in blend prices trivializes the actual per hundredweight differences, and those per hundredweight differences' impact in the numerous areas of overlapping producer milk procurement.

As shown in Exhibit 48, Item 35, SMA260 Class I Utilization and Producer Blend Price Comparisons, Appalachian Federal Order 5 and Southeast Federal Order Number 7, the simple average of the Southeast Federal Order 1007 blend price for the 48 months since order consolidation is $14.057 and is $14.274 for the Appalachian Federal Order 1005. The average per hundred weight difference is .217, but that is less than two percent of either the Southeast Federal Order 1007 blend price or the Appalachian Federal Order 1005 blend price. While a two percent difference in uniform price may seem nominal, along standing blend price difference of this magnitude would generally be considered sufficient to convince dairy farmers to seek to switch markets.

In those areas where producer milk is procured for both orders, over order prices paid by plants procuring from non-members will likely be unequal, resulting in unequal Class I costs. Why would an Appalachian Federal Order 1005 handler pay the same premium as a Southeast Federal Order 1007 handler, competing in the same area, when the Appalachian Federal Order 1005 handlers starts at a .217 higher blend price? Conversely, the Southeast Federal Order 1007 handler must make up the difference between the Order 5/7 blend in the form of an over order premium if the handlers desires to retain its producers. Unequal Class I costs can be, and typically are, an element of disorderly marketing.

Blend price differences are a product of Class I utilization differences and many other factors. Those other factors can be Class I price differences, utilizations in the other classes, prices of the other classes, inventories, overages, the effect of handler and producer location adjustments on the base zone blend price, skim/butterfat utilization differences, rounding in the pool and other factors. It seems to us that the differences in blend prices which exist between the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 are greater than that one would expect using a Class I utilization percentage difference times Class I differential only method.

As shown in Exhibit 48, Item 35, SMA260, Class I Utilization and Producer Blend Price comparisons, Appalachian Federal Order 5 and Southeast Federal Order 7, the simple average of the monthly Class I utilizations of the Appalachian Federal Order 1005 for the 48 months since consolidation is 67.96 percent, and is 63.43 percent for the Southeast Federal Order 1007 - a simple difference of 4.53 percent. Our simple Class I utilization difference method would yield an expected blend difference of .14 per hundredweight, derived by multiplying .0453 per hundredweight times the base zone differential of $3.10), versus the .217 we have seen. This exhibit shows that the blend price differences have indeed been greater than the percent Class I utilization differences would suggest. Something else is going on and that something is largely producer milk use differences in the lower priced classes of utilization.

All Federal Milk Marketing Orders have similar Class III and IV classifications and pricing, so that the market returns can be shared equitably between producers delivering to powder pants and to cheese plants, when market returns on those sales can be vastly different. Because orders 5 and 7 are a single common market, the returns from Class III and IV should also be shared equally.

A distinction can be drawn, or rather should be drawn, on the difference between market balancing and market driven demand. The majority of the Class III production in the Southeast Order 1007 is not particularly determined by available milk supplies, which defines market balancing, but rather is processed to supply demand sales. The volume of milk going to Class III does not vary as much seasonally as does the supply of milk vary seasonally, which is the appropriate statistic in measuring what products are used for market balancing.

The variation in processing into hard products in the Southeast Order 1007, as in the Appalachian Federal Order 1005, is in milk used to produce Class IV. Both the Appalachian and Southeast Orders use butter powder as their balancing products. It is the existence of the Class III demand component in the Southeast Order 1007 as a contributor to the blend price differences between the orders which is significant.

Two - Consolidation of the Appalachian and Southeast Orders would recognize the inter-order competition for Class I sales within the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 marketing areas -

primarily within the eastern portion of the current Southeast Federal Order 1007 area. There is more competition for Class I sales in this area between Southeast Order 1007 plants and Appalachian Federal Order 1005 plants than there is between Southeast Order 1007 plants in that area and Southeast Order 1007 plants located in the western portion of the Southeast Order 1007 marketing area.

Exhibit 48, Item 41, SMA290 Overlapping Distribution Patterns, Federal Order 5 and Federal Order 7 Bottling Plants graphically demonstrates the concentration of Class I processing and Class I sales distribution competition that exists along the current border separating Order 5 and Order 7. Each circle around a Class I processing plant location represents the normal distribution distance of a fluid milk plant, which we estimate to be approximately 250 miles. As can be seen from the Exhibit, the greatest concentration of processing plants lies along the border of Orders 5 and 7, and thus the greatest amount of sales competition lies along this border. The large magnitude of Class I route disposition from Order 5 plants into the Order 7 area previously testified to is not surprising, given the location of the plants and not coincidentally, the location of the population centers along the marketing order border.

Post-Reform Federal Milk Marketing Orders don't look like, act like or even feel like pre-Reform Orders. They are bigger and much different operational entities than they used to be. Using pre-Reform tests of market commonality are no longer rational comparisons. The 15 million pounds of packaged Class I sales from outside, in a market which has 90 million pounds of total in area sales, may have in the past suggested order consolidation. But what caused the problem was not the fact that it was 16.67 percent from another order area, it is that there were 15 million pounds of sales in an area and the local producers were not getting to share in the proceeds of those Class I sales. In addition, the producers supplying the milk which went into those 15 million pounds weren't getting to share in the Class I proceeds in the rest of the market, where those 15 million pounds were being distributed.

It's the 15 million pounds that's important, not the 16.67 percent. Those same 15 million pounds may still be problematic, but now they are divided by 400 million pounds. It's the same problem, just a substantially different statistic. The same argument goes for producer milk procurement overlap. The problem gets lost in the enormity of the fraction's denominator.

The sheer size of current Federal Order marketing areas makes percentage comparisons of in area sales volume a difficult statistic to quantify as a determining factor in the need to merge order areas. From data contained in Exhibit 48, Item 25, SMA190A and B, Class I Packaged Milk Disposition in the Marketing Areas, Southeast Federal Order 1007 and Appalachian Federal Order 1005, total in area route disposition in the Southeast Order 1007 area approximately 400 million pounds per month. Requiring 20 percent of that total to signal consolidation with another Order would require 80 million pounds of in area route disposition from that other order.

From data contained in Exhibit 48, Item 22, SMA170 Utilization of the Producer Milk 2003, Appalachian Order 1005, Southeast Order 1007, and Combined Federal Order 1007, the average monthly producer milk pooled on the Appalachian Order 1005 is approximately 526 million pounds. Requiring 80 million pounds of Class I route disposition in the Southeast Order 1007 area from the Appalachian Order 1005 pool plants would require 13.9 percent of the producer milk pooled on the Appalachian Order 1005 to he sold on routes in the Southeast Order 1007 area. This simply would be too high a standard to meet, virtually anywhere in the country.

Additionally, using a simple computation of Class I disposition on routes from one order, divided by the total Class I route sales in another order, implies that route sales are evenly distributed across the entire order area. Such is certainly not the case in either the Appalachian Order 1005 or the Southeast Order 1007. The concentration of population along the Appalachian Order 1005 and the Southeast Order 1007 border is greater than the concentration anywhere else in the Appalachian Order 1005 or to the Southeast Order 1007 area.

Three - Consolidation of the Appalachian and Southeast Orders would recognize the extent of the common supply area for the current Appalachian Order 1005 and the Southeast Order 1007. As shown in Exhibit 48, Item 16, SMA150 Location of producers Pooled, Appalachian Order 1005 and Southeast Order 1007, December 2003, for the month of December 2003, this common supply area covered 16 states including Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Tennessee and Virginia within the proposed Southeast marketing area.

The Southern Marketing Agency, Inc. milk budget showed a member milk deficit each and every month of 2003. This was true even while including in the Southern Marketing Agency, Inc. member milk supplies geographically located outside the Appalachian Order 1005 and the Southeast Order 1007 market areas. The monthly milk deficits ranged from approximately 43 million pounds in April to 270 million pounds in August. The monthly demand figures did not include any monthly balancing reserve. It must be noted again that only the orders in the southeast have insufficient in-area milk production to meet Class I needs and a reasonable reserve. As such, the overlap of producer milk procurement is significantly greater for milk located outside the marketing area than for milk located within the marketing area. This is true for two reasons - 1, virtually all of the milk produced within the marketing area is serving demand customers, predominantly Class I and 2, producer qualification requirements of the orders - that is, touch base requirements - limit the movement of milk with the proposed Southeast Order area.

Four - Consolidation of the Appalachian and Southeast Orders would allow producer milk to move more freely between pool plants within the proposed Southeast marketing area. Due to producer and producer milk qualification provisions of the individual orders, milk may not shift one order to the other when needed.

A substantial portion of the milk supply situated within the proposed Southeast Order would become more available for use by pool plants located in either of the two current marketing areas. However, while there is producer milk which moves between and amongst the two orders, the producer qualification criteria of the two orders as they currently exist forms a regulatory barrier to the free and efficient movement of this milk. In effect, the producer touch base requirement for market association and diversion qualification is additive as the two orders exist today. That is, in order to ensure producer qualification on a producer which may be efficiently and effectively pooled on either of the two current orders, the producer touch base requirement in the short supply months is, in actuality, 16 days per month. That is the six days required in the Appalachian Order, plus the 10 days required in the current Southeast Order.

Additionally, the requirement that a producer re-associate with a Federal Order market by being physically delivered to a pool plant limits flexibility and efficiency in milk movements. A producer whose milk can be easily shifted between distributing plants in the current Order 1005 area and the current Order 1007 area is treated in this re-association matter as if the producer was off one of the markets for some reason other than the supply of milk to a nearby Class I plant. For example, a producer located in central Tennessee can equally reach the distributing plants located in either the Nashville area or the Knoxville/Athens/Chattanooga corridor. As the orders exist today, the producers must be assigned to one of the two orders on a monthly or season basis, and if the producer is shifted between the orders, must re-associate with the producer's home order by delivery to a pool plant prior to diversion, even though the producer was supplying a distributing plant only a short distance away and which is likely supplying Class I packaged fluid milk in the area in which the producer is located. This amounts to a regulatory limit on the efficient delivery of producer milk to a common Class I market.

Five - consolidation of the Appalachian and Southeast Orders would resolve a disruptive practice, whereby the Southeast Order 1007 carries some of the balancing cost of supply for the Appalachian Order 1005. Producer milk may shift from the Southeast Order to the Appalachian Order pool in the fall months to partially supply the needs of Appalachian pool plants.

Some milk does shift, but why does more milk not shift between the Appalachian Order 1007 and the Southeast Order 1007 to cover seasonal demand shifts? The answer is there just is not any milk left to move. It's all serving a local demand market.

In order to cover the monthly milk production deficits and provide even a modest reserve, milk must be procured from outside the market. If you're looking for milk supplies you just don't look to a place that is also looking for milk. You look to the places that have some extra. This is another reason why you don't see major milk movements between the Appalachian Order 1005 and Southeast Order 1007.

Six - Consolidation of the Appalachian and Southeast Orders would reflect the membership area of the Southeast Council of Dairy Farmers of America, in that its area of coverage corresponds to the proposed southeast marketing area. As shown in Exhibit 48, Item 28, SMA210, Southern Marketing Agency, Inc. Number of Producers and Producer Milk Deliveries, Appalachian Order 1005 and Southeast Order 1007, December 2003, Dairy Farmers of American Inc. represents 58 percent of the producers and 48.9 percent of the producer milk that would be pooled on the proposed Southeast Federal Order 1007.

We need to erase the line that artificially separates a common milk market. While we realize that the cooperative service area may be a small or secondary point in the consolidation-decisional process the Secretary has used in the past, the way a market is supplied and the industry's view of what constitutes a common milk market must be considered. Perhaps the salient question is where else in the order system is there a single marketing agency in common, like Southern Marketing Agency, Inc., which serves what constitutes the vast majority of two orders as if they are one?

Southern Marketing Agency, Inc. includes as part of its operational area portions of the Central and Southwest Orders, and the unregulated portion of Virginia, in addition to the majority of the Appalachian Order 1005 and Southeast Order 1007. The Greater Southwest Agency encompasses part of the Central Order with the Southwest Order in their operational territory, but in no way takes in even the majority of Order 32. We know of no other circumstance like exists in the southeast with regard to a single marketing agency in common and its supply of milk to a market that is split down the middle by a Federal Order boundary. Rather, the converse seems to be more often true. That is, multiple agencies supplying or pricing milk in a part of what is now a single Order.

Seven - Consolidation of the Appalachian and Southeast Orders would recognize the Southern Marketing Agency, Inc. common pooling of costs and returns across the proposed Southeast marketing area.

As shown in Exhibit 48, Item 27, SMA210 Southern Marketing Agency, Inc., Number of Producers and Producer Milk Deliveries, Appalachian 1005 and Southeast 1007, December 2003, Southern Marketing Agency, Inc. cooperative membership represents 72.31 percent of the number of producers and 66.22 percent of the producer milk that would be pooled on the proposed Southeast Federal Order 1007. Also as shown in Exhibit 48, Item 36, SMA265 Southern

Marketing Agency Milk Pooled, the volume of producer milk included in its pool illustrates the scope of the Southern Marketing Agency. For the year 2003, that volume averaged 951.8 million pounds per month.

Comparison of the Southern Marketing Agency, Inc. with the volume of producer milk expected to be pooled on the proposed Southeast Order 1007, as shown in Exhibit 48, Item 22, SMA170, Utilization of Producer Milk 2003, Appalachian Order 1005, so, 1007 and Combined Federal Order 1007, indicates that the SMA pool for 2003 represents a volume equal to 85.3 percent of the proposed Southeast Order pool.

Finally, Eight, Consolidation of the Appalachian and Southeast Orders as defined in Proposal 1 will, as best we can determine, not result in the regulation of any additional parties under the proposed Southeast Federal Milk Marketing Order 1007.

MR. BESHORE: I could use a break.

THE COURT: Why don't we break for lunch? How long do we need? Take an hour. Let's be back at 1:30.

OFF THE RECORD

THE COURT: …afternoon session of the hearing.

MR. BESHORE: Mr. Hollon is prepared to resume at Page 71 of his prepared statement, Exhibit 47, Your Honor.

THE COURT: Please do.

THE WITNESS: Revised Producer Milk Provisions - Our proposal to modify certain paragraphs of section 1007.13 Producer Milk only converts the touch base requirement of the provision from a number of days production basis, to an equivalent percentage of production basis. In addition, the proposal changes the day of the month on which milk of a dairy farmer shall be eligible for diversion. The latter provision would provide that a dairy farmer shall be eligible for diversion the first day of the month during which the milk of the dairy farmer meets the touch base requirements of o the order. These provisions are deemed necessary in order to accommodate the advent of large dairy farms that ship multiple loads of milk per day. Previous testimony has demonstrated that the distant milk supplies, which provide a significant portion of the markets reserve, originate from farms that on average produce more milk per month than do the producers located within the proposed marketing area.

Under a Federal Milk Marketing Order, it is necessary to designate clearly which milk will be subject to the various provisions of the proposed order. This principle was clearly articulated and applied in the decisions dealing with performance standards held over the past two years in Orders 30, 32, 33, 124 and 135. That order accomplishes this by defining specific terms that describe the persons - that is producers - whose milk will be subject to the uniform prices.

The term producer defines those dairy farmers who constitute the regular source of supply for the order. Producer status under the proposed order is provided for any dairy farmer who produces milk approved by a duly constituted regulatory agency for fluid consumption, as Grade A milk and whose milk is received at a pool plant directly from the producer's farm, or is picked up at the farm by a cooperative as a bulk tank milk handler for delivery to a pool plant. Producer status is also accorded to a dairy farmer who has an established association with the market and whose milk is diverted from a pool plant to a non-pool plant by a cooperative associations or a pool plant operator.

To establish a producer's association with the market, our proposal requires that a dairy farmer's milk must be delivered to a pool plant each month to qualify such dairy farmer's milk for diversion to a non-pool plant.

The producer milk definition, Section 13 of the propose Southeast Federal Order, defines the milk that will be priced and pooled under the order. Specifically, the provision deals with the minimum receipt requirements of the individual producers and with allowable diversions of producer milk pooled on the order.

As previously stated, a Federal order must contain minimum performance standards in order to determine what milk should be pooled and share in the market-wide equalization associated with Class I sales. Our proposed producer milk definition is intended to both assure that milk pooled on the proposed Southeast Federal Order is closely associated with fluid use in order to qualify for pooling, and to assure that each producer who shares in the blend price performs for the market.

The minimum requirements included in our proposal are virtually the same as now contained in the current Southeast Federal Order 1007. However, the touch base requirements have been converted from a days production to a percentage of production basis.

Our proposal would require that each individual producer deliver 15 percent of his production to a pool plant in each of the months of January through June, and 33 percent of his production to a pool plant in each of the other months of July through December. A 15 percent requirement is equivalent to about 4.5 days production while a 33 percent requirement is equivalent to about 10 days production.

This requirement of a dairy farmers' milk being physically delivered to a pool plant is included so as to have some direct association between the producer each month and a pool plant of the proposed Southeast order. Without a provision of this kind, milk of a producer could be pooled without ever having to come to a pool plant. The provision indicates that the milk of that producer is associated with a pool plant of the order at least part of the month, while still providing for the efficient handling of the milk. Milk can be diverted direct from the farm to a non-pool plant for all other times of the month if not needed at the pool plant.

If a producer’s milk is not needed and not associated with the market for at least 33 percent of the producers production during the fall months of July through December, then that producer should not be considered as part of the regular supply of milk for the fluid needs of that order. A 33 percent of production standard is a reasonable minimum requirement for associating an individual producer’s milk with the market-wide pool during the short production months.

First of all, milk is at peak demand on Wednesdays, Thursdays and Fridays of each week. Since every month has at least four Wednesdays, Thursdays and Fridays, a producer’s milk would have to be brought in for only the days on which the Class I needs of the order pool plants are at a peak in order to meet the minimum delivery requirements.

Without delivery requirements for individual producers, it would be far too easy for the operator of a pool plant to associate enough milk with the order pool so that their utilization would always be at the minimum permitted under the order. Marketing conditions in the proposed Southeast area, as reflected by the Class I utilization percentage of orders, as shown in Exhibit 48, Item 33, SMA250, Utilization of Producer Milk, Appalachian and Southeast Federal Orders, 2000, 2001, 2002, and 2003, and Exhibit 48, Item 35, SMA260, Class I utilization and producer Blend Price Comparisons, Appalachian Federal Order 5 and Southeast Federal Order 7, support the 33 percent of production delivery requirement for the short production season. If producers are to be considered as part of the necessary and reserve supply of milk for the order, then 33 percent of their production should be brought in during the fall months. Our experience in the day to day operations of the market would support the proposal that at least 33 percent of a producer's monthly production during the fall months is a reasonable standard in order to be able to share fully in the Class I utilization of the market-wide pool.

Our proposal does not change the total amount of producer milk that may be diverted by the operator of a pool plant, or a cooperative association, to non-pool plants during the month. Our proposal would continue the current provisions of the Southeast Order that limit diversions to non-pool plants to a volume equal to 33 percent of the producer milk that is physically received at pool plants as producer milk of such handler, during the months of July through December, and 50 percent in the other months.

Marketing conditions based on historical trends and previously discussed and shown in Exhibit 48, Item 35, SMA260 Class I Utilization and Producer Blend Price Comparisons, Appalachian Federal Order 5 and Southeast Federal Order 7, indicate that the average Class I utilization of the proposed Southeast Order during most of the these months will probably exceed 67 percent. A high utilization necessitates that the milk pooled on the order during these months be made available for fluid use. These proposed limits in line with historical requirements will permit the efficient disposition of milk that is not required at pool plants for fluid use.

Finally, we have proposed to include in the combined Southeast Order a new provision, 1007.13(d)(6), that provides that milk of a dairy farmer shall be eligible for diversion the first day of the month during which the milk of such dairy farmer is physically received as producer milk at a pool plant and the dairy farmer meets the delivery requirements of the proposed Southeast Order.

This proposed provision is new to the current

Southeast Order. The current Southeast Federal Order 1007 follows a procedure that does not make the dairy farmer eligible for diversion until the first day after the milk of the dairy farmer is received as producer milk at a pool plant, unless the milk of the producer was associated with the Order 7 pool at the end of the previous month.

Application of our proposal across the proposed Southeast Federal Order 1007 will promote efficiency in the delivery of a dairy farmer's milk to the market.

Transportation Credit - As a result of the need to import milk to the Southeast from many areas outside the southeast during certain months of the year, transportation credit provisions were incorporated in the Appalachian Federal Order 1005 and the Southeast Federal Order 1007, as they were in the previous four orders reformed January 1, 2000 into the current Appalachian and Southeast orders.

These provisions provide credits to handlers who incur additional costs to import supplemental milk for fluid use for markets during the short production months of July through December. The provisions restrict the use of credits by handlers to milk received from producers and plants located outside of the marketing area. The credits are also restricted to milk received form producers who supply the markets only during the short season and are not applicable to milk of producers who supply the market throughout the year. In addition, producers currently located within either of the Order 5 and Order 7 marketing areas are ineligible for transportation credits on either order, that is each Order 5 and 7 recognizes producers located within the marketing area of the other order to be a part of the regular supply for the southeast region. In this provision, the Secretary has already established the inextricable supply relationship between Orders 5 and 7, and the commonality of supply for the orders. This concept is not new. Its underlying rationale is discussed in the decision that instituted transportation credits in 1996. Proposed Rule 7 CFR parts 1005, 1007, 1011 and 1046 (Docket Number AO-388-A9-Et al; DA-96-08) The Secretary has, through his recognition of the southeast as a common market with regard to supply, signaled the need for the consolidation of the two orders. Proposal Number 1 simply extends that recognition to provide a common uniform price and terms of trade for all producers delivering to the market and a common set of producer qualification requirements for the market. Proponent cooperatives propose that the transportation credit provisions be retained in the proposed Southeast Federal Order, but modified to reflect the consolidation of the two orders. Those modifications, as outlined in our proposed revisions of Section 1007.82, are as follows:

First, revise paragraph C-1 to remove the exception "except Federal Order 1005". This is necessary since all of the Federal Order 1005 area would be merged into the new Southeast Federal Order 1007 marketing area. This is a conforming change and the exception is no longer necessary or appropriate.

Second, revise paragraph C-2-ii to incorporate a temporary proviso which would provide for the equitable implementation of the transportation credits under the proposed Southeast Federal Order 1007, should the effective date of the merger be after the month of January. The temporary provision would provide that any dairy farmer who qualified for payments under the provisions of the former Appalachian Federal Order 1005 or the former Southeast Federal Order 1007 shall continue to qualify under these provisions of the consolidated Southeast Order through the following January.

Absent this provision, some producers who qualify for transportation credits under the current Appalachian Federal Order 1005, and who had the previous year qualified for such payments under the current Southeast Federal Order 1007, would not be eligible, pursuant to this section, to receive transportation credit payments under the proposed Southeast Federal Order 1007.

Adoption of this provision would not be necessary should the consolidated order become effective on January 1 of any year. In that regard, January 1, 2005 or sooner would be an acceptable date to the proponent cooperatives for the implementation of the consolidated Southeast Federal Order 1007.

Third, revise paragraph (c)(2)(iii) to remove the words “or the marketing area of Federal Order 1005”. This again is necessary since all of the Federal Order 1005 area would be merged into the new Southeast Federal Order 1007 marketing area. This is a conforming change and the exclusion is no longer appropriate.

Southern Marketing Agency, Inc. offers the following modification to Proposal Number 1. In section 1007.81, amend the current maximum rate of assessment for the Transportation Credit Balancing fund from the current maximum of 7 cents per hundredweight to 10 cents per hundredweight. There is substantial evidence in support of this modification and amendment.

The current maximum rate of 7 cents per hundredweight, which has been the rate assessed by the Market Administrator since the current Southeast Federal Order 1007 was formed, has been insufficient in the current Southeast Federal Order 1007 to generate funds necessary to cover the claimed Transportation credits. Since the current Southeast Federal Order 1007 was formed under Order

Reform in 2000, only in that year were the collections by the Market Administrator sufficient to cover the claimed Transportation Credits. In 2001, 2002 and 2003, the assessments generated were substantially short of the amount of transportation credits claimed. According to information published by the Market Administrator in the monthly Southeast Order Bulletin, claims were made for transportation credits in the current Southeast Federal Order 1007 which exceeded the available fund balance, by the amounts of 1,096,064 dollars in 2001, 1,078,292 dollars in 2002, and 3,078,667 in 2003. The anticipated continued decline of milk production in the southeastern region, coupled with expected continued increases in demand in region, suggests the amount of supplemental milk - that is, milk for which a transportation credit can be claimed - will continue to increase. As such, the deficit in the Southeast Order’s Transportation Credit Balancing fund will likely continue and will likely worsen.

The maximum Transportation Credit Balancing fund assessment rate of six and a half cents per hundredweight in the current Appalachian Federal Order 1005 has been sufficient to cover all claims for Transportation credits -- at this point in my statement, I am scratching out the words “to day” and insert the words “until December 2003, when a proration was necessary”. In fact, the Market

Administrator waived the Transportation Credit Balancing fund assessment two months in each year of 2001, 2002 and 2003. However, in 2003 the balance in the Transportation Credit fund for the Appalachian Federal Order 1005 declined such that it neared the amount of claimed Transportation Credits in the latter months of the year. It is anticipated that the Market Administrator will not waive the assessment in 2004 due to the substantially lowered Transportation Credit Balancing fund balance. According to Market Administrator statistics, the Appalachian Federal Order 1005 Transportation Credit Balancing fund balance at the end of 2003 was virtually zero.

Exhibit 48, Item 37, SMA280 Transportation Credit Analysis shows hypothetically, based on information published by the Market Administrators for the Southeast Federal Order 1007 and Appalachian Federal Order 1005, how the balances in a merged Transportation Credit Balancing fund for the period of 2000-2003 would have appeared. The hypothetical calculation also presumes that a merged Transportation Credit Balancing fund would have carried an assessment rate of 7 cents per hundredweight, the current maximum in the Southeast Federal Order 1007, and would not have waived the assessment any month in the four year period.

As can be seen from the exhibit, balances in a merged Transportation Credit Balancing fund would have been sufficient to pay all claims in the 2000, 2001, 2002. However even a merged fund, with assessments set at the current maximum of 7 cents per hundredweight for four years, would have been insufficient to pay all the Transportation Credits claimed in 2003. As can be seen, neither the current assessment rate of 7 cents per hundredweight in Order 7, nor the current assessment rate of 6.5 cents per hundredweight in Order 5 is sufficient to cover the claimed credits.

The calculated hypothetical unpaid Transportation Credit claims in the merged fund would have been 2,889,942 dollars in 2003. The total Class I producer milk of the combined Southeast and Appalachian Orders during 2003 was 9,070,871,486 pounds, meaning in order to cover the shortage in the fund balance, the assessment rate would have had to be increased by 3.2 cents per hundredweight in 2003 for a necessary assessment rate of 10.32 cents per hundredweight.

The 3,078,667 dollars in unpaid Transportation Credits during 2003 in the current Southeast Federal Order 1007 would have necessitated an assessment rate of 13.665 per hundredweight in that order alone, which is derived by dividing the unpaid credits amount by the 4,628,998,057 pounds of Class I producer milk pooled during 2003 in the

Southeast Federal Order 1007, and adding to the assessed rate of 7 cents per hundredweight. In actuality, the assessments in the current Southeast Federal Order 1007 were barely sufficient to cover one half the claimed Transportation Credit. Inasmuch as the balance in the Order 5 Transportation Credit Balancing fund at the end of 2003 was in practical terms zero, the effective annual Transportation Credit Balancing fund assessment rate in the Appalachian Federal Order 1007 of .054 was inadequate. A balance of 1.7 million dollars was carried over into the Order 5 Transportation Credit Balancing fund from December 2002, accumulated from previous years. According to Market Administrator statistics, 4.1 million dollars was paid in 2003 in Transportation Credits, which represents 9.26 per hundredweight when divided by the 4.44 billion pounds of Class I producer milk pooled on Order 5 during 2003.

It is indisputable that the southeast region needs milk from outside the region to supply its Class I needs. The Transportation Credit assessment helps shift the cost of the securing those needed supplies onto the proper market segment, the consumers of Class I products. In order to maintain equity among market participants, an appropriate Transportation Credit Balancing fund system must be maintained. There are several options for correcting the current inadequacies of the Transportation Credit Balancing fund system, but only one option will correct all of the current inequities.

The assessment rate for the Transportation Credit Balancing fund in the current Southeast Federal Order 1007 must be increased in order to cover the claimed but unpaid Transportation Credits. In order to fully fund the Transportation Credit Balancing fund, the assessment rate must be doubled from its current 7 cents per hundredweight maximum. While this increase in assessments would theoretically generate enough funds to cover the claimed Transportation Credits, it would create a Class I price alignment issue with the current Appalachian Federal Order 1005. In effect, Class I processors located in the same Class I price zone as described in Section 1000.51 would in actuality have unequal Class I pricing. Such is currently the case at the difference between the current Appalachian Federal Order 1005 assessment rate of 6.5 cents per hundredweight and the current Southeast Federal Order 1007 assessment rate of 7 cents per hundredweight, not counting the difference in months when the Appalachian Federal Order 1005 assessment has been waived. The current nominal difference of a half a cent per hundredweight does not represent a material difference, but nonetheless any difference is not truly defensible. Doubling the assessment rate in the current Southeast Federal Order 1007 would create an effective Class I price difference between the orders on the magnitude of 5 to 6 cents per hundredweight, or nearly half a cent per gallon. A difference of this size would certainly create competitive advantages and disadvantages between handlers when their stated Class I price is supposed to be the same.

THE COURT: Let's take a short recess.

OFF THE RECORD

THE COURT: Continue.

THE WITNESS: Alternatively, the current maximum rates in the two orders can be maintained, which would preserve existing level of Class I price alignment between the orders, but would perpetuate the inequitable differences to market suppliers in procurement costs on distant milk. Since the current Southeast Federal Order 1007 Transportation Credit Balancing fund can only fund approximately half of the claimed credits, the cost of hauling distant supplies for the Southeast Federal Order 1007 is substantially greater than for the Appalachian Federal Order 1005.

The only method available to rid the market of all of these inequities is to merge the two Transportation Credit Balancing funds. A common rate of assessment will preserve Class I price alignment, and a common pay-out rate will preserve equity in the costs of procuring supplemental supplies. Merging the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 and combining the Transportation Credit Balancing funds of the two orders will accomplish all of these goals.

Except for the application of a uniform transportation rate of up to 10 cents per hundredweight, which is an increase of three cents per hundredweight for the current Southeast Federal Order 1007 handlers, and three and one half of one cent per hundredweight for the current Appalachian Federal Order 1005 handlers, the Southern Marketing Agency, Inc. proposed transportation credit provisions are identical to those contained in the current Appalachian Federal Order 1005 and Southeast Federal Order 1007 orders.

Agency proposed transportation credit provisions are identical to those contained in the current Appalachian Federal Order 1005 and the Southeast Federal Order 1007 Orders. Additionally, the Southern Marketing Agency, offers the following modification to the Transportation and Credit Balancing Fund Provisions. That would be to strike the current 1007.82(c)(b)(yy) and replace it with the following language: *the milk of a dairy farmer who is not received as producer milk for not more than 50% of the production of the dairy farmer during the immediately preceding months of March and April. The percentage amount specified in this section may be decreased or increased by* *the market administrator if the market administrator finds that such revision is necessary to assure orderly marketing and the efficient handling of milk in the marketing area. Before making such finding, the market administrator shall investigate the need for the revision, either on the market administrator's own initiative or at the request of interested parties. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views and arguments. Any decision to revise an applicable percentage, must be issued in writing, at least one day before the effective date. Due to the location and distance of the supplemental milk supplies associated with the Southeast and the coordination of those supplies into and out of the market, a change is necessary to the definition of which producers is eligible to receive transportation credits. Specifically, we propose that any producer that is located outside the marketing area of the proposed Southeast Order would be eligible for transportation credits if that producer was not a producer for more than 50% of the producer's farm milk production during the months of March and April of each year. More and more milk from outside the marketing area is needed to supply Class I -- to supply Class I needs of the market, more and more and more months* *of each year. The months in which surplus milk is available in the Southeast from production within the marketing area has declined, and milk must be imported in the Southeast to meet Class I demand most all of the months -- most all months each year. Milk imports into the Southeast from distant sources have become commonplace in January, February, May and June. As such, deliveries of milk by dairy farmers located outside the marketing area as producer milk on the order, should not disqualify a dairy farmer from receiving transportation credit balancing funds in the following July through December period. The Order should continue to limit transportation credit balancing funds to payments from producers who do not constitute a year-round supply of milk for the order. Accordingly, a producer's milk would be eligible to receive transportation credit balancing funds payments if 50% or more of the dairy farmer's milk was not producer milk in the months of April and May. Further, we believe that the market administrator should be given discretionary authority to adjust the 50% limit based on the supply and demand for milk in the area. The market administrator should have the authority warranted to adjust the requirement to zero percent. The various Exhibits entered in this hearing clearly demonstrate the expansion of the milk shed for the Southeast, the decrease in production within the Southeast,* *and the increase in need for milk produced outside the marketing area to meet Class I demand.* This proposed modification of the Transportation Credit Balancing Fund Payment Provisions are necessary and should be adopted. Proponent cooperatives recommend that the proposed Southeast Federal Order retain those provisions of the current Appalachian Order 1005, which provide for the pooling of a supply plant located by a cooperative association, where such plant is located outside the marketing area, but within the state of Virginia. Several of the dairy product manufacturing plants in the southeast are operated by cooperative associations as balancing plants. These balancing plants qualify for pooling based on their performance of the cooperative association not upon shipments from the plant alone. A balancing plant may qualify for pool plant status based upon shipments directly from producer's farms, as well as shipments from the plant. To qualify as a balancing plant, the plant generally must be located within the orderer's marketing area. This requirement assures that milk pooled through the balancing plant is economically available to processors of fluid milk if needed. However, in the case of the current Appalachian Order, a cooperative balance plant also may be located in the state of Virginia. This provision was contained in the previous Carolina Federal Order and was continued in the reformed Appalachian Order. A primary mission of Southern Marketing Agency, Inc., is to provide milk to handlers for fluid use and to efficiently dispose of milk when not needed for fluid use. The proposed Southeast Order Provision should accommodate and encourage efficient milk handling practices. Therefore, the proposed provisions of Section 1007.7(d) should be included in the proposed Southeast Federal Order. Proponent cooperatives also recommend that the proposed Southeast Federal Order retain those provisions of the current Appalachian Order 1005, which provide for the nonpool status of a portion of a pool plant designated as a nonpool plant, that is physically separate and operating separately from the pool portion of such plant. In the current Appalachian Federal Order 1005, a pool supply plant does not include any portion of a plant that is not approved for handling Grade A milk and that is physically separated from a portion of a plant that has such approval. While some inspection agencies render only one type of approval for an operation to accommodate those areas where split operations are permitted, the current Appalachian Federal Order 1005 provide for a physically separated portion of a plant as a nonpool plant. Proponent cooperatives believe that the inclusion of this provision in the proposed Southeast Order would be appropriate. Proposal II, Consolidation of Funds: to complete the consolidation of the Appalachian Federal Order 1005 and the Southeast Federal Order 1007, effectively and equitably, the reserve balances and the marketing services, administrative expense, producer settlement funds, and the Transportation Credit Balancing Funds that have resulted under the individual orders, should be combined. The marketing area the proposed Southeast Order as described in proposal number one is the same territory now covered by the two individual Orders. Because of this, the handlers and producers serving the milk needs of the individual Appalachian Federal Order market and the Southeast Federal Order market, will continue to furnish the milk needs of the proposed Southeast Federal Order market. In this regard, the reserve balances in the funds that have accumulated under the two individual Orders, should be combined into the appropriate fund established for the proposed Southeast Federal Order. Any liabilities of such funds, under the individual Orders, would be paid from the appropriate newly established fund of the proposed Southeast Federal Order. Similarly, obligations that are due the separate funds under the individual Orders, would be paid to the appropriate combined fund of the proposed Southeast Federal Order. The money accumulated in the market service funds of the individual Orders, is that which producers for whom the market administrators are performing such services if paid. Since the marketing area of the proposed Southeast Federal Order encompasses the territory covered by the two individual Orders, the producers who have contributed to the marketing service funds of the individual Orders are expected to continue supplying milk for the proposed Southeast Federal Order. Since marketing service programs will be continued for those producers under the proposed Southeast Federal Order, it would be appropriate to combine the reserve balances in the marketing service fund of the proposed Southeast Federal Order. The money paid to the administrative expense fund in each handler's proportionate share of the cost of administering the Order. Handlers regulated under the two individual Orders will continue to be regulated under the proposed Southeast Federal Order. In view of this, it would be unnecessary -- it would be an unnecessary administrative and financial burden to allocate the reserve funds of the two individual Order back to the handlers and then accumulate an adequate reserve for the proposed Southeast Federal Order. It would be equitable and more efficient to combine the remaining administrative monies accumulated under the two individual Orders in the same manner as the marketing areas are combined. Likewise, the producer settlement fund balances of the two individual Orders should be combined. They should be combined on the same basis as the two individual marketing areas are proposed to be consolidated. This will enable the producer settlement funds of the proposed Southeast Consolidated Order to continue without interruption. The producers currently supplying the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 are expected to supply milk for the proposed Southeast Consolidated Order, thus, monetary balances and the producer settlement funds of the two individual Orders now would be reflected in the pay prices of the producers who will benefit from the proposed Southeast Federal Order. The combined fund for the proposed Southeast Federal Order would also serve as a contingency fund from which money would be available to meet obligations resulting from audit adjustments and otherwise occurring under the two individual Orders. To complete the consolidation process, the reserve balances in the Transportation Credit Balancing Funds that are in effect under the two individual Orders, should also be consolidated. The reserve balances in the Transportation Credit Balancing Funds of the Appalachian Federal Order 1005 and the Southeast Federal Order 1007 should be consolidated into a newly established Transportation Credit Balancing Fund for the proposed consolidated Southeast Federal Order. This procedure will enable the transportation credits to continue, without interruption, under the proposed consolidated Southeast Federal Order.

SUMMARY PROPOSALS ONE AND TWO: In summary, based on the record we have established, the proponent cooperatives strongly urge the Secretary to merge the Appalachian Federal Order 1005 and the Southeast Federal Order 1007, as proposed in Proposals 1 and 2. We believe that the record we have provided will clearly -- clearly demonstrates the need for this action.

PROPOSAL 3, Expand the proposed Southeast marketing area in the state of Virginia. The Southern Marketing Agency, Inc., submitted the additional proposal number 3 for consideration at this hearing, to consolidate the current Appalachian and Southeast Federal Marketing Orders. In Part 1007.2, southeast marketing area, add the following counties and cities to those already listed in proposal one under the subheading *Virginia counties and cities:* In counties, add: Allegheny, Amherst, Augusta, Bathe, Bedford, Bland, Botetourt, Campbell, Carroll, Craig, Floyd, Franklin, Giles, Grayson, Henry, Highland, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Rockingham, Smyth, and Wythe. In cities, add: Bedford, Buena Vista, Clinton Forge, Covington, Danville, Galax, Harrisonburg, Lexington, Lynchburg, Martinsville, Radford, Roanoke, Salem and Staunton. Exhibit 48, Item 38, SMA Proposal -- or SMA 300, Proposal No. 3, Area and

Exhibit 48, Item 39, SMA 310, Proposal No. 2, Plants, are maps depicting the proposed addition of additional marketing area and the location of plants within the proposed additional marketing area. This proposal will have the effect of locking in as fully regulated plants under the proposed Southeast Federal Marketing Order, the fluid milk distributing plants which are current Appalachian Order plants located at Lynchburg, Virginia, the Westover, Kroger Company Plant, The Westover Dairy, Kroger Company Plant, and the Roanoke Valley Rich Dairy National Holdings -- National Dairy Holdings Plant. Both the Lynchburg and Roanoke plants have been pool plant, pool distributed plants, under the Appalachian Order, since the Order's inception in January of 2000. Lynchburg and Roanoke are in the southern portion of the state of Virginia, very close in proximity to the current Appalachian marketing area. The inclusion of the southern Virginia counties, contiguous to the Appalachian Order, will solidify and perpetuate the regulation of the Lynchburg and Roanoke plants in the proposed Southeast Order. Further, the inclusion of additional market areas northward up the Shenandoah Valley, is expected to regulate as pool distributing plants, also in the proposed Southeast Order, the plant located at Mount Crawford, Virginia. This plant is owned and operated by Dean Foods, Company, Mount

Crawford Division, Morning Star Foods. The Mount Crawford plant is a fully regulated distributing plant under the Northeast Federal Marketing Order, but since the Northeast Order's inception in January of 2000 has alternated between partially regulated and fully regulated status. During the month of October 2003, 79 producer members of Dairy Farmers of America, Inc., and 14 producer members of Land-O-Lakes, Inc., and 6 producer members of Maryland Virginia Milk Producers Cooperative Association, Inc., delivered milk to the Mount Crawford plant. To the best of our knowledge and belief, no other regulatory status -- the regulatory status of no other plant would be impacted by the inclusion of the proposed Virginia counties and cities. In support of this additional proposal regarding expansion of the proposed Southeast marketing area, proponent cooperatives make the following points:

1. The regulation of the Lynchburg and Roanoke plants should be continued in the proposed Southeast Order, without regard to the location of Class I route disposition from those plants. The addition of marketing area in the southern Virginia counties nearby and adjacent to the current Appalachian Order marketing area, will perpetuate the regulation of these two plants as current. That is, regulated in the southern orders as opposed to possible regulation of some other Federal Order. The Lynchburg and

Roanoke plants compete for a milk supply with plants located further south. That is, North and South Carolina plants, and to insure an adequate supply for the Lynchburg and Roanoke plants, the producers delivering to those plants must receive a blend price not less than that generated by the proposed Southeast Order. It is our understanding from the operator of the plant, that some possibility exists for the Lynchburg plant to distribute a polarity of its sales -- of its Class I route disposition in the Order 1 area, thus becoming a fully regulated distributing plant under that Order. Significant economic harm could come to the producers delivering to the Lynchburg plant if such were to occur. Additionally, the Lynchburg plant would be significantly disadvantaged in its procurement of milk if the blend price returned to producers delivering milk to that plant were in Order 1 blend price when the plant is in direct competition for producer milk supplies with plants regulated in the proposed Southeast Order. In order to maintain its raw milk supply, the Lynchburg plant would be forced to pay additional over order prices, not less than the difference between the Order 1 blend price and proposed Southeast Order 7 blend prices, resulting in an unequal and an uncompetitive Class I pricing to the Lynchburg plant. The Southern Marketing Agency, Inc., additional proposal seeks to preserve the regulatory status of the Lynchburg and Roanoke plants and avoid a disruptive and disorderly condition of blend price and regulatory differences.

2. In order for the Mount Crawford, Virginia, plant to procure an adequate supply of milk, producers delivering to that plant must receive a blend price equivalent to the blend price generated under Agency 7 Order. The milk supply located near the Mount Crawford, Virginia, plant is an attractive source of supply for plants located in southern Virginia, which are fully regulated on the Appalachian Order, as well as plants located in North and South Carolina and eastern Tennessee. In order to maintain this raw supply, the Mount Crawford plant must pay additional over order prices not less than the difference between the order 1 blend price and current order 5 blend prices, resulting in unequal class 1 prices to the plant versus plants nearby, without regard to whether those plants are regulated under the Appalachian or Northeast Orders.

3. The Mount Crawford, Virginia, plant has alternated between fully regulated and partially regulated status under the Northeast Order since the Order began in January of 2000. In the 48 months since the Northeast Order was promulgated, the Mount Crawford plant has been fully regulated 30 months and partially regulated 18

months. During 2002, the Mount Crawford plant was fully regulated during the months of January, February, June, July, November and December; and partially regulated the other months. The seemingly random change in regulatory status of the plant causes blend price disruptions to the producers delivered to the plant, as well as Class I pricing issues on the plant's route disposition outside of federally regulated areas, when the plant does not qualify as a fully regulated plant. A plant constantly switching into and out of fully regulated status is disorderly on its face and in the case of the Northeast Order, this condition is exacerbated by that Order's dairy farmer brother market's provision. Significant and substantial financial harm can come to producers supplying a plant that alternates between fully and partially regulated status under the Northeast Order because producers may fail to qualify for pooling depending on the month or months in which the plant is regulated or partially regulated. Producers delivering to the plant would be harmed through no fault of their own. The location of the Mount Crawford plant, outside the Northeast Order marketing area, makes the possibility of continued regulatory change very real. Regulating the Mount Crawford plant permanently under the proposed Southeast Order, by including the plant in the proposed Order's marketing area, would eliminate this market disruption and insure the fair and equitable treatment of the producers delivering to the plant regardless of the changes in location of the Class I route disposition from the plant. Regulating the Mount Crawford plant in the proposed Southeast Order would offer cooperative suppliers to plant the opportunity to maximize logistical efficiency in supplying the plant, as well as the broader southeast market. Mount Crawford is located on Interstate 81, a major north/south artery to the southeast for out-of-area milk supplies from the mid-Atlantic area. In the short supply months, milk from the middle atlantic areas is drawn south to supply the critically milk fluid -- fluid milk market currently covered by the Appalachian and Southeast Orders. Conversely, as milk is seasonally surplussed in the southeast, milk is sent back north to the surplus manufacturing plants in the middle Atlantic area. Local milk and out-of-market milk are dominoed, rolling in and out as seasonal shortages and surpluses come and go. The Mount Crawford plant is strategically located to service to the first domino able plant in the chain of milk supply for the southeast. Dominoing milk as seasonal supply/demand changes is the most efficient and cost effective system for balancing the fluid milk market. The regulation of the Mount Crawford plant as a part-time Order 1 plant, coupled with the Order 1 dairy farm for other markets provision, makes us logistical efficiency unattainable. Regulation of the Mount Crawford plant permanently by the proposed Southeast Order would allow the cooperative suppliers of the plant to take advantage of the logistical and operational efficiencies in supplying both the Mount Crawford plant, as well as the larger market.

The Lynchburg, Mount Crawford, and Roanoke, Virginia, plants, are all currently fully regulated under a Federal Milk Marketing Order. The Southern Marketing Agency, Inc., additional proposal would perpetuate the regulation of the two Appalachian Order plants in the proposed Southeast Order and fix the regulation of the Mount Crawford plant as a fully regulated plant under the proposed Southeast Order. As such, the impact of the Southern Marketing Agency, Inc., additional proposals on the Virginia State Milk Commission and Virginia base holders and producers would be insignificant. If there were any impact on Virginia base holders and producers, the impact should be positive, reflecting the likely higher regulated average blend price at the Mount Crawford plant under the proposed Southeast Order versus the Northeast Order; and

6. The current Appalachian Order and the new Southeast Order, as proposed by the Southern Marketing Agency, Inc., regulates a cooperative operating supply plant located in the state of Virginia as if the plant were

located in the marketing area. The typical Federal Order provision regarding cooperative supply plants requires the location within the marketing area. Since the promulgation of the Carolina Federal Order, a predecessor Order to the current Appalachian Order, the Secretary has recognized Virginia and the milk supply located therein to be an integral -- to be integral to the supply of milk and marketing of milk in the southeast. The Southern Marketing Agency, Inc., in additional proposal regarding the pooling of three fluid milk distributing plants located in the state of Virginia, simply extends the Secretary's previous recognition of Virginia and its milk marketing association with the south from cooperative operative supply plants to fluid milk distributing plants.

Summary Proposal Number 3: In summary, based on the record clearly established, the proponent cooperatives urge the Secretary to expand the proposed Southeast Federal Order 1007, as proposed in Southern Marketing Agency, Inc., Proposal Number 3. We believe that the record clearly demonstrates the need for this further action.

Proposal Number 4: Expand Proposals Number 1 and 2 to include two additional counties and two additional cities in the state of Virginia. Proponent cooperatives are not opposed to the adoption of Proposal Number 4, however, we believe that the purpose for the adoption of

Proposal Number 4 would be achieved by the adoption of Proposal -- of the Southern Marketing Agency's Proposal Number 3, and therefore, the adoption of Proposal Number 4 would be redundant and unnecessary.

With respect to Proposals Numbers 1 through 3, we urge the Secretary to adopt our proposals as soon as possible. Thank you.

MR. BESHORE: Mr. Hollon, I have just a few additional questions for you and then we'll make you available for questions by other parties.

CONTINUED EXAMINATION

BY MR. BESHORE:

Q. First of all, a couple of small -- clean up, matters, corrections or clarifications. If you turn to page 31 of your prepared statement, Exhibit 47. There was an Exhibit reference, on the second line of text, which you did not have present with you at the time you read the statement.

A. Yes.

Q. Do you see what I'm referring to?

A. I do.

Q. Can you fill that in at this time?

A. It's -- it should be Exhibits 10 for the Appalachian Order and Exhibit 41 for the Southeast Order.

Q. Okay and those are the Market Administrator

Exhibits that list the distributing plants for December, 2003?

A. Those are the Annual Summary Statistics, which one of the tables in that Exhibit list those.

Q. Okay. Would you turn to page 61 of Exhibit 47.

A. Okay.

Q. The last two lines, you -- it's, as printed, it says "derived -- starting in the parenthetical phrase "derived by multiplying with 0453" -- it says per hundred weight, and that's how you read it, and I think that is not correct. Can you?

A. That should be percent.

Q. Okay. So instead of dollar signs it's what 0453% times the base zone differential of $3.10?

A. That is correct.

Q. Okay. Now throughout your prepared testimony, you referred to Exhibit 48, which is the 7 Exhibits that you previously discussed, and you referenced particular items within Exhibit 48 by number, and most frequently also by title. Is it possible that there may be minor differences in the exact wording in the title of the Exhibit 48 items and the title that you stated in Exhibit 47?

A. Yes, from time to time, there may be some differences in wording but the number should predominate and should always be, you know, consistent.

Q. Okay. So you've referred to the right item number, even if it's possible there was some slight differences in wording of the title as you referenced it.

A. That is correct.

Q. Okay. Now the -- you've identified, at length and with great detail, a number of current marketing problems within the southeast marketing area for which you have recommended the adoption of Proposal Number 1, and 2 to merge the areas and 3 to extend them into a number of counties and cities in the state of Virginia. Has the Southern Marketing Agency considered the possibility that the marketing problems could be solved by regulatory changes other than merging the Orders?

A. We have explored various alternatives. We've been at this process for some time and there are some that we've considered but in the main, they just simply didn't do the job completely and in some cases, even some of the logic, you know, wasn't -- wasn't complete. One of those --

Q. What alternatives have you considered, non-merger alternatives did you explore?

A. There were, I guess two worth expounding on was one was that in the terms of the producer qualification, that's a problem that gives us some logistical and cost concerns and those are fairly big concerns; and so one possibility might be to have reciprocal producer qualification provisions. So if a farm in Order 7 delivers to a farm in Order 5 or if a farm in Order 5 delivers to a farm in Order 7 --

Q. Delivers to a plant in Order 5 or Order 7.

A. That's correct. Delivers to a plant in the other Order -- that qualification might count for the order in which the farm is located in, but that -- first of all, that kind of flies in the face of what a performance standard really is and that's designed to determine who gets to -- what milk should be associated with the pool. You do get some benefits of improved logistics and you do get some benefits from making it a little bit easier to run your day to day business. Some of the problems are you would probably set up a whole new scheme or opportunistic marketers to look at that provision and see if there were some ways to do something about it. It wouldn't do much in terms of dealing with blend price differences. It wouldn't get rid of some of those equity issues that we've debated, and it would also -- you would also create then another new list of administrative detail you'd have to keep up with to make sure you didn't pool twice in some order and that might eventually cause you some audit problems down the road. So we explored that alternative, thought that might be a potential option, but rejected it because it didn't do the job completely and came -- brought it's own set of problems.

Q. Okay. Have you explored other regulatory changes that might address some of the problems without merging the Orders in total?

A. The other main area would be in the area of the transportation pool and those were pretty much mentioned in the statement, but you know, certainly could consider for example, raising either of the assessment rates to enough to equal the deficit; but as we pointed out in our direct statement, that would magnify greatly the difference in prices and cost between the two and again, it wouldn't completely do the job and it would still leave you with both handler and producer price differences that, you know, could effect milk procurement and then again, it wouldn't address some of the other issues like dealing with distant milk and dealing with blend price differences and handles cost differences. So while again, we looked at it, we tried to think of some ways to make it work, it did not solve the problem completely and raised some new problems.

Q. Okay. Is it -- would it be fair to say that Southern Marketing Agency, prior to or in the course of developing its proposals for this hearing, considered all possible regulatory changes that you could conceive of that might solve these problems without a full Order merger?

A. We certainly, you know, chewed through many, looked at the alternatives, there were probably some that we didn't think about, but we tried to work our way down. We had numerous discussions within the agency, back and forth with the Federal Order folks, bouncing ideas back and forth, and still came down to the conclusion that the proposal that we've made is the best choice.

Q. Okay. Thank you.

MR. BESHORE: With the understanding previously noted, that on the producer handler issues, Mr. Hollon will testify again, with a separate statement, he is available for cross examination.

THE COURT: Let's take our fifteen minute recess for the afternoon. Let's do that now.

(RECESS)

MR. ENGLISH: Thank you, Your Honor. My name is Charles English and I represent Dean Foods and Prairie Farms.

EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon, Mr. Hollon.

A. Good afternoon, Mr. English.

Q. Let's start with maybe mort at the end at the end of your testimony, and the technical issues and then work my way back into sort of the policy questions.

A. Okay.

Q. Starting with the discussion of supply plants. Would I be correct that the supply plant that presently in Virginia, but outside the marketing area, is located in Strauss burg, Virginia?

A. Yes.

Q. So in that instance, your specifically thinking about an existing facility, not a prospective facility?

A. Yes.

Q. To your knowledge, that is the only facility that would qualify under that proposed provision for the combined Order. Correct?

A. Correct.

Q. And it is already a supply plant under Order 5 today?

A. Yes.

Q. Now as to your proposal, with respect to split plants, that provision also exists today in Order 5?

A. Is it 5 or 7 or both, yes.

Q. Did it also exist in Order 7?

A. I think the answer is yes also. I'd have to look, but I think the answer is yes.

Q. Okay. Are any of the supply plants today, on Orders 5 or 7, split plants?

A. Yes. There are split plants that accommodate Grade B milk that still are in the area in Missouri and Arkansas.

Q. And are those the plants that you intend would be allowed to continue?

A. Yes. That's what led to the statements to including them.

Q. Are you, do you remember or are you familiar with some of the other proceedings since that Order reform, in particular, in my recollection, Order 33, where we have discussed the whys and wherefores and wisdom of split plants?

A. I am.

Q. And it's true that at least in those instances, as to those marketing conditions, a number in the industry believed it would be a good idea to eliminate the provision. Correct?

A. That's correct.

Q. Is it your position that the difference is in this area that there are still sufficient supplies of grade B that require or need a split plant designation?

A. That is correct. I raised the same questioning that you are raising as we discussed it, and you have -- that was the answer that came back, was that there are some plants where there is grade B milk and so it was needed to accommodate them.

Q. Do you have any concern that, without for instance, a grandfather clause, that additional plants could take on split plant status in the future and then some of the issues that we discussed as potential abuses in Order 33 could arise?

A. Yes. That question was back and forth, but we decided as the SMA group to take this position.

Q. But you recognize, as you did in Order 33, that by permitting a split plant provision, you do, in essence, permit the opportunity to abuse?

A. Yes. Yes.

Q. Okay. Thank you. Continuing on that topic somewhat for a moment, but now sort of details, your list in Exhibit -- well, not your list, I apologize. The list in response to the request of Southern Marketing Agency found in Exhibit 30, I don't know if you have that with you. That is the list of nonpool plants located in the Appalachian Marketing Area February 5. That list includes only one plant that is a powder plant, Blue Grass Dairy and Food in Springfield, Kentucky, as nonpool manufacturing. Is that correct?

A. Yes.

Q. You would agree with me that that is not the only nonpool plant processing powder pooled on Order 5.

Correct?

A. Can you give me some more detail?

Q. Okay. The list in Exhibit 30 is nonpool plants physically in the marketing area. Correct?

A. Yes.

Q. You agree, do you not, that both in the instances of Order 5 and Order 7, there are nonpool plants to which pool plant may be diverted at some point in the year, that is nonetheless priced under Federal Order 5 or Order 7?

A. I think the answer is yes, and I think there is milk supplies that are pooled that get diverted to nonpool plants outside the area where there is some powder processing. So, yes.

Q. And for instance, we know that at least in some months, in excess of 10% of Order 5 milk is Class IV, correct?

A. Yes.

Q. And Class IV is nonfat dry milk and butter. Correct?

A. Yes.

Q. And surely Blue Grass Dairy and Food can't be the --

A. That is correct, that's correct.

Q. -- I'm sorry, I apologize, if you could answer after I finish the question. I realize you know where I'm going. We've been doing this long enough Mr. Hollon, but let me finish --

A. Yes, I'm sorry.

Q. -- the question, and my question was, you would agree with me that Blue Grass Dairy and Food can not possibly be the entity that is processing all the powder that is Class IV on Order 5?

A. That is correct.

Q. Indeed, most of that powder is most likely processed somewhere else. Correct?

A. Yes.

Q. Okay. Would, for Order 5, that powder be processed, for instance, in nonpool plants located in Pennsylvania?

A. Could well be.

Q. Do you know whether it is or not?

A. I know that certain, during some periods of the season, surplus milk, is diverted into the LOL plant at Carlisle. So it could be converted -- it could be dried there and it could be pooled on Order 5.

Q. Okay and for instance, just to be clear, LOL means Land-O-Lakes?

A. Correct.

Q. And Land-O-Lakes operates a plant in Carlisle, Pennsylvania, that processes nonfat dry milk. Correct?

A. That is correct.

Q. Do you know what other nonpool plants, sticking to Class IV for a moment, milk that is otherwise pooled on Order 5 but is processed for Class IV use, where it is processed?

A. Are you asking me --

Q. Other than Blue Grass Dairy Food and the Land-O-Lakes plant in Carlisle?

A. Are you asking me where there might be other plants like Land-O-Lakes, Carlisle?

Q. Well, it's more than might. It's where actually. I mean, you know, we could say might is every powder plant in the United States. So rather than might, I'd like to know what you know about where the milk is processed.

A. I would say at some point in time there could be some nonfat dry milk processed in Gwynsboro, Texas, and Butalis, New Mexico, and Sebatha, Kansas, and perhaps in Goshen, Indiana.

Q. Do you know, sitting here today, whether it actually is at any of those plants as opposed to would be eligible to be?

A. I would say that at some time, again in the surplus season, Christmas Day, New Years Day, that that would be a likelihood.

Q. Would it be fair to say that a more significant percentage of the powder is processed at Carlisle though than in other plants?

A. I'm not able to answer that so I don't know.

Q. Turning to the issue, again still on technical issues, of transportation credits, and in particular, your proposal found on page 86 of your testimony, which is Exhibit 47; and let me preface it with this. When transportation credits originally came into the marketing areas in the southeast and the Appalachians, were you Elvin Hollon, involved in those proceedings?

A. I was not.

Q. Are you aware that the question of whether or not to have transportation credits was subject to significant controversy at those proceedings?

A. I'm aware that it was and I have read some of the decision that incorporated that so there was a diversity of opinion.

Q. And some of that diversity of opinion came from processors who opposed. Correct?

A. Yes.

Q. And some of it came from dairy farmers who opposed. Correct?

A. Yes.

Q. And the Secretary, in adopting transportation credits, had a purpose and intent to pay for only part of the cost of transporting milk for supplemental needs. Correct?

A. Correct.

Q. In suggesting that now we should change the language, let me run through a couple of scenarios for a moment. In reading it as March and April that the broker dairy farmer was not received as producer milk for more than 50%, does that mean that the milk could have been received as producer milk, 100%, in February, and nonetheless still be eligible for credits?

A. Yes.

Q. Truly the only limitation is the March and April. Correct?

A. Yes.

Q. Why select 50% as opposed to say 20% or 30% or 40%?

A. It was simply a discussion amongst the operatives who deal with the transportation and surplus milk -- not surplus milk, but supplemental milk purchasing decisions and that was the number that we arrived at. I can't tell you that there was a hard, fast economic formula that the answer was 50.

Q. Do you agree that if this proposal was adopted, more milk would be eligible for credits than is eligible today?

A. Yes. I would say that more milk would be eligible than is eligible today.

Q. Have you done any analysis of how much more milk would be eligible?

A. I have not.

Q. But you would make more milk eligible, even though you're now raising the amount of money that has to be paid on the credits because the fund isn't large enough today. Correct?

A. Correct. I think those are logical conclusions, not necessarily any causative effect; but --

Q. But you agree that's a logical --

A. Yes.

Q. -- that's basically what you've said. I want to turn to your statement on page 96. I am now sort of getting into the more policy questions, but -- and for the record, Dean Foods and Prairie Farms do not object to either proposals 3 or 4; and I take it that you know from have discussions with your counsel and between and among Dean Foods, that -- and Prairie Farms for that matter -- that Dean Foods and Prairie Farms principal concern, as addressed to the Secretary at the time of this hearing, was at least being discussed, were questions with respect how many Federal Orders you have, how you move milk and what happens with St. Louis, Missouri. Is that --

A. I understand that.

Q. Okay. So turning to your statement on page 96, that is the second full sentence, starting on the fourth line, “additionally the Lynchburg plant would be significantly disadvantaged in its procurement of milk if the blend price returned to producers delivering to that plant were on Order 1 blend price, when that plant is in direct competition for producer milk supplies with plants regulated under the proposed Southeast Order.” Do you see that statement?

A. Yes.

Q. Okay. I take it that is not a statement that is specific to the Lynchburg facility in Virginia?

A. No. It is not. That situation can arise in other parts of the country.

Q. And so we could just as well leave out the names and the locations and make it generic, that is to say a plant regulated by one Order but in direct competition for producer milk supplies in another Order with a significant blend price disadvantage, that that is a significant disadvantage for that plant. Correct?

A. We could, but that probably wouldn’t count for much weight in a specific Order proceeding.

Q. But nonetheless, the general philosophical principle is that. Correct?

A. Yes. I would agree with the general philosophical principle.

Q. And speaking of past proceedings again, and this time now, Order 32 rather than Order 33. Do you recall in the Order 32 proceeding, post Federal Order Reform having to do with pooling, significant discussion, especially from Dean Foods and Prairie Farms about their competitive situation in St. Louis?

A. Yes, I recall.

Q. And do you recall that there discussion in the Order 32 proceeding was that as things existed at that time, they had difficulty procuring a milk supply because milk would literally bypass St. Louis for locations south and east of St. Louis?

A. I remember several Exhibits in that hearing record that demonstrated that fact.

Q. Okay and that fact was the concept that there was a significant blend price different between St. Louis and areas to the south and east.

A. That is true.

Q. Even though they are competing with milk supplies with processors from the south and the east in their own back yard?

A. That is true.

Q. And indeed, that's still true today. Correct?

A. As best I know, it is still true today.
Q. On page 8 of your testimony, which is Exhibit 47, you -- not quite in the middle, a little below the middle, you reference the USDA's decision being based on a 1996 database?
A. Yes.
Q. Isn't it true that USDA and Federal Order Reform for purposes of discussing plants and plant impact, actually used October 1997 plant data?
A. I do not recall.
Q. If they did use October 1997 plant data, that would at least change how one would look at Exhibit 48 tables with respect to Items 4, 5a and 5d. Would it not?
A. Only to extent that you might pick a January 1997 or December 1997 day, but the changes in the market structure over that period -- this is still typical, but certainly if you said we're going to measure from '97 to '03, you would have a different group of relationships.
Q. Some of the changes --
A. Not materially different, but you would have a different group of relationships.
Q. -- some of the changes referenced in Items 4 and 5a and 5b did actually occur between January of 1996 and October of '97, didn't they?
A. Yes.

Q. And this change in plant ownership issue that you discussed, especially early on in your testimony, is not or was not a criteria discussed by USDA during Federal Order Reform. Correct?

A. The -- two groups were using 1996 and one was, in our discussions with USDA, over specifically this proceeding, and as we discussed with them our desires and our intents and the proposals we wanted to make and one of the -- one of the questions that they raised is there, has there been significant difference over time to warrant the hearing; and as we drilled down to that, that's where we came up with the 1996 period as being the basis for information that was embedded in reform and secondly to your question, the reform document itself, you know, that process began in '96 and ended in 2000. So there's quite a bit of time and data that's in that document and there's some tables that you are right are a point in time and there are some, there's some data that measures over a period of time.

Q. But regardless, at least for the purposes of reform, USDA had seven criteria?

A. Yes.

Q. Okay and none of those criteria related to the actual ownership of plants. Correct?

A. You are correct. That's right.

Q. Turning back to the proceeding again in Order 32, earlier -- of even 2002, in addition to the discussion directly as to the issue about the blend price relationship between St. Louis and plants to the south and east, was there not also a fair amount of discussion by participants as to whether or not Order 32 was too large geographically?

A. That view was expressed by some at the proceeding.

Q. And the question about an Order being geographically too large, at least discussed at that proceeding, was that you ended up with a situation where the Order simply wasn't able to address everybody's issues when you talk about St. Louis versus Delta in Colorado. Correct?

A. Yes.

Q. And more recently, turning to a different Federal Order Reform combined what I think, if you go back to the hearing in April of 2002 in Salt Lake City, Federal Order, at least people at that proceeding, discussed how before Federal Order Reform, we had two perfectly good orders, the Great Basin and the Idaho Order. Correct?

A. I heard that discussion.

Q. And post that Order reform, we put two perfectly good Orders together and come up with something that was not as good.

A. I heard that discussion also.

Q. And indeed subsequent to that hearing and subsequent to decision by USDA to make some but not all the changes that Dairy Farmers of America requested, that Order, when it came up for a vote on the Amendment, which is to say on maintaining the Order, the vote was no. Correct?

A. Correct.

Q. And in fact today, in the Federal Register, USDA has published termination of that Order effective April 1st. Correct?

A. That is correct.

Q. In looking at page 20 for a moment, and I don't mean to be bidantic or too obvious but you discuss on page 20 of Exhibit 47, natural boundaries and barriers and changes -- and weather.

A. Yes.

Q. You would agree that all of the natural boundaries and weather and climate ranges were the same in 1996 as they are today, that those haven't changed in any way?

A. No. I don't think they've changed.

Q. Now turning to page 43 and 44 and 45 of your testimony, and starting with the last statement on page 45, having to do with the lock in provision and the pool plant.

The pool plant that is locked into Order 5, that has a greater proportion of its sales in Order 7, that it not an actual change from 2000. Correct?

A. Correct.

Q. USDA, in adopting the lock-in provision back at Federal Order Reform, specifically referenced that plant?

A. Yes.

Q. And that's the same plant they referenced in Federal Order Reform. Correct? To your knowledge?

A. To my knowledge.

Do you know today whether that plant now has a greater proportion of its sales in the Florida Order 6 market than in Order 7?

A. I do not.

Q. And on pages 43 and 44, you discuss the growth of milk sales from Order 5 into Order 7, but conspicuously absent is the discussion of sales from 7 to Order 5. Those have been relatively, if not almost precisely stable, since Federal Order Reform. Correct?

A. Yes.

Q. Do you know whether sales from Order 7 have grown into Florida since Federal Order Reform?

A. I do not.

Q. Do you know whether sales in Order 7 have grown into Order 126 since Federal Order Reform?

A. I do not.
Q. Do you know whether sales from Order 7 plants have grown in Order 32 since Federal Order Reform?
A. I do not.
Q. Would it surprise you to learn that the sales from Order 7 plants into Order 32 are greater than the sales from Order 32 into Order 7?
A. No. It wouldn't surprise me because I think there's some plants on the 7 side that probably -- there are more plants in that direction than there are close to the boundary on the other side.
Q. Except there are plants in St. Louis that are close to the boundary of Order 7. Correct?
A. Well, I was thinking more of the western -- yes, there are some there too. I was thinking more of the Arkansas, Missouri, to Kansas and Nebraska relationship than to St. Louis.
Q. That is to say the fact that on the western side of the boundary of what is now Order 7 there has to be overlap to the west, thinking about your circles, your 250 mile circles?
A. Yes. There could be overlap to the west.
Q. Has the quantity of producer milk, physically produced in Order 7, but delivered to Order 6 plants in Florida, increased since Federal Order Reform?

A. I do not know.

Q. On page 53 of Exhibit 47, under blend price differences, you say the differences in the Class I, Class II, Class III, and Class IV utilization of producer milk pooled under the Southeastern Federal Order 1007 and the Appalachian Federal Order 1005 leads to significant blend price differences which contributes to disruptive marketing additions in those areas of common producer milk supply. Do you see that?

A. Yes.

Q. All right. Getting back to our discussion into the hearing in Order 32, if I substitute for Southeast Federal Order 1007, the Central Order 1032 and for Appalachian Federal Order 1005, I substitute the Southeast Federal Order 1007, your statement would be the same, wouldn't it?

A. For the most part, yes. The different is in their Class III utilization between the two Orders that affect the blend price relationships.

Q. But there would be significant blend price differences?

A. Yes.

Q. Contributing to disruptive marketing conditions?

A. Yes.

Q. On page 54, the first full paragraph, the last sentence, “producer milk pooled on the Southeast Federal Order 1007 is shifted to the Appalachian Federal Order 1005 to meet its needs during the fall”.

A. Yes.

Q. Is there data that you can point to in the record that would show that?

A. I don’t think there’s data in the record. That comes from our operating knowledge, if you will, within the agency of how some of the customers are supplied.

Q. On page 55, near the end of the long period over paragraph 54, you addressed, “this concern is always present that there is always a group of producers…” I think it is “…who feel disadvantaged by the blend price relationship.”

A. Yes.

Q. And that statement would apply to the differences between producers shipping to St. Louis plants in Order 32 and producers who are next door in Missouri shipping to plants in Orders 5 and 7. Correct?

A. Yes.

Q. Turning for a moment to your Exhibits and mostly for the moment, a couple of -- several clarifications. Turning to Item 11, which is your map.

A. Yes.

Q. You have some symbols on the right for seven companies.

A. Correct.

Q. But it is also true that there are symbols on the map that are not represented by those seven, that are small triangles or circles?

A. Correct.

Q. And would I be correct that some of those circles or triangles may be partially underneath and somewhat blocked or obscured, at least, when one looks at this map, from -- by the larger symbols?

A. Yes.

Q. And so the depiction is just again, what it is, a depiction. It doesn't change the fact that there are actually 31 plants in Order -- pool distributing plants in Order 7 and 24 in Order 5, assuming that's the numbers for November, 2003, that are found in the Marketing Administrator's statistics?

A. Yes. You are correct.

Q. And turning to Item 13.

A. Yes.

Q. Now you've made some comparisons, is there any particular reason you left out Order No. 6?

A. No, there's not. It was an oversight. It wasn't intentional.

Q. Did you leave out the Western Orders because they

are west of the Rockies or something?
A. Yes.
Q. So that was intentional?
A. That was intentional.
Q. Leaving the Orders west of the Rockies was intentional. Correct?
A. Correct.
Q. But leaving out Order 6 was not intentional?
A. That's correct.
Q. Admitting that we're not going to have all the exact numbers, let's see if we can just go across and fill in what we can for some of these. Would you agree that the number of pool distributing plants on Order 6 would be significantly less than any of the listings on this chart?
A. Yes.
Q. Do you know how many pool distributing plants there are in Order 6?
A. Not off the top of my head. I would guess a dozen.
Q. Certainly not more than a dozen?
A. No. I would say no more than a dozen.
Q. Do you know how many pool supply plants there are in Order 6?
A. I'm not sure that there are any.
Q. So zero.

A. Zero.

Q. To the best of your knowledge is the answer for that.

A. Correct.

Q. And since column three is the sum of column one and column two, it would be whatever column one is for Order 6. Correct.?

A. Twelve plus zero.

Q. And I'm not going to venture a guess as the population, but basically it's most of Florida, except for what is the western -- it's basically the panhandle, a piece of the panhandle of Florida. Correct?

A. Four counties are in Order 7, the balance would be in then Order 6. So, yes, that would be most of the population.

Q. And similarly columns five, six, seven and eight, you know, we don't know right now what the marketing area is or the furthest point or the closest point. Correct?

A. Correct.

Q. But you'd agree that the marketing area would be much smaller than any of these other areas. Correct?

A. Yes.

Q. And the state in the marketing area is basically the subset of one. I mean, it's most of one state. Correct?

A. I don't think there's any marketing area outside of the state of Florida.

Q. Okay but in other words, for the number of states in marketing area, it's --

A. Oh, yes.

Q. -- that column would be--

A. Correct.

Q. -- one subject to the counties that are not in the Order 6?

A. Yes.

Q. And we don't know, for instance, the last three columns, at least, not at this time. Correct?

A. I do not so that would be easily discernible, but I don't have it.

Q. Assuming they aren't subject to confidentiality and I don't know right now.

A. I don't think that they are.

Q. Okay.

A. Turning to Items 19 and 21a, 21 and then the maps 21a through 21e, I just want to ask a couple of general questions about these. Now while these may be, just show the primary sources of supplemental supplies, you would agree that at least at certain times of the year, the milk that is identified as a source of supplemental supply, would nonetheless stay home and be processed in some form near where those stars are. Correct?

A. I didn't see the last -- your last phrase. I'm sorry.

Q. Near where the asterisks are, that they would stay home basically?

A. Yes.

Q. And so what these maps really depict is the effects of pooling? This is really pooled milk? Correct? Regardless of whether it is actually delivered.

A. Not in every case. In some cases, either the milk that is associated with these stars is pooled. In some cases, it is not. In some cases, it's subject to a spot purchase arrangement. In other cases, there may be a contractual purchase arrangement.

Q. So just for instance, and not saying it's true, but for instance, in looking at Item 21a, the State of Kansas would appear if one load of spot milk from Kansas was delivered as producer milk in December of 2000. Is that correct?

A. Yes.

Q. And then Kansas would be depicted?

A. Or May. It's either month.

Q. Okay. It's May, May or December.

A. Yes.

Q. So it might not be even both months. It may be one of those two months.

A. Correct.

Q. Turning to Item 31 for a moment.

A. Yes.

Q. If you had done an analysis along the northern edge of Kentucky and Indiana, these are the plants in Indiana and Ohio with overlapping sales in Orders 33 and Order 5, wouldn't you expect to see much the same kind of milk competition?

A. I don't know. I didn't do that type of analysis.

Q. And if I asked the same question, visa ve St. Louis, it would be the same answer. You don't know. You didn't do that kind of analysis?

A. That would be also correct. Those are not on both sides of that transaction so the marketing area, for example, you know, competitive situations, so we wouldn't have a lot of data.

Q. Do you have Exhibit 43 up there with you?

A. Exhibit 43?

Q. Yes.

A. No, I don't. I can get it.

Q. Exhibit 43 is the Exhibit prepared at your request or at Southern Marketing Agency's request, with the data prepared for Federal Order 7.

A. Yes.

Q. And if you turn to the first page after the index, which is Table 1, Origin of Federal Order 7 Producer Milk.

A. Yes.

Q. Page 1. Now you're proposing merging Orders 5 and 7 and one reason is overlap of producer milk supplies. Correct?

A. Yes.

Q. Okay. But you agree with me that according to the Market Administrator statistics, looking at the bottom line, the percent of milk from Federal Order 5, that is producer milk on Order 7, is significantly smaller, that is to say it's 3.2% versus 10.8% for Central Federal Order 32. Correct?

A. Correct.

Q. And it is even more significantly smaller Federal Order 5 versus Federal Order 126, 3.2% versus 19.2%. Correct?

A. Correct. However, none of those milk supplies in those two areas are near the geographic proximity of those between Orders 5 and 7. The milk from Order 32 is a long way away, and the milk from Order 126 is even further away.

Q. Well if we look at the maps, isn't there a significant density -- this is the last page, no, the next to the last page on Exhibit 43, Production, Federal Order 5 and Federal Orders Combined, isn't there significant density of the milk in east Texas or in the southeastern Kansas or in northeastern Oklahoma, which is --

A. This map is in December but the biggest bulk of those milk supplies, for example in Order 126, would come from further west, and in months perhaps not in December. I think these are, you know, annual basis.

Q. Nonetheless, the volumes are in, for instance, 126, six times the volume coming from Order 5?

A. Yes. The numbers are what the numbers are in that case.

Q. I have a couple more sort of procedural questions and then I'll try to wind up with about four or five more questions. On page 39 of your testimony, when you reference Exhibit 48 and by the way, I may be completely confused, but on that page, you reference repeatedly Item 27, and I wonder if it's really Item 28, and I'm just trying to clear up the record here. This is not anything more than that.

A. Yes. I think you're correct.

Q. Okay. So in that instance, any time in this document when it says Item 27 but the title is Number of Producers and Producer Milk Deliveries Appalachian 1005 and Southeastern 1007, December 2003, it really should be Item 28?

A. Yes.

Q. Okay.

THE COURT: How many places does that appear? I see it at 49 and is it on 50?

MR. BESHORE: I didn't mark it every time. I know it occurred more than twice, Your Honor. It appears to be on 50, also on the bottom on 49 it's references three -- so a total of six times it looks like, but I think for the record, I mean, we've now established what it is so --

THE COURT: Very good.

MR. BESHORE: It actually may be also on page 69, 70, and again, this is --

THE COURT: Would you agree with that, page 69?

MR. HOLLON: Yes. Yes, I would.

THE COURT: It should be 28 instead of 27, and then also at page 70.

MR. BESHORE: When I'm reading this six months from now, I just want to be able to understand what I was doing.

THE COURT: I see.

MR. HOLLON: Find and replace works better sometimes than it does others.

Q. Now my real questions. Bottom of page 39. You reference data for December, 2003, and you say "the five member cooperatives of Southern Marketing Agency" and I note that on that table there are five and Southeast Milk is not among them, but that on Item 2 in the first page you reference Southeast Milk.

A. That's correct.

Q. Is Southeast Milk no longer a member of -- is Southeast Milk, Inc., no longer a member of Southern Marketing Agency, Inc.?

A. They are still a member of Southern Marketing Agency, Inc., to my knowledge, and they support the proposals as offered by the proponents.

Q. Okay. That's not what I was told, but what the heck. If you could turn to Item 41 on Exhibit 48. Now you've made, based upon your experience, these circles based upon the ideas that milk sales can be at least 250 miles. Correct?

A. Yes.

Q. In fact, of course, there are milk sales, on a regular basis, that are actually far greater than 250 miles. Correct?

A. There are some more and there are some less.

Q. But for instance, there have been a series of proceedings going back to before the Southeast Order was created, that's before Federal Order Reform and before when the merger -- even before then, back in the 1980s, with respect to a plant located at Little Rock, Arkansas --

A. Yes.
Q. -- that has routinely and regularly had sales from that plant in Little Rock, Arkansas, into Florida. Correct?
A. That's correct.
Q. And as far west as past Dallas to the west. Correct?
A. I'm not as familiar with to the west as to the east, but I know no reason to say it doesn't.
Q. Okay. So there are plainly entitles when that circle if you did the actual circle would be far larger than what you have. Correct?
A. Yes, that's true.
Q. And relating back to a series of questions I asked a few moments ago about along some of the borders, you haven't drawn in the plants and the circles, for instance, that would result in Ohio or Indiana, Illinois, Missouri, Oklahoma or Texas. Correct?
A. Correct.
Q. I want you to do a little visualization for me in terms of Item 41 on Exhibit 48.
A. Remember I'm an economist, not a --
Q. I mean, something jumped out at me and I want to see if it, you know, whether, you know.
A. Okay.

Q. You have all of that line up of circles that you show, South Carolina to East Georgia up to the northeast part of Georgia, Tennessee, Kentucky, and then you have a lot fewer circles to the west.

A. Yes.

Q. Doesn't that suggest to you that if we're going to talk about competition of plants, which is the number one criterion for Order, putting together Orders, that maybe we have two Orders, but there's one to the west visually on this map that would be Missouri and Louisiana and Mississippi and west Tennessee.

A. What a novel idea. We discussed that and back and forth, and first of all, we didn't set the boundaries for the first blue lines or the first red lines. Those were set by the Secretary of Federal Order Reform. So part of that debate perhaps, you know, lies there then with us. Secondly, in terms of our day to day operating procedures, we do have supply issues all the way across this area but the most intense ones are the ones up and down the line that we've referenced and for the reasons that we've referenced why we think that boundary should be removed, and those are the ones that we listed in our testimony.

Q. I understand but isn't it possible that the industry got it wrong even before Federal Order Reform in putting together these various Orders and now what we're doing is saying, gee, we don't like it, so we'll just make it even bigger?

A. Far be it from me to suggest that the Secretary got it wrong.

Q. Well I'd say the industry had a lot to say about it, but I have no further questions.

THE COURT: Any questions? Any other questions? Yes.

MR. MILTNER: Ryan Miltner on behalf of Select Milk Producers and Continental Dairy Products.

THE COURT: What was the name again, sir?

MR. MILTNER: Ryan Miltner, M-i-l-t-n-e-r.

EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Mr. Hollon.

A. Good afternoon, Mr. Miltner.

Q. How are you?

A. Just fine.

Q. Great. I wanted -- this will be brief, I hope. I wanted to just clarify some of the relationships you touched on in brief in your statement.

A. Okay.

Q. Dairy Farmers of America, as you've stated, was a milk marketing agent for not only its member producers but also some member cooperatives -- some nonmember cooperatives that you identify on Exhibit, or I should say Item 8 in Exhibit 48. Am I referring to the right page?

A. Item 8, yes. Yes.

Q. And among those cooperative associations is Continental Dairy Products. Is that correct?

A. Correct.

Q. And Dairy Farmers of America is a marketing agent for Continental Dairy Products?

A. That is true.

Q. And on Item 8 to Exhibit 48, you note that Continental shipped no milk into Federal Order 5 or Federal Order 7 in 1996?

A. Correct.

Q. And that would -- would that be because Continental did not exist until 1999?

A. Yes.

Q. And it correctly depicts that Continental is shipping milk into both of those Orders in 2003. Is that correct?

A. Correct.

Q. And as a marketing agent for Continental, Dairy Farmers of America would be responsible for taking the milk of Continental's producers and determining where it is shipped, when it is shipped, and what Orders its pooled on?

A. Correct.

Q. And for the record, Continental's numbers are located in the states of Ohio and Indiana and Michigan in Order 33. Is that correct?
A. Correct.
Q. And the counties that were referred yesterday in northwest Indiana contain a number of Continental's producers. Is that correct?
A. I'm not familiar exactly. I think the answer is yes and I know they are primarily in northern Indiana and western Ohio, southern Michigan, but I can't -- I couldn't go --
Q. Okay.
A. If you said is this it, is this right, and you represented it to me, I would agree with you; but I don't know directly.
Q. Okay. So if I represent to you that there are producers in Jasper County, Indiana, and the neighboring county in Indiana.
A. Yes, I would agree with that.
Q. Okay and so the data from the market administrator that shows the milk from those counties then being brought into and pooled upon Orders 5 and 7, that would be -- that would be done because Dairy Farmers of America, as the marketing agent for Continental, made the decisions as to when it was appropriate and beneficial to

ship that milk into the market?

A. That's correct.

Q. Okay. You also discuss in your statement the touch base provisions of the proposed Southeast Order and I think that's discussed on pages 71 through 76.

A. Yes.

Q. And you discuss primarily the change in the touch base requirements and the change from a measure in days to a measure in percentages.

A. Yes.

Q. And you note that those changes, the change from days to percentages, is consistent with the terms that are currently in the Southeast Order.

A. Yes.

Q. But those are not consistent with what is now in the Appalachian Order. Is that correct?

A. That's correct.

Q. They don't correspond?

A. That's correct.

Q. And in the -- in Order 5 right now, I believe it's two days, two days and six days?

A. Yes.

Q. So under the proposed Order, you'd be -- the producer would have to ship more milk into the proposed Order to be pooled that the same producer would have to ship if he is now pooling milk on Order 5?

A. Yes.

Q. Have you done any analysis to suggest that there will be producers who are now eligible for pooling in the Order 5 area that would not be eligible for pooling under the proposed Order?

A. I don't have a spreadsheet type analysis. We've done some in discussion and we tend to think that that will not have a major effect on reducing that opportunity, that there's going to be a significant demand, ongoing demand for supplemental milk supplies and so the majority of the milk that currently fills that role would continue to be able to do that.

Q. Would that be because those producers are now pooling far in excess of the minimum requirements and would actually exceed the requirements under the new Order?

A. The volume of milk that would be needed and is used would accommodate that either under the old provisions, as well as under the new provisions.

Q. And also and this refers to your discussion of the transportation credits under the current Orders, it occurs to me now that there may be situations where a producer would ship to Order No. 5 during part of the year and qualify for transportation credits and the same producer may ship to Order No. 7 and qualify for transportation credits in different parts of the year.

A. That is correct and then may be able to draw a volume, or not a volume, but a -- to draw transportation credits that would not be available to that producer under the terms of the proposed Order. Was that your question?

Q. I guess it is. Is that correct what I've started?

A. Part of the reason for our proposed change in that new definition or requirement was to try to be able to accommodate the needs for supplemental milk, and it was felt like -- it was felt that retaining the existing provisions, first of all, they wouldn't exist anymore because there would be one Order instead of two; so, was to substitute the language with wording April and May for the language of this Order versus that Order, and that that would -- that would enable us again to accommodate the needs for the transportation credit on the supplemental milk. So we didn't look at it again as something that was more restrictive, but as a way that would help us to accommodate that market need.

Q. So would you, would it be your -- would you surmise that there -- are there any producers now receiving transportation credits by shipping part of the year to Order 5 and part of the year to Order 7 would be able to receive those same transportation credits or a close approximation thereof under the proposed Order, or would you expect that there would be fewer transportation credits paid out?

A. I think you asked two different questions.

Q. Okay.

A. I heard two, but I think the question you are asking, I'll try to answer that is that the types of analyses that we're doing, and again, I don't have a spreadsheet to offer, but is that the change in provision would not foreclose any of the milk suppliers that are currently getting the benefit of the transportation credit, and the market that's getting the benefit of that. So it would not make it worse.

Q. And I did hear you correctly when you responded to Mr. English that you expect the total transportation credits paid out under the proposed Order to exceed those paid out in Order 5 and Order 7 currently?

A. Certainly if you raise the amounts there would be more dollars paid out.

Q. I don't have anything further. Thank you, Mr. Hollon.

A. You're welcome.

THE COURT: Anyone else? Yes, sir.

MR. RICCIARDI: Good afternoon, Your Honor, Al Ricciardi. Good afternoon Elvin, how are you?

MR. HOLLON: Just fine, Al.

MR. RICCIARDI: Your Honor, it is my understanding that Mr. Hollon will have a separate statement that is going to be related to producer handlers.

THE COURT: I believe so. Is that not correct, Mr. Beshore?

MR. BESHORE: Yes.

MR. RICCIARDI: Okay and if that's true, Your Honor, most of my questions on cross examination are going to relate to Proposals 7 and 8, which are in reality the producer handler proposals.

THE COURT: Do you want to hold then until we get your testimony?

MR. RICCIARDI: Yeah and that would be my though, although I intend just so we're not misled, that I will use opening statement, Exhibit 47 and his index, including the various other documents, as part of 48, as part of the examination.

THE COURT: You can do it then.

MR. RICCIARDI: Thank you, Judge.

THE COURT: All right. Anyone else? The people, Mr. Beshore, do you want to -- oh, I'm sorry. Oh, I was looking at him to see if he wanted any more redirect or something. Go ahead, Mr. --

EXAMINATION

BY MR. ROWER:

Q. Good afternoon, Mr. Hollon.

A. Good afternoon, Mr. Rower.

Q. I'm Jack Rower with AMS Dairy Programs. Mr. Hollon, in your testimony, you strongly indicated that SMA faces complications and difficulties in its procurement operations and activities, for example, accommodating the different touch base provisions between Order 7 and Order 5. In advancing the proposal, assuming your proposal was adopted, would those difficulties then end in your opinion?

A. Yes. The problems with getting six days here and ten days there, and making sure you got those, and making sure that when you diverted milk you did it in a way to retain your pool status -- all of those issues would go away, so the time and effort that, for example, our dispatchers spend because the, somebody gets touched in the wrong direction and then the accounting guy comes down and complains at them greatly, all of those things would go away.

Q. So the operations of SMA would then be streamlined. Is that correct?

A. And it's member operatives. Yes that would be true.

Q. On a different note, has SMA requested adjustments from the individual market administrators, to your knowledge, in trying to modify the qualification standards between Order 5 and 7?

A. To my knowledge, they have not.

Q. Okay. Thank you. Your Exhibit 48, Item 34, shows differences between the blend prices that dairy farmers have received in Order 5 and Order 7. Is that correct?

A. Yes.

Q. In your opinion, in a post-proposed merger world where the merger was adopted, would dairy farmers whose milk was typically pooled on Order 5 likely receive the lower blend price than --

A. That's a moving, I guess, a moving target question and much of it depends on the relationship of Class III and Class IV prices, and if you look backwards over the life of the Order from reform to now, many months, the answer to your question would be yes; however, as Class III and Class IV prices and their relationship changes --

Q. Right.

A. - you could very easily paint a scenario, I suspect in sometime in the not too distant future anyway, that those price changes would result in just the opposite. That Class III prices would be high enough that the Order 7 blend price would have some significant price advantage and then those who are unhappy would simply change zip codes.

Q. Let me just phrase it slightly differently. Had the proposed merger been implemented in January, 2003, had it been adopted, we wouldn't have a moving target would we?

A. That is true.

Q. And --

A. There wouldn't be two blend prices in essence to compare or there wouldn't be disparities and differences caused by the difference in Class III and Class IV prices.

Q. Okay. Thank you.

MR. STOKER: Randal Stoker, Dairy Corporation, USDA.

EXAMINATION

BY MR. STOKER:

Q. My first question for you, Elvin, is in pertaining to your Proposal 3, and you reference it on page 93 of your testimony, you mention in the additional counties to be included in the merged Order, includes the county of Augusta?

A. Yes.

Q. The county of Augusta contains two independent cities, the city of Staunton and the independent city of Waynesboro. Is it your intent to exclude the independent city of Waynesboro?

A. That was not our intent. That was an oversight, so it should be included in the cities list.

Q. Okay. Next on Item 8 on page -- and also you reference it in your testimony on page 12, there is a list of cooperatives acting as handlers.

A. Yes.

Q. Is there a reason why you listed them starting in 1996 and not with reform in the year 2000?

A. Again, in our discussions back and forth with the dairy program staff, prior to any proposals ever being, you know, made, we discussed much -- much of our proposals and much of our intent and we were asked rather directly, you know, the question of what's different? Why should you, why should something be done now after all we've only had four years of reform? And so, we pointed out two things. You know, one was some reasons why we thought what was different and secondly that the reform process was based on data that predated 2000 and in those discussions, from both parties, the 1996 date, you know, was identified. Now whether it should have been '97, '98, '99 or '93, or '94, but that was the date that came in those discussions so as we developed our testimony and our case, we used that as a target for zero and 2004 as a target -- or 2003 as a target for now in order to point out structural differences in the marketplace that we thought warranted a hearing.

Q. Okay. I think it's a very helpful illustration and it's interesting to note that there are six bold ones that aren't still in business in the 2003 year, and also it's interesting to note that there's eight new ones in 2003 that weren't in existence in 1996.

A. That's true.

Q. I was trying to get to a little bit more of what maybe really transpired during that transition stage. To your knowledge, was any of these as a result of a merger or a takeover, and how many of those were due to just going out of business?

A. I don't know that there was any takeovers. To the best -- I'll try to just go down the list and tell you, you know, basically -- based on my experience. Arkansas Dairy Coop is in existence in both times; Associated Milk Producers merged into Dairy Farmers of America, the Southern Region of and the North Central Region retains that name and exists as an independent cooperative; Carolina Jersey Milk Producers, I do not know the reason why there is an 'x' in one box in another; Carolina Virginia Milk Producers became what is now Maryland Virginia Milk Producers; Continental Dairy Products, as Mr. Miltner pointed out while ago, was not in existence in 1996 and came into existence during the period; Cooperative Milk Producers is in both cases still in existence; Dairy Farmers of America did not exist as an entity in 1996 and does now; Dairy Lee Cooperative, I think, had no milk associated with the Order, it did exist in 1996, but had no milk associated with the Order; Dairymen's Marketing Cooperative existed both periods; Edisto Milk Producers Cooperative, I think I probably mispronounced that, but they have disbanded and members of that cooperative are -- their milk is marketed in other ways; Elite Milk Producers is now a part of Select Milk Producers; Foremost Farms, 1996, I'm not sure if it existed then but its predecessors, Wisconsin Dairies and Golden Guernsey Milk Producers Cooperative, and -- I should remember that one, AMPI Morning Glory Farms existed in '96 but it, I'm not sure if it as an entity was in 1996 but if it wasn't those three predecessors were; Land-O-Lakes was not in the market in 1996, it exists today; Lone Star Milk Producers did not exist as an entity in 1996; Maryland Virginia is both in the market in both periods and is contained as producers who were, I think, part of the Carolina/Virginia group in 1996; Michigan Milk Producers did not have milk in the market as a direct handler in 1996; Mid-American Dairymen and Milk Marketing, Inc., both merged into Dairy Farmers of America; National Farmers Organization is in both periods; Select Milk Producers is in both periods; Southeast Milk did not have, Southeast Milk did not exist in that form in 1996 but -- and they did not have milk in the marketplace in 1996; Upstate Milk Producers still exists, had milk then but not now; I have to admit I didn't think Vanguard Producers existed in 1996, but they must have, they no longer exist; and Zia was -- existed then, it had milk in the marketplace and it not longer has milk in the marketplace under its own name, it's part of that represented by the Southwest Agency and Dairy Farmers of America.

Q. Okay. Thank you, that was very helpful. In connection with that, it's evident by that, what you just presented, that some of these cooperatives come and go, some disband. In the event that we, that, you know, the merger was to take place, if in particular those federations of cooperatives that market in multiple Federal Orders were to disband or were to change, would the new merged Orders still achieve the efficiencies and marketing advantages that you have outlined?

A. Well, first it's pretty hard to do a 'what if' if people are going to continue to work together or not, but I would point out that the Southern Marketing Agency has long-term commitments from all of its members and we're, and it's not, you know, a year or two. So the idea that they perhaps will not be here tomorrow is a little far fetches, and secondly, the day to day efficiencies would certainly still be in place and to those entities that remained, under your hypothetical situation, they would find, you know, those advantages, to more efficient, to efficiently serve the marketplace.

Q. Thank you. In your testimony on, in reference to, on page 33 and 36, you reference lock in provisions and you mention that these situations of lock ins typically occur at the borders of an Order area, or on the fence. Is that correct?

A. Right and I would also add that sometimes the plant produces a unique product that for capital expenditure reasons may mean that -- and it may mean you only have one plant that makes that particular product and has a wide geographic distribution, but you know, that would be a third reason, but yes, those two also.

Q. I think you've also pointed out and would you agree that the purpose or intent of these lock in provisions are to equalize the milk procurement competition, and thus improve the orderliness in which the procurement of the milk supply takes place?

A. I would have no dispute with that statement.

Q. On the converse of that, would you also agree that the purpose and intent of the absence of the lock in provision were to equalize -- to equalize the competition in dairy sales, such that it would improve the orderliness of dairy product marketing and distribution?

A. You could make that argument, yes.

Q. Is it typical that a plant that is locked in pays a higher, because of the minimum pricing is locked in, it typically would pay a higher blend price to -- in order to procure a mixed supply?

A. If it is locked in, I would generally say no. I think if it's locked in, it's locked in to where it's most common procurement is so it would be, you know, in equal -- what word to I want, an equal competitive position with most of its competitors for its milk supply.

Q. Okay. Thank you, and last, on page 71 of your testimony, you indicate that SMA represents 72.3% of the producers supplying the market or 62% of the producer milk of the proposed Order. Is that correct?

A. Yes. Yes.

Q. Is it -- it is a safe assumption or is it stretching it to say that 27.7% of the producers or 33.8% -- the percent that's not represented there -- is coming from nonmembers or, where is that other milk coming, supplying the market?

A. It would be from non-SMA members. Some of that milk may be marketed through some arrangement with an SMA member. I suspect a lot of it is, but certainly that would be from non-SMA members and in the southeast, there are producers who are not members of cooperatives which are members of SMA.

Q. Do you know if there has been, on a trend since 2000 through 2004, has there been an increase or a decrease in the amount of nonmember milk supply in the markets in question?

A. I would tend to guess that, again, I'm just -- I would just guess here, that the trends have been relative to producers going out of business and so, and coming into business, and I'm not sure if I could say that member farms go out or come in any more than nonmember farms go out or come in so I do not know.

Q. Thank you. That's all I have.

THE COURT: Ms. Carter?

MS. CARTER: Antoinette Carter with USDA.

EXAMINATION

BY MS. CARTER:

Q. Along those lines and terms of the number of nonmember producers currently associated with Federal Order 5, the Appalachian Order, as well as Federal Order 7, the Southeast Order, do you have knowledge of what's, the volume of producer milk that is pooled on those orders by nonmember producers and -- as well as the number of nonmember producers on those orders?

A. Let's see if we can make a stab at it from the Exhibit that we turned in. If so many -- if so many is and here's the total, then so many are not.

Q. Okay.
A. So.
Q. And in terms of number of producers?
A. I would again guess if there is a total number and these are SMA members, then the balance would be not from SMA member cooperatives.
Q. Okay. You mentioned that there were noncooperative association members that are not SMA members.
A. Cooperatives who are not SMA members, yes.
Q. Yes. That SMA does provide some type of marketing function for?
A. Yes.
Q. Can you explain that arrangement?
A. Okay. Mr. Miltner questions me, for example, about the relationship between Continental Farms and Dairy Farmers of America in its marketings with -- in Orders 5 and 7, and in that particular arrangement, there is a contractual agreement between the two that pretty much as he outlined it, the milk supply -- the milk is supplied by Continental Farms, which is a cooperative with members in Indiana, Ohio and Michigan, and there's a contractual arrangement that DFA would market that milk to -- of Continental Farms in return for, you know, a level price and that it would market that milk to its best return.

That would be one example. There are other examples where and that -- you know, where it might, that example applies to the entirety of the volume. There are other examples where there may be an agreement to market a load of milk a day or a million pounds in a month, or a volume of milk seasonally where -- or even to the point of a volume of milk -- hypothetically, 20 loads of milk a day, 365 days a year; but if the milk is not needed in the market on a particular day, it may stay at the home, in the home market and return for a fee, and then the -- that cooperative would market it to its best return. So there's a wide variety of marketing arrangements that involve anywhere from all of the milk produced to a subset of the milk.

Q. Okay. Turning your attention to Exhibit 48, where you've provided, I guess a trend in the changes in marketing, in the marketing structure in the southeast.

A. Okay.

Q. I guess specifically with regards to pool plant, pool distributing plants, which is Item 5a on both the Appalachian, as well as the Southeast Order, Pool Supply Plants, Cooperative Association, which you've gone through with Randal in terms of some of the changes that currently exist, as well as Grade A milk producers by state in the southeast region, in all of these tables you've provided the changes that have occurred from June of 1996 to June of

2003, do you have any information on what the change has been since the current Appalachian and Southeast Orders were implemented in January of 2000 in terms of what the changes have been with respect to each of these?

A. So for example, Table 5a?

Q. Correct.

A. I don't have it where I could recite it, but obviously, that's a matter of record. Again, as I've pointed out to Mr. Stoker, we chose 1996 as a result of conversation with the dairy programs group that that was an appropriate period to measure a change in the market, but that would -- it would be known and with regard, I think, to the pool supply plants, Item 7, again that might be something known. With regard to the Item 8, those come from handler lists that are published in market administrator statistics, so those would be available for those time periods, but I can't do them off the top of my head.

Q. With regards, looking at and trying to get some information with regards to what the facts or impact of Proposal I, which is the merged Appalachian and Southeastern Order marketing areas, what the impact of the proposed merger would have on returns to producers. Have you, there has been, I guess, information put into the record concerning combining the -- the computated blend prices and based on that information, have you looked at the differences in what the impact will be for each Order in terms of cooperative members versus nonmember producers, for example under Order 5 and what that would be?

A. Certainly there, you know, the one table where we took a simple a weighted average.

Q. Uh-huh.

A. Which was, you know, all of the data that we had without trying to go into each pool month by month, you know. There is differences between the existing Order 5 blend and a weighted average in existing Order 7 and a weighted average, and certainly a member or a nonmember would have the same minimum blend price. So there would be one measure. You know, any other measures would require a tremendous amount of proprietary cost data, I think, that comes in servicing the market that probably would not be available to the record.

Q. Okay and just to follow up on that with regards to the, with regards to Federal Order 5, the Appalachian Order, using that data, would producers under that Order overall, would there be a positive difference and/or a negative, and I guess, with regards to the Southeast Order as well?

A. Again, there that would be a moving target question.

Q. Uh-huh.

A. Under the current set-up of class prices or of utilizations in class prices as a general rule, if Class IV prices are relatively high, you know, Appalachian Order producers are probably going to have a somewhat higher blend price and if Class III prices are higher relative to Class IV, over a period of time, Federal Order 7 producers are going to have a relatively higher blend price; and there we've attempted to point that example out so, you know, pick your crystal ball for the future and put those two relationships in and that would give you somewhat the answer, but I would also point out that no matter which one of those you picked out, whoever was on the lower end of that would feel disadvantaged and that would -- that would be me today and you tomorrow, and the next day that position could reverse.

Q. Okay. Moving to the lock in provision that's included in your proposal and basically you're proposing to continue the current lock in provision that's under both the Appalachian and Southeast Orders. Have you given any thought to a different standard for a plant that has, that's locked into a marketing area but has plurality of its sales into a higher price market, if there should be different standard for such a plant?

A. Have not given that any thought.

Q. Okay and I'll just expand on that. Should the producers that would be supplying that plant benefit from the higher market price under the Order in which it has its plurality of its sales, in your opinion?

A. I guess typically I don't -- I don't think of that as being the problem or the issue, but you know, as you outlined it it would be, it would be hard to make a case against that if -- if a plant, you know, would get to a higher, you know, area that producers should share in that; but again, there's the whole realm of issues about, you know, price, price alignment, is it consistent, does it flip back and forth, and I guess I would have to say that over time, consistency would be the greatest measure.

Q. Okay.

A. And if there's a consistent pattern, then that should be the guide but if there's not a consistent pattern, then it seems like the, you know, the provision as it stands would be preferable.

Q. Okay and just one last question to follow up with regards to that. The rationale that currently exists for locking plants in and generally it's been plants that are locked into a marketing area that has plurality of their sales, I believe into a lower price market. Is that correct as you understand it or?

A. I think so.

Q. Does that rationale, is that same justification applicable under a condition where the plurality of the sales would be in a higher price market, in your opinion?

A. I think we just went through that.

Q. Okay. Okay. Thank you.

MR. STOKER: I have one more.

THE COURT: I don't think she's finished yet.

MS. CARTER: I'll defer. He can go right ahead and I'll just.

THE COURT: All right. You please go.

EXAMINATION

BY MR. STOKER:

Q. This is in relationship something Antoinette touched on and that's the differences in blend prices. I'd like to refer to Exhibit 25 that was prepared at the request of Chip English.

THE COURT: This is Mr. Stoker speaking, just for the record.

MR. STOKER: Yes, Randal Stoker.

THE COURT: The witness is securing a copy of the Exhibit. He'll be back in a second. We'll go off the record for a second.

(OFF THE RECORD)

<u>CONTINUED RECROSS:</u>

Q. Elvin, have you had an opportunity to kind of glance over the differences in blend price on the cover sheets of each of 25, 26, 27 and 28.

A. Yes.

Q. As a general, I realize that these marketing situations may change in the future, as you've indicated, by class percentages and things, but I was looking at the differences in the past as they would have related had it been merged, it's pretty safe to assume that Order 5 producers would be disadvantaged and Order 7 producers would be advantaged. Is that correct?

A. Yes.

Q. Have you done any work to calculate up if there is a net gain or loss between the merger if all producers would gain or lose?

A. No, we haven't. I would say in general that, you know, your eyeball analysis is that for most months the Order 5 blend is higher. One of the things that we've tried to point out is that that's not so much of the sharing of the returns of the Class I market or the added differential value, but it's the terms of sharing the returns of the reserve market and that where we see this as a combined market based on many of the reasons we've put forth it seems reasonable that all producers would share in that reserve value. It's one of the reasons why we have nationwide Class I, Class II, Class III, Class IV prices.

So, yes you point out something that's certainly true and as we look at it over the course of both past and future, it seems to us that those reserve values ought to be shared equally also; and would say that, you know, SMA has producers on both sides of that line and DFA has producers on both sides of that line, and from DFA's standpoint, that point has been discussed very intently at DFA meetings, and still the position is to support the merger.

Q. Thank you.

THE COURT: Any questions? Ms. Deskins?

MS. DESKINS: Sharlene Deskins, United States Department of Agriculture.

EXAMINATION

BY MS. DESKINS:

Q. I have got some questions about the Southern Marketing Agency. Now it's a corporation, correct?

A. Yes, it's a corporation.

Q. Okay.

A. It's a common marketing agency, but it also is a legal corporation.

Q. Okay because I'm just trying to understand that. In some industries they have things that are called a super co-op, which is a co-op that consists of other co-ops. Is that the Southern Marketing Agency is?

A. I'm not familiar with your term, super co-op; but the Southern Marketing Agency is a common marketing agency composed of only cooperative members so you or I couldn't go and belong. If we formed a co-op, we might could belong.

Q. Okay so it's only -- it's co-ops are members of the Southern Marketing Agency?

A. Yes.

Q. Okay because the reason -- another reason I'm asking is that you said that Southern Marketing Agency, at one point had 5,242 members?

A. That's probably written incorrectly.

Q. You meant there -- the co-ops that were a part of it had those members?

A. Yes, yes.

Q. Okay. Okay and then I had a question for you on Exhibit 38 of -- I'm sorry, it's Item 38 of Exhibit 48. It's a map of Virginia.

A. Yes.

Q. Do you have any idea of how many members -- how many members of the co-ops that are part of Southern Marketing Agency would be located within this light colored area in Virginia?

A. Well, not exactly but I would say somewhere between 500 and 1,000.

Q. Okay and what about the dark area, do you have any idea?

A. Oh, I'm sorry. The light - you mean the light area?

Q. Yes.

A. Oh, I'm sorry. I'm not sure if there is any. There's -- I'm not sure if there is any milk produced, or not much milk produced in those counties. In the darker area, a greater number.

Q. Okay. Do you have any idea how many?

A. Again, I would guess between 500 and 1,000.

Q. Okay and would all of those be members of -- I'm trying to get the name right, the Maryland Virginia Milk Producers Cooperative Association?

A. They would be members of Maryland Virginia and Dairy Farmers of America.

Q. Okay. Thank you.

A. You're welcome.

THE COURT: Other questions? Yes, Ms. Carter.

MS. CARTER: Antoinette Carter with the USDA.

EXAMINATION

BY MS. CARTER:

Just to follow up on just a couple of questions regarding the Transportation Credit Balancing Fund. I want to know if you could just provide us with just a review of what the operating cost level has been for the Transportation Credit

Balancing Fund, under the Appalachian as well as the Southeast Order, for the years of 2000 through 2003?

A. I'm sorry, I don't understand your question.

Q. What has the operating cost level been for the Orders with regards to the Transportation Credit Balancing Fund? What has been the operating level based on the amount of collections and the payments out, in terms of the rate, I guess is my question.

A. Well the -- if I understand your question, on -- in Order 5, in all of 2002, they were able to pay all of the claims made to the fund at 100% value and in 2003, they were able to pay all of the claims, I think up until December.

Q. Okay.

A. And in the Southeast Order, I think every month of operation had a prorated claim of some sort and 50%. You know, 50% or more, again, that would be -- those things are published in the monthly Order 7 Bulletin as far as the amount of proration each month.

Q. Okay and just to follow up on that, for example, under the Southeast Order, Order 7, although they -- the assessment rate for the months during each of those years was at a seven cents per hundred weight, there was a proration that was done, I believe, for every month in which credits were paid out, which seems to indicate that the operating level, if you will or the assessment level, should -- in order to do the full credits, would have been -- should have been at a higher level or it was operating at a level obviously higher than seven cents per hundred weight. Is that --

A. I think part of our testimony said that in order to have a zero balance it would have had to have been thirteen and a half cents roughly, but there's a calculation made of that in the statement for Order 7.

Q. Okay, okay, and to that end, with regards to Federal Order 5, because in some months they did waive payments during certain years and months of certain years, it seems like they were operating, would you agree, at a level that was less than the rate of the assessment collected which at the .65?

A. Certainly over the entire period, 2000 to 2003, I think probably 47 out of 48 months, you know, there was -- there were no prorations; however, we also have provided an example that under a merged scenario would indicate that it would take at least ten cents a hundred weight to break even between the two Orders and that example, Exhibit 37. One of the assumptions underlying Exhibit 37 is that the -- I'm sorry, Item 37 --

Q. Item 37.

A. -- not Exhibit 37.

Q. Okay.

A. In this spreadsheet or in this calculation, it's an attempt to try to measure, I think, what you're asking about, the operating performance of the two funds.

Q. Uh-huh.

A. Well, you didn't ask of the two but if you combined the two, how would it look and so, part of the -- one of the underlying assumptions here is that the seven cents that was collected in Order 7 was paid, so it's off the books and column, the second to last column to the right says that in some months there wasn't enough, that that didn't pay all the bills.

Q. Uh-huh.

A. So if you, again, if you start through this example, and to me, it's kind of like if you had, you know, if you're balancing your checkbook at the end of the month and you started out in January of 2000 with $310,000.00, you collected $212,000.00, and if we were to make it be seven cents in both of the two transportation pools, you would have collected an additional $16,300.00. So it says at the end of the month, you would have had $539,000.00, because there was no pay outs in that month.

Q. Uh-huh.

A. So you begin to run that example through and you have an ending balance, you add to it to get until you get to a point where you pay something out so you make the subtraction. So again, just like you would run your checkbook. Well, you run this for 48 months and you get down to December and it says that we're 2.889 million in the whole, so the operating experience over this cumulative time said it worked good for a while; but we ran out of money and that's what we would use to justify the additional funds. So if it takes ten cents to break the two even in our analysis, that would be about the operating experience -- I think that's the way we're defining it of the two together.

Q. Okay. Given that the assessment rate under the current Appalachian and Southeast Order over the past four years has been at different levels, under the Appalachian Order there has been the waiver of credits --

A. Yes.

Q. -- collected under certain months, and under the Southeast there has been a proration throughout that period, is it correct that that's an indication that those Order, that there are distinct differences with regards to the transportation credits for those two marketing areas.

A. If you view them separately and as distinctly different, the answer would be yes; and the market administrator in both cases has different charges. You know, the market administrator in Order 5 is -- he has it fairly narrow, he just looks for the checkbook for Order 5, and the market administrator in Order 7 just looks at the checkbook for Order 7. So the market administrator in Order 5, you know, he went down and did his analysis and says, well, looks like I can waive the assessment in these months because there's enough monies. We would say -- we would suspect that today he would probably not be looking at waiving any 2004 assessments because the balance doesn't look as strong, and in '03 it didn't look as strong. The market administrator in Order 7 is faced with the scenario of every year now she started out the year and looks at the checkbook and says, not going to be enough again this year doesn't look like. So when you look at them separately you say, yes, there could be some different experience. We also provided an example of the Sulphur Springs to Atlanta versus Sulphur Springs to Greeneville example of where, as an operator, you look at your bills and you say, I owe this much to get this milk transported and because the two funds are not -- one is prorated and one is not, I'm going to make a decision to maximize now, my checkbook, that's not efficient in the sense of both of the markets so our answer to that would be to merge both the funds as well as merge the markets.

Q. Okay. In addition, you are proposing, I believe it's Proposal No. 3, SMA's Proposal to combine the balances in the fund should the Orders be merged?

A. Yes.

Q. Have you looked at any other alternatives in terms of maybe possibly disbursing the money back to those that paid into the fund and if you have, what are your thoughts on that?

A. Outlined, I think, some of those alternatives. Certainly, you could take in each case, there's a transportation fund, there's an administrative assessment fund, you could take all of those and zero them out. In the -- in the December 31, 2004, pool so when the new Orders take effect in January 1 of '05, you would start out with zero and you would reserve enough funds to meet those. That would be certainly an alternative. The alternative we propose is that to carry those balances forward because for the most part they were earned by the same subset of producers, supplying a common market and that are facing a common situation. So our testimony would say to carry those fund balances forward.

Q. Okay. Okay. Thank you.

A. You're welcome.

THE COURT: Mr. Beshore?

MR. BESHORE: Your Honor, I do have a number of questions of redirect for Mr. Hollon. I wonder if we might not have the opportunity for a short break before we finish redirect.

THE COURT: Yeah. Did you want to offer, at this point, 47 and 48?

MR. BESHORE: I do, yes.

THE COURT: Well, let's receive both of those. They're received.

(Whereupon, the Exhibits, having been previously identified as Exhibit Nos. 47 and 48, were received into evidence.)

THE COURT: So at least we've got that bookkeeping out of the way.

MR. BESHORE: Thank you.

THE COURT: And you want to break, for what, about ten minutes?

MR. BESHORE: Yes.

THE COURT: We'll take a ten minute recess. While we're doing that, I had a couple of requests. We're off the record.

(OFF THE RECORD)

THE COURT: Mr. Thompson, you are sworn and you have a statement, and let's do this. Let's mark your statement as Exhibit 49, Statement by Tom Thompson, and you also have with you a letter -- I guess it's a letter of authorization by Norman Jordan saying that he'd like you to read his testimony in. We'll make that 50, and then his statement is 51. Is everybody clear on that? Any other?

(Whereupon, the documents referred to were marked for identification as Exhibits 49, 50, 51.)

MR. THOMPSON: Your Honor, I have one clarification.

THE COURT: Yes.

MR. THOMPSON: Dr. Bill Thomas was here until about thirty minutes ago.

THE COURT: Yes. Do you have one of those things.

COURT RECORDER: No. It's the one in front of you ringing.

MR. THOMPSON: He is the economist for Georgia Milk Producers as a consultant. He is retired from the University of Georgia as a Dairy Economist and he asked that I also read his statement into the record.

THE COURT: You have a third one?

MR. THOMPSON: That is -- his comments and mine are under one cover.

THE COURT: Okay. All right.

MR. THOMPSON: But with your permission, I would like to begin by reading his comments because my analysis is based upon his, actually my comments are based upon his analysis.

THE COURT: And you'll be available for cross examination as to both?

MR. THOMPSON: Yes, I will.

THE COURT: Okay.

MR. ENGLISH: So we're marking each of those statements separately?

THE COURT: Let's see, I said 49 for yours and then I forgot to put a number on it. Let me see, 49A for Thompson, and then inside, it's in the same group, we'll make -- where does it start?

MR. THOMPSON: Actually Dr. Thomas' is the first part of that, under the cover.

THE COURT: Oh, Thomas' is 49A --

MR. THOMPSON: Yes, sir.

THE COURT: -- and Thompson's is 49B.

MR. THOMPSON: Yes, sir.

THE COURT: It starts later on under that cover. Do you have all of that over there, Mr. Recorder?

MR. ENGLISH: She doesn't have enough copies. She doesn't have the letter. I guess we'll have to make copies.

THE COURT: I'll tell you what I'm going to do. I'm going to give her the letter and I don't know what we do with that. Maybe, the government can retrieve that from her and get the copies later. What do you think? That one page letter? Yeah. Okay. Let me make sure I've got everything on here now. I gave the letter 50.

COURT RECORDER: All right.

MR. ENGLISH: And then was the testimony of Norman Jordan 51?

THE COURT: Yes.

THE COURT: All right, sir, you're under oath, would you start by -- with Exhibit 49, which is Exhibit 49A and 49B. You're first going to read the, it's 49A, what Dr. Thomas prepared.

MR. THOMPSON: Yes, Your Honor.

Whereupon

TOM THOMPSON

having been first duly sworn, was called as a witness and testified as follows:

EXAMINATION (reads statement)

MR. THOMPSON: The letter that I am about to read is from Dr. Bill Thomas. It states that he is a Dairy Economist with over 25 years of experience and he represents Georgia Milk Producers, Inc., an association of the 340 dairy farms in Georgia. Georgia Milk Producers represents all the dairy farms in the state, including cooperative members, as well as non-members.

The final decision establishing the current Southeast Order addressed the issue of a production deficit in the proposed Order. USDA found at that time that, using

1997 data, "Georgia had the greatest "deficit" -- with route distribution from Order 7 handlers falling about 42 million pounds short of the 122 million pounds of expected consumption". That's the final end of that quotation. The decision further stated that "the deficit in other states ranged from 4 to 11 million pounds."

Since that time, the situation in the order has continued to decline. When Order 7 was expanded in the year 2000, the population of the states included in the Order was 38,031,420. It has increased each year and in 2003 was 38,952,855. This was a 2.4 percent increase in just three years.

During this same time period production in the order states fell from 8.9 billion pounds to 8.4 billion pounds or a decline in excess of 15 percent. During the same period, U.S. production increased 1.6 percent. Referring back to USDA's decision, it calculates per capita milk consumption with rates varying from 16 pounds of fluid milk per month to a high of 19 pounds. Assuming an average of 18 pounds per month, per capita consumption has increased 8.2 billion pounds in 2000 to over 8.4 billion pounds in 2003.

Comparing production and consumption in 2000 when the Order was initiated, there was a small surplus of 692 million pounds in the states in the Order, Table 1 (is referenced). With the decline in production and increase in population that small surplus has changed to a deficit. In 2003 the order states had a estimated deficit of 869 million pounds.

In developing or changing an Order USDA-AMS must weigh many issues, factors and interest. (and it has a footnote too. It is referring to Novakovic and Stephenson, Procedures for developing, Issuing and Amending a Federal Milk Marketing Order, Dairy Markets and Policy Issues, O-2, Cornell University, 1995) USDA is required to be evenhanded in considering the needs of producers, processors and consumers. Based on the decline in production in the region compared to the growth in demand, USDA has not sufficiently considered the needs of the dairy farmers in the states covered by the Order.

One recent publication by Jesse and Schuelke projects regional milk production in 2020. They project that between 2000 and 2020 milk production in the Southeast will fall 49.8 percent. As bad as that decline is, their projection for Appalachia is even greater with an 86.4 percent decline. By 2020 they project that there will only be 701 million pounds of production in those states.

THE COURT: Let me stop you there for a second. I -- he's reading the statement in, but is there problems with taking official notice of this or, we're getting experts inside of the experts here.

MR. BESHORE: We're not going to object to it, Your Honor.

THE COURT: There is no objections as such? All right the, but, I guess it hasn't risen to the level anybody want to take official notice of Novakovic and Stephenson, or Jesse and Schuelke? I don't -- I don't know either one of them so, all right, so -- well, I guess we let it continue that if the doctor were here, he would tell us that's the basis for his statement you're giving the association.

MR. THOMPSON: Yes, sir.

THE COURT: All right, keep going.

MR. THOMPSON: All right.

This amount of milk could be produced by less than 60 dairies with 500 cows each. That is not many dairy farmers surviving in a four state area: certainly not enough to maintain an infrastructure for the industry. It has been the common practice for USDA to enlarge a market order area and lower the average utilization in some areas and raise it in others. Georgia dairy farms have experiences losses in income every time tat FO 7 has expanded from its original configuration as a Georgia Order to the proposals before us today.

Table 3 shows the changes in Mailbox prices between 2001 and 2003. Since the method of reporting Mailbox prices changed in 2001, it is not possible to go back to 2000 itself. Over the last two years, the mailbox price declined from an annual average of $16.02 per cwt inn 2001 to $13.08 in 2003. This decline in mailbox prices in the Southeast occurred at the same time that milk production in the region continued to decline.

That's the end of Dr. Thomas' statement.

Behind the -- his statement and behind my statement, there are various tables, Table 1, which is Selected Population and Milk Production Statistics, FO 7 States. This is source from USDA, the Agriculture Research Service and Atlanta Market Administrator. Table 2 is Projected Regional Milk Production Shares, 2020, and this is, as I have referred earlier to, the source of Jesse and Schuelke, Regional Trends, and Table 3, Regional Mailbox Prices, Selected Areas, 2001-2003, and the percent change and the source there is Dairy Market News, and that concludes Dr. Thomas' statement.

THE COURT: All right. Well, let's continue with yours and then we'll see about receiving them into evidence. You're 49B.

MR. THOMPSON: All right.

EXAMINATION (reads his statement)

I am Tom Thompson, President of Georgia Milk

Producers, Inc., an association of all 340 dairy farmers in Georgia. We represent all the dairy farms in the state, including coop members and non-members. I am also a Georgia dairy farmer (and I might add I have been for 44 years).

The proposals before us today may increase the blend price slightly to Georgia dairy farmers but they will not increase the utilization sufficiently to stop the loss of production. We request that USDA correct the mistake that was made in 2000 when the lower utilization western part of the current Southeast Order was added to the higher utilization eastern part of the Southeast Order. Dividing the current Southeast Order and creating a Mississippi Valley Order, as defined in Proposal 5, would be the first step to help rectify the mistake made in 2000.

We do realize the proponents of Proposal 1 have made valid points in the proposal to merge Orders 5 and 7. They do have overlapping market areas. They do have common supply areas and common cooperative marketing associations. Testimony presented by the Market Administrator has shown that there is a great deal of overlap in marketing areas on the eastern part of the current Order 7. That overlapping does not exist for plants located in the western part of the Order.

We support raising the utilization in the most deficit areas of the Southeastern states by creating a Mississippi Valley Order and combining the traditionally high utilization areas of the remainder of Order 7 and Order 5 into a new Southeast Order.

MS. DESKINS: Your Honor.

THE COURT: Yes.

MS. DESKINS: We would have an objection to that because it's beyond the scope of the notice of the hearing.

THE COURT: Well, I would --

MR. ENGLISH: May I be heard?

THE COURT: Yes.

MR. ENGLISH: You have a proposal to -- that's opened up the question of the boundaries of the marketing areas for Orders 5 and 7. That proposal, one proposal would merge 5 and 7 in their entirety. You have another proposal that says no, don't merge those two Orders, but instead take this area that is to the west and make it a new Order called the Mississippi Valley. All of those issues are now open for consideration by the Secretary. When the Secretary could decide, in her wisdom, to take a portion of Order 7 and merge it together with Order 5, regardless of anybody actually officially asking for that. I think that, you know, the issues are all open for consideration of what the proper boundary for the marketing area is.

THE COURT: Well, I'll allow it in. I'll allow it in and overrule the objection. Go ahead.

BY MR. THOMPSON:

And as a follow up, Your Honor, my next statement, from my prepared statement is the observation that this is a hybrid of Proposal #1 and Proposal #5.

Transportation Credits are an effort to recover from the market the cost of supplying the market during the deficit fall months. Transportation credits are a deficit market adjuster. Proposals before this hearing are to combine transportation credit funds and increase the collection rate. History has shown that the larger the supply area, the greater the cost of balancing that supply. Therefore, as production in the region has declined, the cost of supplying the market has increased. Rather than placing the burden of balancing the market on the dairy farmers in the order who are members of cooperatives, transportation credits do shift some of that burden to the market.

Transportation credits have an unintentional result of making it easier to bring in an alternative supply of milk rather than encouraging the production of a local supply of milk. The market is paying more for the milk that it is receiving but that increased cost is going to truck drivers instead of dairy farmers. The price to local dairy farmers should be increased rather than paying for additional transportation costs.

It is our belief that supplying a deficit market can be helped with a fall incentive plan to increase production when the market is deficit as well as using transportation credits to pay to bring milk in that otherwise is not being produced. We propose that the collection rate be increased as others have proposed but we believe the first priority for the deficit market adjuster fund should be to encourage increased milk production in the fall. If producers do not respond to this incentive, the fund should then be used to offset the cost of hauling milk to supply the market.

What we propose is a deficit market adjuster which would encourage new production in the region. If that does not occur, then use the funds for transportation credits. There are a number of benefits if additional production can be generated. These include:

1. Savings on purchases from outside the Southeast.
2. Savings on hauling milk from outside the Southeast.
3. Savings on hauling milk inside the Southeast.
4. Lower balancing costs by having supplies nearer to processing locations.
5. More efficient use of seasonal balancing plants.

6. Spill-over economic impact (to the community and to the state).

It is apparent to us that unless corrective action is taken, there will be no significant milk production in a region that continues to have a rapidly growing population. Without corrective action, everyone loses: local dairy farmers (lose), our nation (loses) through increased energy import costs and highway maintenance, our commuters (lose) through increased traffic congestion, but most importantly our region's milk consumers who will be straddles with ultimately higher costs of imported milk into the region (lose as well).

(Your Honor), We appreciate the opportunity to appear before you today and present our views (and I'll be happy to take questions).

THE COURT: All right. Let's go on to 51. I think we should get it all out and then we'll open you up to examination. This is the statement we've marked as 51, by Norman Jordan, and you're going to read it in, and you -- since you're on the same, same situation, you're available to take cross examination on the data therein contained?

MR. THOMPSON: Yes.

THE COURT: All right, sir.

EXAMINATION (reads statement of Norman Jordan)

MR. THOMPSON: Yes, sir. This is the testimony of Norman A. Jordan, Jr., President of North Carolina Dairy Producers Association, and I have been asked by him to read this into the record.

"There is something wrong in the current milk marketing environment for the Southeastern United States. This area has an increasing population yet milk production is declining. Figure 1 shows regional changes in population and milk production. Under these conditions, one would expect returns to surviving producers to improve. However, mailbox prices to producers have not improved relative to other regions where milk supplies are more abundant. Figure 2 shows mailbox prices for selected Federal Order markets.

Speaking on behalf of North Carolina producers, we have seen a continual decline in the number of farms and milk produced while our population has grown. Chart 3 shows the trend in North Carolina and the two other major producing states in the Appalachian Order. We, the surviving North Carolina producers, do not feel that the market is rewarding us appropriately. Under the Carolina Federal Order, which preceded the current Appalachian Order, our Class I utilization was 79%. Since January 2000, under FO 5, our utilization has been 68% on average. As far as I am aware under the Carolina Order, there were no concerns that the milk supply was inadequate. Federal Order Reform has been detrimental to North Carolina producers and I am concerned that the merger proposals will do nothing to improve the ability of local producers to stay in business and continue to supply the fluid milk needs of local consumers.

I do not have access to the detailed information necessary to evaluate the current proposals. Therefore, I can only request that any changes in the Order boundaries and Order regulations seek to address the growing deficiency in local milk supplies by enhancing the returns to local producers who supply the market year in and year out.

It would appear that we are in a downward spiral. As local production diminishes, the cost of balancing the market rises. These increased costs must then be born by producer coops serving this market who are the, apparently, unable to recoup these costs fully from the processors and ultimately the consumer. I request the USDA-AMS Dairy Division modify the pooling rules such that local producers receive an increased proportion of the Class I sales. I believe that 80% annual average Class I use is a reasonable target that provides the market an adequate reserve. I further request that a means be found to recapture the cost of balancing the market through increased transportation credits and other means, in order to relieve producers in the Southeastern United States of this burden. I feel that these proposed changes are necessary for USDA-AMS to fulfill the intent of Market Order legislation. Further, if this can not be achieved it is clear that the dairy industry of the Southeastern United States will vanish.

And then he has attached to this Figure 1, a chart, Regional Changes in Milk Production and Population; the source is USDA data, calculation by G. A. Benson; Figure 2, Mailbox Prices, Selected Orders, 2000-2003, Source: USDA-AMS-Dairy Division, and Figure 3, the back chart, Appalachian Region Milk Production, 1989-2002, Source: USDA.

THE COURT: Questions. Mr. Beshore?

EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Thompson, Marvin Beshore, representing Southern Marketing Agency. I have just a question or two about Georgia Milk Producers for the record. As I understand it, and correct me if I'm wrong, Georgia Milk Producers, Inc., is an organization formed under Georgia law?

A. That is correct.

Q. And in Georgia -- every, under the law, every dairy farmer in Georgia is assessed dues to be a member of Georgia Milk Producers?

A. That is correct but they first have to decide by two-thirds vote that they want to do this.

Q. Okay so that they want to have the organization?

A. That they want to have the organization. Yes. It is a self-imposed deduction to support an organization that it takes two-thirds vote to, in the affirmative to achieve.

Q. Okay and once it's in existence, then every dairy farmer -- by that vote, every dairy farmer in the state becomes a member of it by obligation, by law?

A. Yes, sir. That's correct.

Q. And Georgia Milk Producers is strictly a trade organization and not a milk marketing organization?

A. That's correct.

Q. Okay. So you don't have any customers for milk or you're not in the business of --

A. No, sir. We do not. We have the distinct position of representing producers in the specific area and support their views.

Q. Thank you.

THE COURT: Anything else? Yes, Mr. English.

EXAMINATION

By MR. ENGLISH:

Q. Let me make it clear what this is not. Nobody at Dean Foods or I assisted you in any way in writing this testimony. Correct?

A. No, sir. No, sir, you did not.

Q. And you came up with this concept of a hybrid proposal on your own?

A. Yes, sir, we did.

MR. ENGLISH: That's all I have. Thank you.

THE COURT: Any other questions? Ms. Deskins?

<u>CROSS EXAMINATION BY</u>

<u>MS. CARTER:</u>

Q. With regards to your proposal, which would basically, if adopted, be the Eastern part of the Southeast Order and the Appalachian Order, current Appalachian Order, what provisions do you propose be included in that Order if adopted?

A. The provisions that currently exist in Order 7 as I understand it are a little tighter in terms of pooling requirements than those in Order 5, and it is my understanding that the Proposal that has been submitted by the Southern Marketing Agency incorporates the provisions of Order 7 as the overlying rules that would operate, but I can only reference that from what I've heard. You would need to ask them.

Q. Just to follow up, what -- have you done any impact analysis of what your proposal, what type of impact your proposal would have on producers, handlers and consumers?

A. I have not and I'm not the economist. I'm a dairy farmer.

Q. Okay.

A. I wish Dr. Thomas were here. I don't know that he's done that either, but you know.

Q. Just one last question. You indicated that Georgia Milk Producers Association is comprised of 340 dairy farmers in the state of Georgia that are members of cooperatives and they also consist of nonmember producers. What cooperative associations do your members --

A. There are three cooperatives that I am aware of and I think those would constitute virtually all of the coop members in the state. Maryland Virginia Milk Producers headquartered in Richmond, Virginia; Dairy Farmers of America headquartered in Kansas City, Missouri, and Southeast Milk, Inc., which is a Florida coop and I'm not sure of the town in Florida that they are -- that their headquarters is.

Q. And just the one last question. I think you provided a table that lists the mailbox prices that producers received on average, 2001 through 2003.

A. I think this was part of Dr. Thomas' tables.

Q. Okay. The prices that are listed here, do they include any over order premiums?

A. Mailbox price, according to the definition that I understand, includes everything.

Q. Okay.

A. It is the net price at the farm gate, after taking all costs out of marketing the milk. In other words, you could take the milk check that the dairy man gets and then divide the pounds that he shipped that month into the milk check and that is the farm price. So it does include everything that he got, yes, on a net basis, after paying all costs. All costs of marketing, not all costs of production.

Q. Okay. Sorry to interrupt. Thank you.

MS. CARTER: That's all I have.

THE COURT: Do you have questions. Is there an objection to the receipts of Exhibits 49A, 49B, 50 and 51?

They are received.

(Whereupon, the Exhibits, having been previously identified as Exhibit No. 49A, 49B, 50 and 51, were received into evidence.)

THE COURT: All right. So, you're excused.

MR. THOMPSON: Thank you, Judge.

(WITNESS EXCUSED)

THE COURT: All right. Let's go off the record for a second.

(OFF THE RECORD)

THE COURT: All right. On the record. Mr. Beshore, Mr. Hollon.

MR. BESHORE: Okay. Thank you.

Whereupon

ELVIN HOLLON

having been previously duly sworn, was recalled as a witness and testified as follows:

EXAMINATION

BY MR. BESHORE:

Q. Mr. Hollon, first of all, let me ask you a couple of questions about subjects that Mr. English covered in his cross examination. First of all you were asked, I'm not sure what the significance is exactly but let's set that aside, you were asked to identify plants that may have been the location for milk manufactured at nonfat dry milk from Order 5.

A. Yes.

Q. Are there any that you are aware of that didn't come to mind when you were asked that question? You mentioned, for instance, Carlisle, the plant in Carlisle. Are there any other plants in the northeast region, for instance?

A. Certainly there would be milk that is pooled on Order 5 or 7 in primarily during surplus times that's processed in the nonfat dry milk at Marrow, Virginia's plant at Laurel, and at the Derrick plant in Reading, and perhaps even at Middleberry Center.

Q. And those locations are in Pennsylvania?

A. Is one in New York? Are they both in Pennsylvania?

Q. Reading and the Middleberry Center are both in Pennsylvania.

A. Both in Pennsylvania.

Q. Okay. Now, Mr. English also inquired with respect to the proponents, proposed language for supply plants which would allow a so called split plant. Do you recall that?

A. That is correct.

Q. Okay and the proponents do propose to allow supply plants to be split plants have a Grade A intake side and a Grade B intake side, so to speak. Correct?

A. Yes.

Q. And you testified that that is in order to --

because there is Grade B milk in the area of some of the existing supply plants and they take in Grade B milk.

A. That is correct.

Q. And if you take in Grade B milk -- Grade A milk, you've got to have two separate facilities for handling the milk I take it?

A. Yes.

Q. Now is it -- is it the proponent's intention to accommodate any pooling abuses of the type that Mr. English referred to in Order 33 or Order 32 that was facilitated in part by split plants?

A. No. That's not the intent nor the desire.

Q. Okay. Do the performance requirements in the current Orders, Order 7 and, well that's the language that's being picked up I think, the Order 7, would the performance requirements with respect to supply plants apply to the supply plants under the proposed Order?

A. Yes. That would be the intent.

Q. Okay and are they, are those requirements substantial in terms of the association of the market?

A. Yes they do require greater market association and the proceedings that Mr. English referred to in Orders 32 and 33, the performance standards were much less restrictive, much less severe and so the split plant provisions were more easily abused or more readily accommodated, depending on your view; and in this case, because the performance standards are already greater in terms of what it takes to associate with the market, it would be much more difficult to accommodate or abuse those split plant provisions.

Q. Now Mr. English also inquired with respect to the changes since 2000 in the amounts of distribution from distributing plants in one Order into another Order. Do you recall that general subject testimony?

A. Yes.

Q. And you may not have understood or maybe you didn't understand one of the questions that I thought I understood and I thought you were asked about the observed degree of distribution from Order 7 plants into the Order 5 marketing area.

A. Right.

Q. Okay and that number has been relatively steady since, or the magnitude of it has been relatively constant since 2000. Correct?

A. Yes.

Q. Is there anything in the configuration, in the location of those Orders, in the marketplace that affects those type of milk movements, from package products, from plants in Order 7 into Order 5?

A. Well the differential structure is not as accommodating going from Order 7 to Order 5, and Order 7 distributing plant would likely have a higher Class I price than if it went -- than going north, so you wouldn't expect as much interplay, or overlapping distribution.

Q. Have you ever heard that referred to as moving milk upstream?

A. Yes. That's a term of art that's used quite frequently.

Q. Okay. In any event, the grade of Class I prices is lower as you go north, and the Order 7 plants, which are all south of Order 5 essentially, would have a higher --

A. Yes.

Q. -- price to begin with.

A. That would in general be true. So that would restrict or limit some of that movement.

Q. Now let's look, turn to the -- you had two items in Exhibit 48 which depicted the pounds or portions of the Orders represented by the proponent cooperatives and you were asked some questions on cross by Mr. Rower or Mr. Stoker or Ms. Carter, or more than one of them, about the structure of the markets in terms of cooperative members and nonmembers.

A. Yes.

Q. In Order 5 and Order 7 and I think Item 2 in Exhibit 48 is one table that shows some of the proportions of milk represented by the proponent cooperatives and the other one is perhaps Item 37, not 37; but there's -- do you remember which other item showed that.

A. No but we can find it -- 28.

Q. I'm sorry.

A. 28.

Q. 28, okay. Thank you. Now if you -- Item 28 shows percentages of -- 72%, it shows 72, 75, 68 -- but Item 2 shows bottom line percentages of 77, 80 and 79. What are the differences in those numbers?

A. On Item 2, the 77, 80, 79 percentages reflect the additional other cooperative milk that is marketed in agreements with SMA members, proponent members. So stand alone, those members would be 63, 69, 66; but when viewed in terms of total supply into the market, you know, the percentages are much higher. Again, reflecting those types of supply arrangements that Mr. Miltner and I discussed and Ms. Carter and I, you know, had some back and forth with, that are marketed through SMA members into the marketplace.

Q. So those are volumes represented by some of the cooperatives, some of the sources shown on that -- on Item 28?

A. Yes.

Q. As well as some of the sources shown on -- well, shown on Item, on Item 28?

A. Yes.

Q. Okay, now there's -- so that, in aggregate, you have about 80% of the market that you are serving directly?

A. It would be the representative by a membership agreement with one of the proponent members or a marketing agreement of some type, be it short term or longer term basis, for milk so that would accommodate the 77, 80 and 79 percent numbers.

Q. Okay. Now do the -- do any of the proponent cooperatives, through -- directly or through affiliates also market milk in the other 20% of the combined markets?

A. Yes. There is at least one arrangement between -- the marketing entity is called Dairy Marketing Services, known as DMS in the industry. It is owned by Cooperative Dairy Farmers of America and Dairylea and it represents a sizeable percentage of that remaining 20% in the two Orders, that markets milk of nonmember producers primarily to Dean Foods plants and National Dairy holdings plants.

Q. Okay. Now let's walk through that just a little bit and make sure the record is clear. DMS is an organization that is owned by Dairy Farmers of America and by Dairylea Cooperative, Inc. Correct?

A. That is true.

Q. And Dairylea Cooperative is one of the organizations that markets milk in the southeast region. It's own members milk through the Dairy Farmers of America?

A. That is correct.

Q. And Dairylea Cooperative is, in fact, a member of Dairy Farmers of America?

A. It is also -- it is a cooperative member of Dairy Farmers of America.

Q. Cooperative member of Dairy Farmers of America. Okay and Dairy Farmers of America and Dairylea, then, jointly own Dairy Marketing Services, which is a marketing organization that markets milk for other dairy farmers. Correct?

A. That is correct.

Q. And within these Orders, does it market milk for producers in both Orders 5 and Order 7?

A. Yes.

Q. Okay and I think you use the word substantial, it markets a substantial share of the 20% that's not accounted for by directed cooperative milk?

A. That would be correct.

Q. In both markets?

A. Yes.

Q. Okay. Does it market in both Order 5 and in Order 7?

A. It does.

Q. Okay. Are the terms of sale of the DMS milk in line with the terms of sale by the cooperative's milk as a common marketing agency?

A. It is.

Q. Okay. Now to your knowledge, are there approximately, and we don't have any -- any precise numbers in the record from the market administrators, all the data we asked for and I guess one of the bits of data that they have in their files that was not requested was the number of nonmember producers; but to your knowledge, is the number of nonmember producers on Order 5 and in Order 7 in the same approximate range?

A. I would say in general that 15 to 20% in either Order would encompass the nonmember producers and it would be about the same in Order 5, percentage of, as it is in Order 7, percentage of.

Q. Okay. Now, so with respect to the economics and what happens in terms of pluses and minuses, if there is to be a combined Order, assuming that using historical projections only -- historical facts, looking back at Class III and Class IV utilization, blend prices as you discussed with Ms. Carter, looking back if you assume that Order 5 producers would lose under those scenarios, some cents per hundred weight, and the nonmembers that would lose, like the numbers there would lose, cooperative numbers, right, would nonmembers on Order 7 have gains of the same amount, in essence?

A. That would be true because the proportions are roughly the same. We pointed that, attempted to point that out, that for every group that would be happy in one month, there would be a pretty much equal group that would be unhappy and be a total of zero sum gain; but the proportionate differences between the two would be about the same.

Q. Okay and if the screw turned and terms of Class III and Class IV price relationships in the future, and it went the other way, the -- it would flip flop the other way; but it would still be a zero sum among all concerned in the markets.

A. In the main that would be true because again, the percentages are about the same.

Q. Okay. Now at the present time, the proponent cooperatives are able and do, through private agreements among themselves, establish a uniformity of returns throughout this single market area, as you've testified, by agreement. Correct.

A. That is true. SMA operates a pool not for very much in similar or very much like the Federal Order pool but over the entirety of two markets and then it equalizes those returns among its members. Again, as you said, it's by a prior treaty or agreement that that's the way the return to the market should be distributed.

Q. But you're unable, without changes in the regulations as we have proposed in terms of merging the Orders, you're unable to equalize those returns among cooperative -- the cooperatives and the nonmembers. Correct?

A. That is true.

Q. But the merger would achieve an equalization of those utilizations among all concerned in serving in the single market?

A. All suppliers to what we -- propose to be a single market would then get a uniform return, both in Class I, II, III, and IV.

Q. Now you were asked -- I'm not sure by whom, whether -- was there any criteria in Federal Order Reform relating to market structure or something to that effect. Do you recall that?

A. Yes. Yes.

Q. Okay. Is it not the case, as you've testified, that one of the criteria was the number of handlers in the market?

A. That is true. There was a number of pages of discussion in the reform document that -- dealing specifically with, for example, the old Kansas City Order, the former Peoria Order, the Upper Michigan Order. Those come to mind. I'm not sure if there were others, but in essence, those markets had such a few number of handlers that market information could not be adequately provided so there was always a suspicion as to, you know, how those returns were allocated -- South Dakota Order, Eastern South Dakota Order was a similar situation, and one of the provision in order reform said this is not a good thing. There needs to be more handlers in a market, both for market information and for the ability to deal with Order provisions in a way that would create favorites in some and not in others and that was unintended. So certainly, that was one of the criteria.

Q. Okay. So is it your understanding that when we're talking about the number of handlers being pertinent, that if there are a number of plants owned by the same handler, there is still only -- there's only one handler?

A. That is true.

Q. Okay and the concerns relating to the number of handlers, you're -- the information you've provided demonstrating that the number of handlers has been reduced by consolidations relate to that criterion of the Secretary?

A. Yes. That would be correct.

Q. Okay. Mr. Hollon, is there -- you've testified and prepared testimony at length and on cross examine here, is there, you know, is there a sentence or two in your testimony where you can sum your case up or where you have summed your case up for the adoption of Proposal 1?

A. I think there is a paragraph, page 15. It's right in the middle of the -- right in the middle of the page. It's I think a single sentence, "the continued existence of the two Federal Milk Marketing Orders across a single fluid market inhibits market efficiency and supply and balance in the market. It creates unjustified blend price differences, encourages uneconomic movements of milk, and results in the inequitable sharing of Class I proceeds applied from the single market." That probably, if you're going to do it in there's no such thing as a free lunch version, that's probably about as succinct as I can get.

Q. Okay. That would be, that would be a good place to stop. I got one technical area to inquire into with you yet. With respect to transportation credits and payouts, and you were asked a number of questions concerning the apparent difference in cost per hundred weight in servicing the Order 5 market versus the Order 7 market.

A. That's correct.

Q. Okay and I just want to explore that a little bit.

A. Why don't we use Item 40 in the Exhibit package also while we're talking about this.

Q. Okay. That's your primary spreadsheet with respect to the transportation credit pool. Correct?

A. That is correct.

Q. Okay. Is the -- is the draw on the transportation credit pools in Order 5 and Order 7 affected by the geographic location of the supplemental milk being supplied as it relates to the Class I price grid in the Federal Order system?

A. Yes. I'm also searching for one more Exhibit to try to explain that. Exhibit 19, or Item 19.

Q. Okay, Item 19 and Item 40.

A. Yes.

Q. Item 19 being the map.

A. It is a map of supplement milk sources brought into the market through the proponent cooperatives.

Q. Okay.

A. If you look first to Item 40, there is laid out basically an equation that mimics the Order language and the computation of the transportation credit; and so it has miles, it has an adjustment for 85. That's saying that the Order language says you shouldn't get paid on the first 85 miles of the haul. That should -- that's something designed to try to encourage some efficiency in the operation, and about the middle of the page, there is also an adjustment for less the Class I differential; and in this particular example, going from Sulphur Springs to Atlanta, there is a dime's worth of difference in a Class I differential, so it affects that calculation, by in essence, you know, taking a dime out of the potential return. Obviously, all things being equal, if you had a different destination and starting point, and between those two destinations there was a fifty cents difference in differential, the bottom line is that the transportation pool would pay less money. So if you go back again to look at the map in Item 19 and look, for example, at the distribution of milk out of Texas or out of that supplemental source, you can see that that -- it goes primarily to Order 7 plants, and the adjustment for the difference in differential is small. So in each of those calculations, that would be made in the market administrators, the adjustment would be smaller and the transportation pool would pay out greater. Conversely, the sources of milk that come into Order 5 would be more from the mideast and northeast areas, and there the difference in differential would be larger. It would be more on the magnitude of 25 or 35 or 45 cents, so the payout by the transportation pool, would be smaller. So the fund would last longer because those payouts are smaller, or perhaps another way of saying it is that the Order 7 pool would have to prorate faster because its payouts are greater and the Order 5 pool would prorate less -- and it didn't prorate at all, and one of the reasons is the way that the formula works and the way the milk supply comes into the market.

Q. In your opinion, does that difference in pay outs represent a substantial difference in market structure or need for supplemental milk between Order 5 and Order 7?

A. Ask that again.

Q. Does the difference in pay out represent a substantial difference in market structure or the need for supplemental milk supplies in Order 5 versus Order 7?

A. There is the need for supplemental milk supplies in both markets. I think that's reasonable well documented and would be hard to deny, and so the fact that the provisions are difference and have a different effect seems like that would be an additional reason to merge the transportation credit funds and merging the Orders.

Q. So that the cost of milk to the competing handlers was equalized?

A. Was equalized and the effect on the transportation credit funds and producers and handlers would be treated the same way.

Q. Thank you.

MR. BESHORE: That's all I have.

THE COURT: Any other questions? Are we going to let Mr. Hollon go and rest in peace until we get some other proposal?

MR. HOLLON: Mr. Ricciardi is reserving his opportunity for tomorrow and the next day.

THE COURT: For tomorrow and that. All right. Is there anything else to be done this evening or shall we now recess and --

MS. DESKINS: Judge Palmer, what about people passing out those statements? Are they where that we can pass them out?

THE COURT: All right. Fine. That's a good point. Do we have statements that are going to be --

MR. ENGLISH: I don't know, Your Honor, but another point -- we don't need to be on the record. I don't know if we're off or not.

THE COURT: Well, let me -- let's get her points. So, first, does anybody have statements that are going to be available?

MR. ENGLISH: I don't have any statements yet to pass out. I mean, we're still working on things, but Mr. Beshore might have a comment on that that's sort of like a statement, in my opinion.

MR. BESHORE: We do have one witness that will be here tomorrow to testify on the producer handler issue, through whom we possibly second, but one for sure, through whom we intend to just offer as an Exhibit, testimony and cross examination, given that her prior hearing, the same participants here, on the same subject. So there's not going to be a further prepared statement but that, giving due notice, that that prior testimony and that it's going to be presented.

THE COURT: I'm going to take official notice of the, I guess we'd be taking official notice or would be not?

MR. BESHORE: We're going to offer it as an Exhibit and not have it read.

MR. RICCIARDI: And I'm going to have a significant objection to that.

MS. DESKINS: We will probably, too.

THE COURT: All right. Well, sharpen up all your thoughts so that you can help me.

MR. RICCIARDI: Now, Judge, what I'd like to do, if possible, is at least, get an idea, if we have one, as to when this is going to be called and whatever order if that's possible so that we can prepare for tomorrow.

THE COURT: All right. Let's do that. What are we looking at?

MR. ENGLISH: Your Honor, I'll get to that in one second; but I've got to say -- if we're going to talk about allowing prepared statements, what is the difference between a prepared statement and a document that has already been given as testimony and subject to cross examination? The only difference is, one has already been given under oath and has already been subject to cross examination. If it isn't reliable, if it isn't what the Administrative Rules permit, then we aren't -- ought to be allowed to have any prepared statement and if we're going to allow prepared statements, what's the difference? There is none; and the witness will be available for full cross examination.

MR. RICCIARDI: And I will make my argument when we get to that point, Judge. I didn't know we were previewing it now.

MR. ENGLISH: Well, I want to put him on notice for it. So --

MR. RICCIARDI: I got my notice.

MS. DESKINS: We can make our argument now, which is, if we were to allow things from previous hearings to come in, why have this hearing at all?

MR. ENGLISH: The difference is we're not talking about a witness not being here. The witness is here.

MS. DESKINS: They could just prepare a statement for this hearing, even if it was the testimony from a previous one. That would relieve our concern that it be taken from a previous hearing.

THE COURT: Well, he's going to have a statement with him.

MR. ENGLISH: And that's what we're going to do and it's going to become an Exhibit and the only difference is, he's not going to read it in, which the Judge said yesterday, he'd be prepared to accept.

MS. DESKINS: There's a difference between his statement and testimony from a previous hearing. Those are different.

THE COURT: Well, I gather that his written statement will be this prepared statement from an earlier hearing.

MR. ENGLISH: Actually --

THE COURT: Are you going to give copies of it out? Do you have copies?

MR. ENGLISH: Well, I do have a copy at the present time. That is if -- the hotel has found my Federal Express delivery that we paid a premium to have delivered here this morning.

THE COURT: How long is it? How many pages?

MR. ENGLISH: I'm not certain. I'm not certain actually.

THE COURT: I just wondered if you could --

MR. ENGLISH: 120 pages, Mr. Miltner, sent us of transcript. There are a couple of Exhibits with it, which were prepared Exhibits. I think it's far superior to a written statement. It was presented testimony and the witness will be here.

MR. RICCIARDI: It would be, Judge, if it had anything to do with these particular Orders and it doesn't.

THE COURT: All right. Well.

MR. RICCIARDI: And it's, that's what we'll talk about it. Obviously, it's like coming in, bringing in information about another automobile accident. So what?

THE COURT: All right. Do we know who is going to testify tomorrow? Let's see, let's get a witness list together.

MR. ENGLISH: Well, Mr. Herbein will be here.

THE COURT: Herbein.

MR. ENGLISH: And Mr. Hitchell has been here, and Mr. Hitchell should probably get on and off.

THE COURT: Herbein and Hitchell.

MR. BESHORE: I have one short, very short additional witness on Proposal 1, which is Mr. Johns.

THE COURT: Mr. Johns.

MR. ENGLISH: Mr. Gary Lee from Craig Farms would like to testify and the testimony will be available first thing in the morning.

THE COURT: All right.
MR. ENGLISH: Then, other than that, then, I mean, I think a lot of this is going to depend on your ruling on whether or not we're going to have Mr. Herbein regive his testimony, you know, live or not. That's going to lengthen the hearing or not. I believe Mr. Hollon will be testifying on the producer handler issue. We can address that the same way. Mr. Christ has testimony on the producer handler issue, and later we'll have testimony on proposals --
THE COURT: Who else, I heard Hollon, who was after Hollon? Who was next?
MR. ENGLISH: Mr. Christ.
THE COURT: Christ.
MR. ENGLISH: C-h-r-i-s-t.
THE COURT: C --
MR. ENGLISH: C-h-r-i-s-t.
THE COURT: Okay.
MR. ENGLISH: And he will be testifying twice, once on the producer handler issue and once on the merger proposals, or the demerger proposals.
THE COURT: Now is the thought that all of these people will be completed tomorrow?
MR. ENGLISH: No. I doubt it.
THE COURT: Okay. Well these are the witnesses

we have.

MR. RICCIARDI: And I've got one witness to put on Proposal A, Judge, Mr. Sumners.

THE COURT: Mr. Sumners.

MR. RICCIARDI: Yes and I'm assuming he'll go on Thursday or Friday, depending on how things go tomorrow.

MR. MILTNER: Or Monday.

MR. RICCIARDI: I'm not talking to you about Monday.

THE COURT: All right. Well, I guess that's where we stand. Let's adjourn now until 9:00 tomorrow. We have all of our contentious problems tomorrow and we'll work them all out.

(Whereupon, the hearing in the above entitled matter was closed at 6:20 p.m.)

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