

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN Re:	X	FEBRUARY 25, 2004
	X	9:00 a.m.
MILK IN THE APPALACHIAN AND SOUTHEAST MARKETING AREAS; NOTICE OF HEARING ON PROPOSED AMENDMENTS TO TENTATIVE MARKETING AGREEMENTS AND ORDERS	X X X X X X	DOCKET NOS. AO-388-A15, AO-366-A44 and DA-03-11 WESTIN ATLANTA HOTEL 4736 BEST ROAD ATLANTA, GA

VOLUME III 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
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MR. PAUL CHREST
MR. CARL CONOBER
CONSULTANTS

MR. JOHN VETNE
SOUTHEAST MILK, INC.

REPORTER:

JANICE ADDINGTON

CONTRACTOR (not present):

R & S TYPING SERVICE

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P R O C E E D I N G S

1
2 FEBRUARY 25, 2004

3 Whereupon,

4 JOHN HITCHELL

5 having been first duly sworn was called as a witness herein
6 and was examined as follows:

7 EXAMINATION (reads his statement)

8 THE WITNESS: Your Honor, I'm testifying today on
9 behalf of proposal number four.

10 THE COURT: Proposal number four. And would you
11 give more of your identification, where you live and who
12 you work with and that sort of thing.

13 THE WITNESS: I'm employed by the Kroger Company,
14 manufacturing division. I'm the general manager of raw
15 milk procurement and regulation. And I'm located in
16 Cincinnati, Ohio.

17 THE COURT: All right, you have a prepared
18 statement with you. Shall we mark this? I'll mark it as
19 exhibit number 52.

20 (Whereupon, the document referred to was marked
21 for identification as Exhibit number 52.)

22 THE COURT: And then if you'll proceed to read
23 it, Sir.

24 THE WITNESS: I have to make an apology at the
25 very beginning of my statement. I've put the wrong date.

1 I know it's February 27th, 2004, instead of 2003. If the
2 Court Reporter can make that change.

3 THE COURT: Please scratch this out, and put in
4 2004. There you go.

5 THE WITNESS: Good morning. As I said, my name
6 is John Hitchell, I'm employed by the Kroger Company, Dairy
7 Group/Manufacturing Division, as a general manager of raw
8 milk procurement and regulation. I'm located in
9 Cincinnati, Ohio.

10 The Kroger Company owns and operates Winchester
11 Farms Dairy, in Winchester, Kentucky, and Westover Dairy
12 in Lynchburg, Virginia, that are now pool distributing
13 plants on Federal Milk Marketing Order number five.

14 In addition, the Kroger Company owns and operates
15 Heritage Farms Dairy in Murfreesboro, Tennessee, and
16 Centennial Farms Dairy in Atlanta, Georgia, that are pool
17 distributing plants on Federal Milk Marketing Order number
18 seven.

19 I'm appearing today to first state our support of
20 a merger between Federal Milk Market Orders number five and
21 seven.

22 Second, I'm appearing to give specific testimony
23 in support of the Kroger Company's Proposal number four
24 that requests the proposed southeast order be expanded to
25 include two currently counties, and two currently

1 unregulated cities, located in the state of Virginia. In
2 proposal number four - - in addition, proposal number four
3 seeks to include the current Appalachian marketing area
4 pool plant order language in proposal one.

5 Westover Dairy, Lynchburg, Virginia is a pool
6 distributing plant qualified as a pool plant on the
7 Appalachian Federal order number five. During the month,
8 fifty percent or more of the fluid milk products physically
9 received at such plants are disposed of as route
10 disposition, or are transferred in the form of packaged
11 fluid milk products to other distributing plants. At least
12 25 percent of such route distributions, or dispositions and
13 transfers must be to outlets in the marketing area. Herein
14 lies the issue at hand.

15 Before January 2000, Westover Dairy, in
16 Lynchburg, Virginia, was a fully regulated pool
17 distributing plant, pooled on the Carolina Federal order,
18 since the promulgation of the order. Total route
19 disposition percentage in the Carolina Federal order, which
20 would qualify a plant as a pool distributing plant was not
21 less than 15 percent of total route disposition. When
22 the Appalachian Marketing Area was created in January 2000,
23 which included the former Carolina Marketing area, the
24 total route disposition in the marketing area percentage
25 increased from 15 to 25 percent.

1 This major change has created an undue hardship on
2 Westover Dairy from being able to increase its route
3 disposition in the unregulated marketing area of which it
4 is physically located and areas outside of Federal Order
5 number five. In order for the plant to maintain its
6 qualifying pool status on Federal Order number five its
7 growth potential is limited to the Appalachian Marketing area.

8 In 2002 and 2003, Westover has been forced to review
9 the breakdown of its Class One sales on a weekly basis to
10 maintain its status as a pool distributing plant on Order
11 number five. In 2002, Class one distribution class one
12 distribution in order number five represented 17.6 percent
13 of the plant's class one sales. Sales in order number five
14 in 2003 averaged 25.95 percent of the plant's class one
15 sales. This represents the largest percentage of sales in
16 Federal order by Westover. However, during the same time
17 period, sales in the unregulated area of the state of
18 Virginia where the plant is located, represented 43 percent
19 of Westover's class one distribution.

20 At times Westover has been forced to relinquish
21 sales that have - - that they have historically serviced in
22 areas outside of order number five, in order to remain a
23 pool distributing plant. This situation has made it very
24 difficult for Westover to be a reliable supplier of class
25 one milk to these customers, and damages their ability to

1 maintain this business.

2 If the regulatory environment of Westover Dairy
3 changes from its current status, the plant would suffer a
4 severe financial hardship and find it difficult to compete
5 in the markets it now services. Limiting the growth
6 potential of a pool distributing plant is not and should
7 not be a function of the Federal Order Program.

8 In our proposal, we request the expansion of the
9 proposed southeast order with the additions of Campbell and
10 Pittsylvania Count and the cities of Lynchburg and Danville
11 in Virginia.

12 The addition of these counties will physically
13 place Westover Dairy within the proposed southeast market
14 area. Our proposal is designed to affect only Westover
15 Dairy. The addition of these counties and cities to the
16 proposed southeast order, would add class one sales to the
17 plant within the order. This will increase the percentage
18 of Westover's class one sales within the order and help to
19 maintain their status as a pool distributing plant in the
20 proposed southeast order.

21 In addition to our proposal, the Kroger Company
22 supports proposal three by the south - - southern marketing
23 agency. Proposal number three expands the proposed order
24 with additional counties and cities in Virginia. The
25 addition of this area to the proposed order will

1 significantly increase Westover's percentage of class one
2 sales within the proposed order.

3 The Kroger Company is also requesting in proposal
4 four that the current Appalachian market area pool plant
5 order language be included in the southeast order.

6 Winchester farms dairy, Winchester, Kentucky, is
7 a pool distributing plant qualified as a - - is a pool
8 plant qualified as a pool distributing plant on the
9 Appalachian Federal Order. Winchester has been a pool
10 distributing plant on order five and, previous to order
11 consolidation, on order 46 since 1988. Prior to 1988,
12 Winchester had been a pool distributing plant on order 33
13 since the plant began operation in 1982.

14 At that time, the plant was placed in an
15 uncompetitive position to attract a milk supply, since it
16 was located in a Federal order with a significantly higher
17 utilization than the order under which it was regulated.
18 The Department recognized this situation and convened a
19 hearing on June 30, through July first, 1987, to receive
20 testimony to revise the pool distributing plant language in
21 order 46 and order 33 in order to allow Winchester Farms to
22 become a pool distributing plant on order 46. Based on a
23 record of the hearing, the department issued a decision
24 that resulted in Winchester Farms becoming a pool
25 distributing plant on order number 46 in 1988.

1 Today the situation is the same as it was in
2 1987. Winchester Farms would be located in the proposed
3 southeast order while a majority of its sales are still in
4 Federal Order number 33. It is imperative that Winchester
5 remains a pool plant in the proposed Southeast order. If
6 the plant's regulatory status were changed as a result of
7 his hearing, it would be impossible to operate the plant in
8 its current capacity and remain a full distributing plant
9 in the proposed order. In order to continue to service our
10 current customers and provide dairy farmers the market and
11 financial returns they have enjoyed at Winchester Farms
12 since 1988, the plant must remain a pool distributing plant
13 in the proposed order.

14 The adoption of proposal three and four will
15 increase the percentage of Westover's class one sales to a
16 level that should insure its status as a pool distributing
17 plant in the proposed southeast order. This will allow the
18 plant to pursue business opportunities in the areas outside
19 of the proposed southeast order the plant currently
20 services. The plant will be allowed to provide dairy
21 farmers with a competitive market without jeopardizing its
22 status as a pool distributing plant.

23 The adoption of the Appalachian marketing area
24 pool plant order language will allow Winchester Farms to
25 continue its status as a pool distributing plant in the

1 proposed southeast order. This will assure Winchester to
2 continue to service its current customer base and provide
3 dairy farmer with a competitive market.

4 Therefore, the Kroger company requests the
5 Secretary promulgate the southeast order that includes
6 proposal three and proposal four.

7 I'd like to add a little bit to my prepared
8 statement here. After hearing Mr. Holland's testimony, I
9 agree with his statement, that if the Secretary promulgates
10 the southeast order, and adopts proposal three, it is
11 unnecessary to include proposal four. However, if the
12 Secretary determines to promulgate the southeast order, and
13 does not include proposal three, we would then request that
14 proposal four be adopted.

15 That is the end of my statement. I'd like to
16 thank the Secretary for granting this hearing, and
17 providing the opportunity to testify.

18 THE COURT: Thank you, Sir. Questions? Yes, Ms.
19 Carter.

20 MS. CARTER: Antoinette Carter, with USDA. Good
21 morning, Mr. Hitchell. I have just a few questions.

22 EXAMINATION

23 BY MS. CARTER:

24 Q. From whom do you obtain your source of supply?

25 A. In both plants?

1 Q. Yes.

2 A. Both plants, the Dairy Farmers of America is the
3 supplier.

4 Q. With respect to the lock in provision, have you
5 considered to given any thoughts to if a different standard
6 should be applied for a plant that has the plurality of its
7 sales in a higher price market?

8 A. That is not the case in our situating here. So I
9 really haven't given any thought to it. Our situation is
10 that both of our plants would be pooled and markets would
11 have lower utilization to us. If we would become pooled,
12 those marketplaces, the dairy farmers would supply our two
13 plants. Economic returns would be severely reduced. If
14 our regulatory status would change at both facilities.

15 MS CARTER: Thank you, that's all I have.

16 THE COURT: More questions? Yes, Sir, Mr.

17 Riccardi.

18 MR. RICCARDI: Thank you. Al Riccardi. Mr.
19 Hitchell, how are you today?

20 THE WITNESS: Just fine. How are you this
21 morning?

22 MR. RICCARDI: I'm doing well. Thanks. I have a
23 couple of questions.

24 EXAMINATION

25 BY MR. RICCARDI:

1 Q. I want to direct your attention with two, what is
2 really the third page of exhibit 52, but really the second
3 page of your substantive testimony. You made a statement
4 in the second full paragraph, last sentence: Limiting the
5 growth potential of a pool distributing plant is not and
6 should not be a function of the federal Order Program.

7 And that's your position, I assume?

8 A. That is correct.

9 Q. Would it also be true, and would Kroger have a
10 position on this, that limiting the growth potential of a
11 producer/handler is not and should not be a function of the
12 Federal order program?

13 A. The Kroger company base is stated his position at
14 a Federal order hearing that was held earlier this year and
15 we'll stand by the position so stated.

16 Q. You don't have a position one way or another at
17 this hearing today?

18 A. I do not at this hearing at this time.

19 Q. Would you agree with me that just substituting in
20 producer/handler for pool distributing plant would be
21 consistent with the testimony that you provided here?

22 A. If we were given the opportunity to openly
23 negotiate our prices, without the constriction of
24 regulatory, without the regulatory constriction, the
25 situation might be somewhat different. But unfortunately,

1 we don't have that opportunity. Certainly the
2 producer/handler is not constrained by the regulatory
3 prices as we are, so I'm not sure it's exactly the same.

4 Q. Let me ask a couple more things. I think you testified
5 in response to a question that Kroger at least for one or
6 two of its plants has a supply agreement with DFA?

7 A. That is correct.

8 Q. Would that be true with all four of the plants in
9 five and seven?

10 A. Yes, that is correct. We have independent dairy
11 farmers in Murfreesboro, Tennessee, but the majority of the
12 milk is supplied by DFA. Centennial is a hundred percent
13 supplied by DFA.

14 Q. Are those full supply agreements?

15 A. With the exception of Murfreesboro, that is
16 correct.

17 Q. And are there any other stand alone plants other
18 than fluid milk plants in five and seven other than the
19 four that you've mentioned?

20 A. We operate an ice cream plant, Southern Ice Cream
21 Specialties just up the road here in Marietta, Georgia that
22 is not a - - it is not a pooled plant; it is a stand alone
23 class two operation is not pooled under Federal order.

24 Q. So there are maybe five plants, four that are
25 pooled, and five and seven and one, the ice cream plant

1 that is not.

2 A. There are, there would be four plants pooled and
3 one that's not.

4 MR. RICCARDI: Thank you very much.

5 THE COURT: Other questions? Yes, Mr. Beshore.
6 If you sit behind Mr. Beshore, - - he jumps up before I can
7 - -

8 EXAMINATION

9 BY MR. BESHORE:

10 Q. Just one question, Mr. Hitchell to clarify your
11 response to one of Mr. Riccardi's question. The - - you
12 indicated that you weren't prepared to - - that you weren't
13 making any specific statement or position on - - at this
14 hearing. But that you were standing on the position you
15 had taken, and testimony you had taken at an earlier
16 proceeding, Federal order hearing this year.

17 A. That is correct.

18 Q. Or last year.

19 A. That is true.

20 Q. And just so you all know and understand, that
21 that hearing which was, involved the Arizona, Las Vegas,
22 Pacific Northwest orders, your Kroger company's position
23 was in support of - -

24 MR RICCARDI: I'm going to object, Your Honor.

25 MR. BESHORE: He asked the question and he

1 listened the answer. I should be able to elaborate - -

2 THE COURT: Let me hear the objection, then I'll
3 rule on it.

4 MR. RICCARDI: Your Honor, I asked a specific
5 question regarding his testimony here regarding producer
6 handlers. He said that he had some other position there,
7 but no position that he was taking in this case. It is
8 therefore improper to bring in the other information from
9 131, and 124, because I asked him specifically about his
10 testimony here. He's not taking a position. It shouldn't
11 come up.

12 THE COURT: I understand, but I think you opened
13 the door by the question. So we'll let Mr. Beshore ask one
14 clarifying question.

15 Q. The position - -

16 MR. BESHORE: Thank you, Judge.

17 Q. The position that was taken by the Kroger company
18 at that hearing was in support of a proposal which
19 established, or would establish a three million pound per
20 month ceiling on exemption for producer/handler operations,
21 correct? That was yes?

22 THE COURT: Did you answer?

23 A. Yes, that is correct.

24 MR. BESHORE: Thank you, that's all.

25 THE COURT: We'll let the record reflect that

1 that's in the contacts with Arizona, and maybe the
2 situation in this market is different.

3 MR. RICCARDI: Arizona and Northeast, Your Honor.

4 THE COURT: Yes. Thank you, Mr. Riccardi. Mr.
5 Hitchell, oh, yes, MR. English?

6 EXAMINATION

7 BY MR. ENGLISH:

8 Q. Good morning, Mr. Hitchell.

9 A. Good morning.

10 Q. A couple of questions about the plants and your
11 concerns. With Winchester Farms on the final page of your
12 testimony, and it just may be a grammar point, and I
13 apologize. But you say, Winchester Farms would be located
14 in the proposed Southeast Order while a majority of its
15 sales are in Federal Order number 33.

16 A. That is correct.

17 Q. If the orders are merged, you're nonetheless
18 saying that a majority of your sales would still be in
19 Order 33.

20 A. That is correct.

21 Q. And the problem that that would present, if you
22 were not locked in - -

23 MR. ENGLISH: And for the record, we support the
24 continuation of the lock in provision.

25 Q. But the problem that that would present if you

1 weren't locked in is with your plant located in Kentucky,
2 competing for a milk supply in Kentucky, you would suddenly
3 be returning, at least as the Federal order minimum price
4 is, the blend price from Order 33. Correct?

5 A. That is correct.

6 Q. And that would create a competitive imbalance for
7 you, correct?

8 A. That's correct.

9 Q. And the problem with a competitive imbalance for
10 a handler under Federal Orders is that we have a very
11 competitive marketplace?

12 A. That is correct.

13 Q. In the modern marketplace, with large box to
14 customers, would it fair to say that customers change at
15 around a difference of a half cent a gallon?

16 A. Again, the majority of our sales are within our
17 company, but we do have some sales outside the Kroger
18 company. And that is a fair statement. That is a constant
19 competitive battle to make sure that we have a competitive
20 price and out of that plant specifically, Winchester Farms,
21 we do service a customer outside of the Kroger Company
22 called Sav-A-Lot, and we are constantly having to meet
23 competitive challenges when it comes to a wholesale price
24 situation.

25 MR. ENGLISH: That's all the questions I have.

1 THE COURT: Any other questions? Appears to be
2 not, Sir. Do you have anything you wish to add?

3 THE WITNESS: I do not.

4 THE COURT: Thank you very much.

5 THE WITNESS: Thank you.

6 THE COURT: Who will be the next witness? Shall
7 we go off the record for that? Let's go off the record for
8 a second.

9 (OFF THE RECORD)

10 THE COURT: Mr. Johns is the next witness.

11 Whereupon,

12 FRANK JOHNS

13 Having been first duly sworn was called as a witness herein
14 and was examined as follows:

15 THE COURT: Mr. Johns is sworn.

16 EXAMINATION

17 BY MR. BESHORE:

18 Q. Mr. Johns, could you give us your name and
19 business address, please?

20 A. My name is Frank Johns. Business address is
21 10411 Cogdill Road, Knoxville, Tennessee.

22 Q. And by whom are you employed, Mr. Johns?

23 A. Dairy Farmers of America.

24 Q. In what capacity?

25 A. Director, customer relations for the southeast

1 region.

2 Q. How long have you been employed by Dairy Farmers
3 of America, and its predecessors?

4 A. Ten years.

5 Q. Now, do you have a brief statement you'd like to
6 make with respect to some of the issues in this hearing,
7 particularly the Virginia Milk Commission Regulations?

8 A. Yes, I do.

9 Q. Would you proceed with that.

10 A. Thank you.

11 My name is Frank Johns, I'm director of customer
12 relations for Dairy Farmers of America, Incorporated.

13 MR. ROPER: Let me stop you for a second. Does
14 the Reporter have a copy?

15 MR. BESHORE: We will provide one to the Reporter
16 subsequently. It's a brief statement. I don't intend to
17 make it as an exhibit. You're going to get a copy of it
18 too, but this will be done as an oral statement without any
19 exhibit. Completely oral. Go ahead, Sir.

20 THE WITNESS: My business address is 10411
21 Cogdill Road, Knoxville, Tennessee, 37932.

22 I'm here today to testify on behalf of the
23 proponent cooperatives of Proposal number three, which
24 proposes the expansion of the proposed southeast marketing
25 area into certain counties, and cities in the state of

1 Virginia.

2 This testimony is presented to clarify and
3 amplify previous proponent testimony pertaining to Proposal
4 number six.

5 The Virginia State Milk Commission operates a producer
6 base pricing plan, whereby producers delivering milk to
7 plants with Class One route disposition in the State of
8 Virginia, receive a Class One price set by the State Milk
9 Commission on those producer's base milk volumes delivered
10 to such plants. The regulations covering the operation of
11 the Virginia State Milk Commission do not provide for the
12 market wide pooling of any of the proceeds of the Class One
13 prices established by the Virginia Milk Commission.

14 As such, the proponents of Proposal Number three
15 do not expect the change in the producer milk definition,
16 as defined in proposal number six, to impact or limit the
17 pooling of milk on the proposed Southeast Order from
18 Virginia Milk Commission base-holder producers.

19 Rather, we expect no change whatsoever in the
20 operation of the Virginia Milk Commission base plan, or any
21 change in the milk deliveries to unregulated plants or
22 plants regulated by the Southeast Order, as a result of
23 proposal number six.

24 As long as Federal Milk Marketing Orders have
25 existed in an around the State of Virginia, there has been

1 pooling of milk from Virginia Base-holder producers on
2 Federal Milk marketing orders since many of the plants
3 regulated under the various orders have route disposition
4 in the state of Virginia.

5 No significant problem has arisen as a result of
6 this system, and all the proceeds from the sale of milk,
7 either Federal order blend price proceeds, or proceeds from
8 the Class One prices established by the Virginia Milk
9 Commission accrue to the base-holding producers supplying
10 these plants.

11 The proponents of Proposal Number Three would
12 oppose any change or modification to the current Federal
13 Order producer definition, or an change in the intent and
14 application of the producer milk definitional change as
15 contained in Proposal Number Six, if such amendment, change
16 or modification would result in any impact whatsoever on
17 the operation of the Virginia Milk Commission base plan,
18 the Class One pricing system established by the Virginia
19 Milk Commission, or the pooling of milk from Virginia base-
20 holders on the current Federal Milk Marketing Orders, and
21 on the proposed Federal Milk Marketing Orders.

22 Thank you, this concludes my statement.

23 Q. Mr. Johns, for how many years have you had some working
24 interaction with the Virginia Milk Commission rules?

25 A. I have been working for dairy farm cooperatives

1 for 25 years. Twenty three and a half of those 25 years
2 were for cooperatives that had Virginia Milk Commission
3 base-holders as members.

4 Q. Would it be fair to say that in distinction with
5 the market wide pools, the Federal Order Pools, which are
6 market-wide pools, the Virginia Milk Commission Regulations
7 are more individual handler pool, or individual producer
8 value regulations?

9 A. That would be safe to say, yes, Sir, on a monthly
10 basis, and primarily interested only in the Class One
11 portion.

12 Q. And with respect to producers who hold the
13 Virginia base and are delivering to plants that are
14 regulated by Federal orders, would we understand those - -
15 the interaction of those regulations correctly to be that
16 the Virginia regulations provides some over-order value for
17 the producers?

18 A. That is correct.

19 Q. On the class one.

20 A. On the class one portion, that is correct.

21 Q. And I don't know if you're familiar with it or
22 not, but if you are, would that be similar to what occurs
23 with Pennsylvania state regulations with respect to prices
24 that it establishes for class one milk over and above
25 Federal order prices?

1 A. I'm somewhat familiar with Pennsylvania, and that
2 is my understanding as well, yes, Sir.

3 Q. Now in a hearing that was held in 2002,
4 concerning order one, by the way, are there order, to your
5 knowledge, are there producers in the order one area who
6 hold the Virginia base?

7 A. That is correct.

8 Q. And in that order one hearing, there were
9 proposals very similar to proposal six here with respect to
10 prohibiting so called double pooling or double dipping of,
11 with respect to milk pooling, and in that proceeding, the
12 testimony was, and requests by some of the proponents were
13 that those - - that prohibition would not interfere with
14 either the Virginia regulations or the Pennsylvania
15 regulations, and they should not be seen as - - producers
16 should be able to freely operate under both regulations.
17 Is that what you advocate here also?

18 MR. ROPER: I object.

19 THE COURT: I sustain your objection. I think
20 that's a little too complicated, and it's really your
21 testimony rather than his.

22 Q. Let me try to ask it this way. Is it your intent
23 that the adoption of proposal number six not, in your
24 understanding, that it would not interfere in any way with
25 the operation of Virginia Milk Commission regulations?

1 A. That is our intent and understanding, yes, Sir.

2 Q. Now, if hypothetically a state authority, which
3 established over Federal order values, whether it be the
4 Commonwealth of Virginia, the Commonwealth of Pennsylvania,
5 or any other, if hypothetically those states, as has been
6 proposed in some of them, from time to time, established
7 some pooling among producers of those over-order values,
8 would that, in your view, be a double pooling in any way of
9 the Federal order values?

10 A. In my opinion, that would not constitute a market
11 wide pool of values. So it would not constitute a double
12 pooling in my opinion.

13 Q. Because those over-order values are different
14 values than the basic Federal order minimum.

15 A. That is correct.

16 MR. BESHORE: I have no other questions for Mr.
17 Johns.

18 THE COURT: Any other questions for the witness?
19 Yes, Mr. Deskins?

20 MS. DESKINS: Sharlene Deskins, Office of General
21 Counsel, USDA.

22 EXAMINATION

23 BY MS. DESKINS:

24 Q. You used a term, I just want to clarify.
25 Virginia base holder?

EXAMINATION

1
2
3
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BY MS. DESKINS:

Q. Good morning, Mr. Duprey.

A. Good morning.

Q. Last time you were on the stand, - -

THE COURT: Let's get his name one more time.

Q. Could you please state for the record your name?

A. Steven Duprey, D-U-P-R-E-Y.

Q. And last time you were on the stand, you were asked to prepare some additional documents. Do you recall that?

A. Yes.

Q. Can you please tell us what documents you prepared in response to those requests?

A. I prepared one for Chip English, Prairie Farms Foods, and three for Tom Thompson of Georgia Milk Producers.

Q. Let's start with the one that you prepared for Mr. English and Prairie Farms.

MS. DESKINS: Your Honor, could we have that marked as an exhibit?

THE COURT: Yes.

MS. DESKINS: I'm not sure what number we're up to now.

THE COURT: This will be 53.

(Whereupon, the document referred to was marked

1 for identification as exhibit number 53.)

2 Q. Mr. Duprey, do you have in front of you what's
3 been marked as exhibit 53?

4 A. I do.

5 Q. Could you please tell us what that is?

6 A. It is two tables, actually three tables. The
7 first table is non-pool plant sales into Federal seven
8 marketing area, from the originating order. So plants
9 located within a particular order having sales into Federal
10 seven.

11 Q. And there's a table two?

12 A. Table two is Federal seven pool plant sales into
13 other orders.

14 Q. And there's also table three.

15 A. Table three lists for April, May and June of
16 2001, the total volume of producer/handler route sales into
17 Federal Seven.

18 Q. Now, you prepared this exhibit 53 yourself?

19 A. I did.

20 Q. And it is correct to the best of your knowledge?

21 A. It is.

22 MS. DESKINS: Your Honor, I move for the
23 admission of exhibit 53.

24 THE COURT: Any objection? There appears to be
25 none. It's received.

1 (Whereupon, the document previously identified as
2 exhibit number 53 was received into evidence).

3 Q. Now the next, you prepared documents for Mr. Tom
4 Thompson?

5 A. Correct.

6 Q. Let's start with the one that is for the mailbox
7 prices.

8 MS. DESKINS: And we'll mark that as exhibit 54.

9 (Whereupon, the document referred to was marked
10 for identification as exhibit number 54.)

11 Q. Mr. Duprey, let's go over exhibit 54.

12 A. Fifty four contains mailbox prices by month,
13 going back to 1996 for various areas. Federal milk
14 quarters or reporting areas. Provides annual summaries for
15 '96, '97, '98, '99 and 2002. There are some interim months
16 there, we've had to gather together information from a few
17 different sources.

18 Q. And could you just tell us what those source are?

19 A. The sources are from the Dairy Market News
20 publication, which is available on the agricultural
21 marketing service website. For 2003, the annual summary
22 wasn't available, but is available on the Federal Milk
23 Market - - address. F and M Atlanta, dot com. Which is
24 Federal orders six and seven.

25 Q. And it looks like you got in from some other

1 sources, such as like California Department Food and
2 Agriculture?

3 A. That is where Dairy Market News obtains the
4 information.

5 MS. DESKINS: Your Honor, I would move for the
6 admission of exhibit 54.

7 THE COURT: Any objections? There being none,
8 it's received.

9 (Whereupon, the document previously identified as
10 exhibit number 54 was received into evidence).

11 Q. Mr. Duprey, what is the next exhibit that you had
12 that you prepared for Mr. Thompson?

13 A. Received some classification of producer milk
14 from 1995, January 1995, to December 2003.

15 MS. DESKINS: We'll mark it as exhibit 55.

16 (Whereupon, the document referred to was marked
17 for identification as exhibit number 55.)

18 Q. Mr. Duprey, it looks like it's self-explanatory.
19 Is there anything else you wanted to add to it?

20 A. This is information taken from the annual
21 statistics from Federal order seven. It's basically self-
22 explanatory.

23 MS. DESKINS: Your Honor, I move the admission of
24 exhibit 55.

25 THE COURT: Any objections, hearing none, it's

1 received.

2 (Whereupon, the document previously identified as
3 exhibit number 55 was received into evidence).

4 Q. And then there should be one more exhibit that
5 you prepared for Mr. Thompson.

6 A. Correct. This contains Federal Order class
7 prices and blend prices, going back to January 19, '95
8 through December 2003.

9 MS. DESKINS: Why don't we mark this as exhibit
10 56.

11 (Whereupon, the document referred to was marked
12 for identification as exhibit number 56.)

13 Q. Is there anything you wanted to add about exhibit
14 56?

15 A. No.

16 MS. DESKINS: Your Honor, I move for the
17 admission of exhibit 56.

18 THE COURT: Did you explain where you obtained
19 the information?

20 THE WITNESS: It is obtained from our annual
21 statistics that were published throughout the years.

22 THE COURT: Annual statistics published by whom?

23 THE WITNESS: By the market administrator of the
24 southeast marketing area.

25 THE COURT: If there's no objection, it's

1 received.

2 (Whereupon, the document previously identified as
3 exhibit number 56 was received into evidence).

4 Q. I did have one more question for you, Mr. Duprey.
5 In regards to exhibit 38, I'd asked you a question
6 previously about what non-fluid meant on page eight. Can
7 you tell us what non-fluid means?

8 A. Yeah, (Positive response). That is basically
9 nonfat dry milk powder that is used to make a class two
10 product.

11 MS. DESKINS: Your Honor, I have no further
12 questions.

13 THE COURT: Questions? Mr. English maybe you
14 have some. No? Mr. Bashore?

15 MR. BESHORE: I do, but I'm working on them.

16 EXAMINATION

17 BY MR. BESHORE:

18 Q. Mr. Duprey, could you turn to exhibit 54, please?
19 I need to correct something here. This second page, table
20 of contents. Says prepare at request of Southern Marketing
21 Agency, Inc. That is not correct, is it?

22 A. That is incorrect. I apologize.

23 Q. Could we, I'd like to ask that that be, exhibit
24 be corrected for the record.

25 THE COURT: If you'd write that in. Georgia, is

1 prepared at the request of Georgia Milk Producers, Inc.,
2 huh? So marked the copy that I have, and ask the Reporter,
3 do you have one in front of you? Exhibit 54, the very
4 first, - - let's take a second to do that.

5 (OFF THE RECORD)

6 THE COURT: Mr. Beshore?

7 MR. BESHORE: I have just one question on exhibit
8 53.

9 Q. The footnote at the bottom, indicates that - -

10 A. For which table?

11 Q. I'm sorry, table one. Indicates the
12 producer/handler sales are included within the other orders
13 category. My question is, how does, how are
14 producer/handlers from identified orders, such as order 32
15 reflected on these, on table one?

16 A. A producer/handler located in Federal order 32 is
17 reported in the other orders column of data.

18 Q. So there was testimony, I think, previously when
19 you testified, there were at least one, and I possibly,
20 well, there were two producer/handlers from outside the
21 order seven working area that have distribution within the
22 order seven marketing area, and at least one of them is
23 certainly an order 32. Probably both of them are.

24 A. Correct.

25 Q. But their data is included on this table.

1 They're route sales in other orders as opposed to order 32.

2 A. Correct.

3 Q. And the other orders category then, also, does
4 that also include distribution of producer/handlers within
5 order seven? Any that there might be?

6 A. We do not have any producer/handlers in Federal
7 Order Seven.

8 Q. But Federal Order Seven exempt plants sales are
9 all in that column?

10 A. All exempt plant sales are in the other orders
11 column.

12 Q. Even though the exempt plan is within order
13 seven.

14 A. Correct.

15 Q. Thank you.

16 THE COURT: Any other questions? Mr. Riccardi?
17 Go ahead, Mr. Riccardi.

18 MR. RICCARDI: Thank you, Your Honor.

19 EXAMINATION

20 BY MR. RICCARDI:

21 Q. Good morning, Mr. Duprey.

22 A. Good morning, Sir.

23 Q. You are called a volunteer, but I assume you took
24 offense at that because you did go to Michigan State, I
25 think you said. Let me take a look with you at exhibit 53,

1 the last page, the third page and I don't know if you have
2 it there, and I apologize if you don't. I guess you do
3 because you're looking at the blue cover. Exhibit number
4 39, page 38. Have you got both of those?

5 A. Yes, Sir.

6 Q. Good. My assumption that what you did on the
7 third page of exhibit 53 is, you went back and you looked
8 at the three months, April, May and June of 2001 when there
9 were three producer/handlers from outside the Federal Order
10 Seven area that actually had dispositions of sales within
11 Federal Order Seven. Correct?

12 A. Correct.

13 Q. And you've given us an aggregate number for each
14 of those months, for example, the first month, April, is a
15 million eighty six, four thirty five (1,086,435). That's
16 the number of pounds of fluid milk that were sold into
17 seven by the three producer handlers?

18 A. Correct.

19 Q. Is there a way to break that down further, so
20 that we could determine for April, May and June, what the
21 amount was for Promised Land Dairy versus Martin Dairy, and
22 W. H. Braun?

23 A. Well, there is a way, but we cannot do it. In
24 other words, we would release confidential information.

25 Q. So you can only give us, based upon

1 confidentiality, the aggregate number. You can't give us
2 any kind of a breakdown as to which of the
3 producer/handlers outside of seven had the number of pounds
4 of sales in that particular month.

5 A. No, we cannot.

6 Q. And you couldn't even give us any kind of
7 percentage like if it was one third, one third, one third.

8 A. No, we cannot.

9 MR. RICCARDI: Thanks.

10 THE COURT: Mr. English?

11 EXAMINATION

12 BY MR. ENGLISH:

13 Q. First, let me thank you for providing the data
14 that I requested.

15 A. You're welcome.

16 Q. Now I'm going to turn from the data that I
17 requested and throw you a curve ball. But hopefully, it's
18 not something that's unfamiliar to you. Your office is
19 also the market administrator office for order six, the
20 Florida orders?

21 A. Correct.

22 Q. And I confess, I did a little internet surfing
23 last night, and I looked at both USDA dairy programs,
24 statistic sites, and order six sites. And I could not find
25 any producer milk data for order six. That is to say,

1 producer milk by state and county. Would that be correct?

2 A. Correct.

3 Q. And would that be that even because there are
4 more, more than three handlers receiving milk in Florida,
5 that is - - let me back up. You do report the quantity of
6 milk total, that is total producer milk for order six,
7 correct?

8 A. Correct.

9 Q. And you do report it by classification, correct?

10 A. Correct.

11 Q. And that is because there are three or more
12 handlers reporting that kind of data, correct? For the
13 actual use of the milk.

14 A. I believe that's correct. But also, we have some
15 - - how should I say it? We are authorized to release some
16 information from the cooperative handlers in that region.

17 Q. Did that information include information about
18 the location of producer milk?

19 A. Now, it does not.

20 Q. And without that authorization, is it fair to say
21 that because of confidentiality reasons you're not able to
22 release the information about producer milk.

23 A. That is correct.

24 Q. So if I were to request information about
25 producer milk for order six, by state and county, you would

1 be unable to provide the information, correct?

2 A. Correct.

3 MR. ENGLISH: Thank you.

4 THE COURT: Any other questions at all? Thank
5 you again, Sir, for helping us out.

6 THE WITNESS: Certainly.

7 THE COURT: Again, off the record for a second.

8 (OFF THE RECORD)

9 THE COURT: The witness was sworn. We took a
10 recess so that additional copies of what I'd put a - - we
11 marked for identification as exhibit 57 could be
12 distributed. And in looking at it, it appears to be the
13 transcript of a prior hearing, pages, part of the
14 transcript, not the entire transcript. But the transcript
15 of testimony that Mr. Herbein gave at a hearing in Tempe,
16 Arizona, on September 25, 2003.

17 And the pages not only include his direct statement,
18 but cross examination, et cetera, et cetera. And I know we
19 had a preliminary objection to that yesterday. But before
20 we talk about that, I'm just trying to direct us straight
21 as to what paper's here and where we are. So now, if you
22 would, I've sworn the witness. So if you would now get his
23 name and address, we'll see where we go.

24 Whereupon,

25 CARL D. HERBEIN

1 Having been first duly sworn was called as a witness herein
2 and was examined as follows:

3 EXAMINATION

4 BY MR. BESHORE:

5 Q. Yes, could you please state your name and
6 address, MR. Herbein.

7 A. Yes. Carl D. Herbein, my business address is 401
8 Oley Street, Reading, Pennsylvania.

9 Q. What is your profession, Mr. Herbein?

10 A. I'm a certified public accountant.

11 Q. Could you summarize for us your professional
12 training and professional experience?

13 A. Yes. I have a bachelor of science degree - - I
14 have a bachelor of science degree in accounting from
15 Elizabethtown College, I began my professional career with
16 the national accounting firm of Ernst and Young in 1967.
17 In 1972, I began what is now Herbein and Company, a public
18 accounting firm with offices throughout Pennsylvania.

19 We have a - - our firm has a significant portion
20 of our practice in the dairy industry. And specifics in
21 that experience, in the dairy industry includes the rake
22 making process in Pennsylvania, presenting financial
23 information to the Pennsylvania milk marketing board for
24 price establishment, presenting expert testimony before
25 Federal Order hearings, significant work in the cost

1 accounting area. That is one of my personal favorites.

2 I have published a number of articles concerning
3 agribusiness and cost accounting in the dairy industry. I
4 developed and present annually a two day cost accounting
5 workshop for the International Association of Dairy Food
6 IDFA, where we train the up and coming bright stars in the
7 cost accounting industry, and as it relates to dairy.

8 I've been involved with numerous mergers and
9 acquisitions in the dairy industry in the consolidation
10 process recently. And we've also spend a significant
11 amount of time working on the food side of things.

12 We've done significant work for the Pennsylvania
13 Association of Food Merchants in in-store milk handling
14 costs, and milk margins within stores. And I guess as in
15 addition to that, I supervise and run our CPA firm of a
16 hundred people with five offices.

17 Q. Mr. Herbein, could you tell us the geographic
18 range, the approximate number and geographic range of your
19 firm's clientele in the dairy processing sector?

20 A. That part of our practice is nationwide.

21 Q. And approximately how many firms have been - -
22 dairy processing firms have you professionally done work
23 for?

24 A. Approximately a hundred and fifty.

25 MR. BESHORE: Your Honor, at this time I would

1 offer Mr. Herbein as an expert in dairy plant cost
2 accounting.

3 THE COURT: Sir, does anybody wish to voir dire?
4 Apparently not.

5 MR. RICCARDI: Not at this point, Judge.

6 THE COURT: Not at this point. Well, it's at
7 this point or never.

8 MR. RICCARDI: Not on that particular issue,
9 Judge. Obviously you and the secretary will take whatever
10 you want with regard to his testimony, and I'm not going to
11 voir dire on his basic qualifications.

12 THE COURT: He's a qualified CPA who's done dairy
13 work. Very well. He's so qualified and recognized.

14 MR. BESHORE: Thank you.

15 Q. Now, Mr. Herbein, do you have before you the
16 document that has been marked for identification in this
17 proceeding as exhibit 57?

18 A. Yes, I do.

19 Q. Now, were you retained earlier, in 2003, to
20 prepare, to do some studies and to present some testimony
21 on the issue of proposed changes in producer/handler
22 regulations in a Federal Order proceeding relating to the
23 Arizona, Las Vegas, and Pacific Northwest marketing orders?

24 A. Yes, Sir. I was.

25 Q. And did you present testimony at that proceeding?

1 A. Yes, I did.

2 Q. In Phoenix, Arizona? Or Tempe, Arizona?

3 A. Yes. In Tempe, Arizona.

4 Q. On September 25th, 2003?

5 A. That's correct.

6 Q. Now, is exhibit - - have you reviewed exhibit 57?

7 A. Yes, I have.

8 Q. And is that a transcript of your testimony under
9 oath in those proceedings both on direct examination and on
10 cross examination by Mr. Riccardi, and Mr. Yale's office,
11 including Mr. Yale, or Mr. Milner? And also, attached to
12 the back of exhibit 57, do we have the exhibits which you
13 prepared and presented at that hearing?

14 A. Yes, I have reviewed 57 as presented here, and it
15 is a copy of the transcript of direct and cross and also
16 the exhibits which we submitted, which I submitted at that
17 proceeding in Tempe.

18 Q. Do you adopt that, would you adopt that statement
19 as your testimony today if we were to go through the
20 exercise of asking you the questions that were asked at
21 that time?

22 A. Yes, Sir. I do.

23 THE COURT: Let me see if I understand. Would
24 you state what the issues are today that you're directing
25 your testimony to? What is it that you're testifying about

1 today?

2 THE WITNESS: That's a question? Yes. I'd be
3 happy to. The testimony today is to the secretary here a
4 link between this testimony and Federal order five and
5 seven. And by link, I mean that the circumstances that
6 exist, that we discovered in our study for Federal order
7 124 and 131, that those same circumstances can be adjusted
8 to these orders and that the theories and opinions that we
9 formulated from our study will apply here.

10 THE COURT: Well, you became more scientific than
11 I meant. What's the proposal that we're talking about
12 today?

13 MR. BESHORE: I can answer that. The proposal is
14 functionally, and to some extent the same, language wise,
15 as proposal in Arizona, which would establish a maximum
16 volume of exempt production for producer/handlers.

17 THE COURT: What's the number here today?

18 MR. BESHORE: Three million pounds per month.

19 THE COURT: And what was it again?

20 MR. BESHORE: Three million pounds of class one
21 route disposition per month. Proposal six.

22 THE COURT: And that's the maximum that a
23 producer/handler could handle?

24 MR. BESHORE: Seven, I'm sorry. Proposal seven.

25 THE COURT: Proposal seven. Three million, how

1 many pounds?

2 MR. BESHORE: Three million pounds of class one
3 route disposition per month.

4 THE COURT: And that's the maximum that under the
5 proposal, that a producer/handler could handle and still be
6 a producer/handler.

7 MR. BESHORE: Correct.

8 THE COURT: And what was the situation in
9 Arizona? Was it the same amount?

10 MR. BESHORE: Same amount.

11 THE COURT: Same amount. So it's the same amount
12 in both places.

13 MR. BESHORE: Same amount in both places.

14 THE COURT: Same proposal. Basically.

15 MR. BESHORE: Essentially the same.

16 THE COURT: And your testimony out there, and the
17 testimony you're here to give today, has to do with studies
18 that you made to see how what? Tell me what that's about
19 in a broad way? Just a broad way, what did he study?

20 MR. BESHORE: He studied, look at exhibit 25,
21 which is in the back, after the blue page, for those bound
22 copies of exhibit 57. The, behind the blue dividing page,
23 which divides the transcript from the exhibits, exhibit 25
24 (a) thorough (k), represent Mr. Herbien's charts of cost
25 related studies of dairy plant operations which he

1 presented in Arizona. The first two pages of which
2 represent the cost structure, title cost structure of fluid
3 milk plants of various sizes, which is a national study of
4 the costs of operating plants, ranging from those handling
5 90 thousand pounds of class one per month to 30 million
6 pounds of class one per month.

7 THE COURT: Let's stop for a moment and see if
8 Mr. Herbein agrees. What, is what Counsel says correct?

9 THE WITNESS: Yes. I'm following carefully. He's
10 correct.

11 THE COURT: I know you're following carefully.
12 And what he's said so far is correct.

13 THE WITNESS: Yes.

14 THE COURT: And this then was based on national
15 figures, not figures restricted to Tempe, Arizona. Or that
16 area. Is that right?

17 THE WITNESS: That is correct.

18 THE COURT: Go ahead, Mr. Beshore.

19 Q. National study adjusted in part for local cost
20 indices and those areas, and there will be testimony with
21 respect to further adjustments for cost indices in these
22 markets. But rather than go through verbatim here, the
23 explanation of the study, its background and its detail, we
24 propose simply to offer exhibit 57 as if it were a pre-
25 prepared statement that Mr. Herbein would read, but not

1 reading it today.

2 THE COURT: I understand there are problems with
3 that, that several folks have. Mr. Riccardi, you have
4 problems. Tell me about them.

5 MR. RICCARDI: First of all, Judge, we are in
6 this proceeding with this order, five and seven. And any
7 evidence that comes in needs to be considered only with
8 regard to marketing conditions in these two Federal
9 marketing areas.

10 First of all, before we get into the issue of the
11 study, in order for the study to be relevant to anything,
12 assuming it was going to come in at all, we'd have to
13 establish that there was disorderly marketing conditions in
14 five and seven, created by producer/handlers which would in
15 fact require a change or limitation on the volumes.

16 There's no evidence with regard to that.

17 THE COURT: Let me stop you there. I presume
18 you're going to tie that in for us, Mr. Beshore.

19 MR. BESHORE: Absolutely. Not agreeing with his
20 statement.

21 THE COURT: But whatever, obviously, there's
22 going to be some testimony about producer/handler situation
23 causing some disorderly marketing. If it's not given by
24 this witness, by somebody else. So that doesn't trouble
25 me. Go on to the next one.

1 MR. RICCARDI: It does, Judge, because I doubt
2 they can do that, but let's go to the next issue. This
3 study is a cost study that's related only to order 131,
4 number one. Number two, it is a flawed study, because it
5 was a selected study of fifty clients that this individual
6 had of which he picked 20 that had nothing to do in my
7 opinion with order five and seven, or 131.

8 But leave that aside. They also intend to
9 introduce a part of his testimony. He testified both in
10 Phoenix, he also testified in Alexandria. That testimony
11 has just come online. And it's not like a statement that's
12 directed to this particular issue, because this witness
13 hasn't done anything other than say, there's an automobile
14 accident in Phoenix. You may have an automobile accident
15 now in the same area. I did a study out there. Use it for
16 this particular issue, when there's no connection or facts
17 that related.

18 And as I said, we have Alexandria, so if in fact
19 we're going to have part of his testimony, all of his
20 testimony would have to be included, and if we're going to
21 do that, by the way, Judge, and we're going to try this
22 federal order by using other Federal orders, which I know
23 is what they want to do, then maybe what I need to do is, I
24 need to bring in a significant testimony of Dr. Canootzin,
25 who is our witness in order 131 and 124, who disputes

1 everything that Mr. Herbein says. And since he was subject
2 to cross examination fully by these individuals directly,
3 then maybe that statement needs to be brought in.

4 And then when do we end? The fact is, if this
5 witness has testimony that's relevant to these proceedings,
6 let him bring it in. You cannot take a, some testimony and
7 a report that was done for one Federal order and for which
8 it's not even been determined, yet, Judge. We're still
9 pending. It's like trying to take a case when you have not
10 even the trial court decision, because the trial court of
11 thing's still going on.

12 So I think it is flawed, I think that bringing in
13 at this point is not anything that this Court should allow,
14 because what we're doing is opening up this proceeding to
15 irrelevant information from another on-going, pending
16 Federal order hearing.

17 THE COURT: I understand. Did you want to
18 comment too?

19 MS. DESKINS: Well, I would add to what Mr.
20 Riccardi said about relevancy. I mean, this testimony was
21 for a hearing on different orders. And then also when he
22 said he adopts his testimony as his statement, I notice
23 that my name's in there, Mr. Tosi's name's in there. Is he
24 adopting our questions as his testimony?

25 I mean, I don't think he can do that. That's also

1 contained in here. And then also, I would agree with the
2 point, if his testimony from a hearing on a different
3 marketing areas can be brought in, well, what about other
4 testimony that arose at that hearing. Can't that also be
5 brought in?

6 And if he does have a statement to make, if he
7 thinks there's things in here that was relevant, I think
8 what should be done is, he should take those things out,
9 make a statement for this hearing, and then present it.

10 THE COURT: Let's - - yes, yes. Mr. English.

11 MR. ENGLISH: There's two separate and distinct issues,
12 but both of them can be adequately resolved. First,
13 backing up to sort of the end of Mr. Riccardi's comments.
14 There's a significant difference between a live witness who
15 appears and says I am adopting, this is my testimony. And
16 my testimony includes commentary in response to questions.

17 The questions aren't the testimony, but the answers
18 are. And those answers are part of it. But that's a
19 different thing from saying, oh, by the way. We want to
20 put Dr. Canoot's testimony in. They want to bring Dr.
21 Canoots back, and do the very same thing with his
22 statement, and subject him to cross examination, bring him
23 on. We'd be happy to see him.

24 MR. BESHORE: Would you pay for it?

25 MR. ENGLISH: We don't have to - - you know. The

1 fact of the matter is, we're paying for Mr. Herbein to be
2 here. And he is here.

3 Going to the question of marketing issues. As
4 the judicial officer of this department determined 43 years
5 ago, in independent milk producers, rule making generally
6 looks to the future and is experimental in nature, being
7 subject to amendment as expertise warrants. Of necessity,
8 rule making often costs forecasts in estimates.

9 Now in particular, he was producer/handler
10 hearing, and it was out in Seattle, and it was alleged by
11 the petitioners to be no existing evidence of disorderly
12 marketing. But in response, the judicial officer said,
13 Petitioners attacked some of the testimony at the pertinent
14 amendment hearing, because such evidence does not
15 demonstrate present disorderly market conditions which
16 affect order minimum prices to producers.

17 As indicated above, potential threats to order
18 objectives may form a basis for regulation and evidence
19 indicating such possibility is sufficient to support
20 regulation to maintain orderly marketing conditions.

21 And finally, as to the issue directly at our - -
22 we are not subject to Federal rules of evidence. I know
23 there are those who wish we were. But the fact of the
24 matter is, that Koch, administrator law 5.5(2), and a
25 number of cases I will now cite, stand for the following

1 proposition: Administrative decisions support the
2 principle that former testimony may be admitted so long as
3 the testimony appears credible. Or that admission may
4 serve some other desirable goal. This is a highly liberal
5 standard in comparison to the standard rules of evidence
6 quoting from Koch.

7 Yet, it is common knowledge that evidentiary
8 rulings at agency adjudications need not comply with the
9 Federal rules of evidence. What determines the admissible
10 evidence in an administrative proceeding is whether it is
11 reliable, and of probative value. And the witness has
12 already said in response to questions from Mr. Beshore,
13 that he is going to tie this study with changes, with
14 changes, for market conditions, that is to say local
15 conditions to this area.

16 Whether or not it complies with the Federal rules
17 of evidence, is irrelevant. That is from a case 1995 EPA
18 Administrative Law decisions, Lexus 40, citing Clinester
19 versus Drug Enforcement Administrations, 606(f)Second,
20 1128, DC Circuit 1979.

21 Along these lines, it was noted in United States versus
22 Booth, 76 ID, 73, 1969, that admitting former testimony in
23 administrative proceedings is a simple concept well
24 grounded in the common law. The purpose of using prior
25 testimony is to save the time, effort and money of the

1 litigants and expedite trials with a view to achieving
2 substantial justice, and to prevent a miscarriage of justice so
3 long as the witness is available for cross examination.

4 I submit, Your Honor, this evidence is in
5 compliance with that legal doctrine.

6 THE COURT: Mr. Beshore wishes to add something.

7 MR. BESHORE: I do. Of course, I join in Mr.
8 English's comments. But I would add just a couple of
9 additional points. As to the necessary predicate for proof
10 of marketing conditions in this order that Mr. Riccardi
11 argued about, I would just hearkens back to Mr. Hitchell's
12 testimony just a few minutes ago. The secretary doesn't
13 have to wait for Mr. Hitchell's plant in Lynchburg,
14 Virginia or Winchester Kentucky to be in a state of chaos
15 because it has flopped out of the regulations.

16 He doesn't have to wait. He can consider and
17 promulgate the lock in regulations to prevent that
18 marketing chaos. That's what we're talking about here. He
19 doesn't have to wait for the situation that the record is
20 going to show is now present in Arizona to take over this
21 marketplace, in order to consider whether some regulations
22 that will prevent it are appropriate.

23 And the testimony to the extent that it's Arizona
24 specific, is like Mr. Hitchell's testimony. It's like,
25 here's what will happen if we don't have these regulations.

1 That's what, you know. That's the connector. And of
2 course, it will be. The data will be updated, the charts
3 will be - - the cost data will be regionalized specifically
4 by Mr. Herbein.

5 THE COURT: Mr. Herbein can do the updating now?

6 MR. BESHORE: Yes, yes. And he will. Providing
7 he's prepared to, he's allowed to testify.

8 Now, as to the content of 57, if it's necessary,
9 I'm prepared to sit here with Mr. Herbein as a script. I'll
10 read the Q's, he can give the A's. As we did it out in
11 Arizona, and we can take whatever amount of time it takes
12 to get that testimony under oath in this proceeding. I'll
13 be glad to. Forget about Mr. Riccardi's cross, which I've
14 offered as part of this exhibit, for a fully rounded
15 record. I'll be glad to forget about that.

16 If he wants to ask it he can, if he doesn't, he
17 doesn't. I don't think that's the best way to take Mr.
18 Herbein's testimony. It should be taken the way we
19 proposed to take it as his statement as if given. And
20 we'll go on with the additional supplemental and they can
21 cross.

22 And if he wants to bring in Dr. Cannotz, it's his
23 witness, not ours. He's perfectly entitled to and handle
24 it the same way.

25 THE COURT: Shall I now rule? Anything further?

1 MS. DESKINS: I would say, just based on, I think Mr.
2 Beshore does have the right approach, which would be
3 questions and answers and then if things are not relevant,
4 we do have the opportunity to object because according to,
5 based on what Mr. English said, the statements that he's
6 talking about in his testimony is related to another order.
7 Another hearing. There's a relevancy question. It's not
8 relevant here. And while he is correct in rules of practice,
9 the Federal rules of practice don't apply, but the 900 rules do
10 apply, and they provide for evidence that is irrelevant to be
11 excluded. Certainly, his testimony that's here towards the
12 marketing additions and different orders is not relevant here.

13 I mean, I think Mr. Beshore does have the right
14 approach. If necessary, he should read through and have
15 him answer the questions here, and if we have an objection
16 based on relevancy, we can raise it at the time.

17 THE COURT: Let me be Solomon and make a
18 decision. I think my functions at these hearings are to
19 make sure that the hearings are fair, and they're official.
20 That's the basic function. These hearings have to be
21 fair. So what's the fair proceedings to follow, and what's
22 the efficient way to get the evidence in?

23 As far as the concern about there being a need
24 for evidence about disorderly marketing, this hearing's
25 about that, and I presume this is part and parcel of one of

1 the pieces that follow with you, if the secretary decides
2 that there are the kind of marketing conditions that
3 require a amendment. So at that part of the objection
4 doesn't really do much.

5 What I am concerned with is possible confusion
6 that's brought on by this particular transcript. I don't
7 know how to avoid it. The witness, we understand, will
8 update figures, but basically his figures are national,
9 based on national figures. With the general applicability
10 across the country, but some of it had to do, particularly
11 with the west, not here in the east.

12 And now he says he's available to upgrade as we
13 go along, or correct as we go along so that we understand
14 it. I don't have any problems with the charts and I don't
15 have any problem with the direct. I would think that like
16 a deposition, I suppose, if you start offering parts of a
17 transcript of a deposition, then the other side has the
18 right to say let's put it all in.

19 And that affects, - - I think we can leave that
20 up to the other side. I think what you chaps should do
21 here on your side is put in the direct. So I don't have
22 any problem with direct.

23 Help me, though with the page numbers. I don't want
24 to foul this up. This transcript, and we'll call it now
25 exhibit 57, which has been so marked for identification,

1 starts at page 650, which basically is a cover sheet.
2 Upper page of the cover sheet. And then I guess we really
3 start with his direct testimony which starts page 759. And
4 you're basically asking him questions through to what
5 point? It looks like, wait a minute. Does it end at 790?
6 Wait a minute. Maybe it's even before that.

7 MR. BESHORE: Ends at 790.

8 THE COURT: 790 is the direct.

9 MR. BESHORE: Correct.

10 THE COURT: Now was there any - - there wasn't
11 any cross examination during that, right?

12 MR. BESHORE: That's correct.

13 THE COURT: That was - - there were some
14 objections.

15 MR. BESHORE: Mr. Riccardi's cross examination
16 starts at 801.

17 THE COURT: Well, as far as any objections,
18 obviously, any statement, we take the statement. And then
19 afterwards, during cross examination, objections can be
20 made to parts of it. Doesn't have to be made statement to
21 statement. You have a good point. You're entitled to your
22 objections to relevance, et cetera, to the statement. But
23 it can be made during cross examination. So I think what
24 we'll do then, is accept you know, the whole exhibit's
25 before us. But what I would do is say that pages 759 to

1 790, was it 790?

2 MR. BESHORE: Yes.

3 THE COURT: Are the parts that we're going to
4 consider, plus the tables.

5 MR. BESHORE: 789.

6 THE COURT: 789. Plus the tables are being
7 offered on behalf of the proponents. And we then can see
8 what happens on cross examination with the rest of it.
9 Meanwhile now, you're going to update this and make sure
10 that it's applicable for this market, if there's changes
11 that need to be made.

12 MR. BESHORE: Yes.

13 THE COURT: I think that's the fair and efficient
14 way to handle it, so that's what we'll do. That's the
15 ruling.

16 MR. BESHORE: So at this time,

17 THE COURT: And everybody has an exception to it.
18 You wish to - - Have to get under the rules. Do we have
19 to specifically state an exception, or is it automatic?

20 MR. RICCARDI: I think it's automatic, to the
21 extent you're going to proceed in this matter. Obviously,
22 I disagree with it. But what I would like to do then is, I
23 would like him to do, and I don't have it available here to
24 do it right this minute, but I will during the course of
25 the hearing, all of the cross examination, not only of the

1 witness from Phoenix, but also his testimony in Alexandria.

2 MR. BESHORE: I have no objection to that.

3 MR. RICCARDI: We're going to do it the way you're
4 talking about. Then, why do we not have the evidentiary
5 portion of it?

6 THE COURT: I see a distinction. I see this as
7 if this was a particular, akin to a deposition that was
8 taken and then you could put in the whole thing. Whereas
9 the other one is probably a different series of facts that
10 took place in the beginning. But if you don't have any
11 objections, I don't have any objections. Let's not do it
12 that way then. So I'm going to rule against that even
13 though Counsel doesn't object to it. I'm going to have a
14 record that'd not too confusing.

15 MR. RICCARDI: Does that mean you're going to
16 exclude my cross examination? And you're also going to
17 exclude the cross examinations in Alexandria?

18 THE COURT: I'm going to exclude the cross
19 examination in Alexandria.

20 MR. RICCARDI: Because?

21 THE COURT: Because it was in Alexandria, and not
22 pertaining to this material that he gave at Phoenix. It's
23 not part of the transcript of material or the testimony
24 that he gave in Phoenix.

25 MR. RICCARDI: An ongoing hearing at which he

1 came in and testified, Judge. Just like in your example,
2 it's an ongoing deposition instead of having - - we had one
3 day in Phoenix, we had another day in Alexandria.

4 THE COURT: It's not an ongoing deposition.

5 MR. RICCARDI: I think it is.

6 THE COURT: Well, you've got your exception on
7 that part. As for your cross examination here, if you want
8 to do it, we would let you. But I haven't - -

9 MS. DESKINS: Your Honor, it was part of the same
10 hearing. It got continued.

11 THE COURT: Beg your pardon?

12 MS. DESKINS: The hearing got continued. It was
13 started in Phoenix, and went to Seattle and got continued
14 in Alexandria. It was one hearing.

15 THE COURT: It was one hearing.

16 MS. DESKINS: He testified twice.

17 THE COURT: I see, I thought it was a separate
18 hearing.

19 MS. DESKINS: No. He testified twice.

20 MR. RICCARDI: One continuous hearing, Judge.
21 That's why I was trying to make the argument, it started in
22 Phoenix, then went to Seattle, and ended in Alexandria. He
23 ended up testifying twice, but it's the same consolidated
24 hearing.

25 THE COURT: Then I would allow it in. And you're

1 not objecting to it, so that's fine. I misunderstood.

2 MS. DESKINS: The Government has the same
3 objection. We have the same objection to anything from a
4 previous hearing.

5 THE COURT: Right. Yes, yes. You could bring
6 yours in too.

7 MR. RICCARDI: And understand, Judge, I'm
8 continuing my objection, but based upon your ruling,
9 obviously, I will want to be - -

10 THE COURT: Right. I understand. I understand,
11 yes. That will have to be addition, I don't know how you're
12 going to bring that in. I guess you'd do it in briefing,
13 part of your brief, huh?

14 MR. RICCARDI: I'll do it as, Your Honor, I'm
15 going to introduce the cross examination as an exhibit.
16 I'll get it compared and just introduce it as - -

17 THE COURT: As an exhibit.

18 MR. RICCARDI: But I will also cross examine
19 live.

20 THE COURT: Thank you. Go ahead, Mr. Beshore.

21 MR. BESHORE: Just so I understand, before I - -
22 just so the record's clear.

23 THE COURT: I hope I understand.

24 MR. BESHORE: Before I proceed with further
25 direct testimony of Mr. Herbein, we have received, Your

1 Honor, has received exhibit 57 transcript of Mr. Herbien's
2 direct testimony on pages 759 through 789.

3 THE COURT: And the - -

4 MR. BESHORE: And exhibits 25, exhibit 25 (a)
5 through (k), which are the attachments to exhibit 57. And
6 with that preliminary - -

7 Q. Mr. Herbein, I would like to direct your
8 attention to the first two pages, exhibits (a) and (b) of
9 exhibit 25, the attachment to exhibit 57 in this hearing.

10 A. I have them.

11 Q. Now, those, first of all, could you just describe
12 briefly what is depicted in exhibits (a) and (b) of 25 that
13 we just referred to?

14 A. I'll be glad to.

15 THE COURT: Your Honor, I think the record's
16 going to get confused if we keep saying exhibit 25, because
17 we have an exhibit 25 here. Let's just refer to them as
18 (a), (b), (c), as attached to the transcript which has been
19 marked as exhibit 57. That will probably confuse, the
20 Herbein transcript. Exhibit (a) to Herbien's transcript.

21 Q. So let's could you just then briefly summarize
22 what's depicted on Herbien's exhibits (a) and (b)?

23 A. Yes. Herbein (a) and (b) are presented to show
24 six different size categories of processing fluid milk
25 plants. And in this particular, this exhibit shows order

1 131 and 124 columns for each one of those size plants. And
2 in the previous hearing, we took our national statistics
3 from our firm's database and regionalized them so that we
4 had Las Vegas, Arizona, and Pacific Northwest numbers. And
5 the method by which we made those adjustments, I'll
6 explain, and then I'll explain what we did to localize them
7 to Federal order five and seven.

8 And essentially, what you need to do to take
9 statistics that are from a broader base and narrow them, is
10 to determine what are the differences on a regional basis.

11 And the things that do not change are packaging costs, for
12 example. Plastic, resin, and paper cartons are a national
13 market, and we have essentially no difference from New York
14 City to Louisiana in the cost of containers.

15 Processing plant costs, which have a significant
16 influence for local labor and health care and utilities,
17 there we have some significant differences. So the first
18 step that we did is, we took our database. We selected
19 approximately 20 plants out of our database, and then
20 adjusted those costs to, in the - - in what is Herbein (a),
21 to the Las Vegas/Phoenix area and to the Seattle/Pacific
22 Northwest area.

23 And what we have now done for this proceeding, we
24 have once again made an adjustment using the columns that
25 are shown as 131 from Herbein (a) and (b), and we have

1 regionalized those statistics, and I'm going to present
2 here this morning the results of that localization for
3 Federal order five and seven, so that when we go to the
4 conclusions and my opinion as to what Herbein (a) and (b)
5 show, we'll be presenting that on a localized basis for
6 Federal order five and seven.

7 Q. Which lines need to be changed, or which lines
8 result in changes on Herbein (a), when you localize it for,
9 let's just start with order five.

10 A. There are three lines that change, and then I am
11 proposing to present at this proceeding of adjusted and
12 localized numbers. And they are plant processing costs,
13 and if we look at the producer/handler (a), column under
14 131, it's the .806. That number changes.

15 And of course, the per gallon number with is an
16 arithmetical total of the three numbers above it, that
17 changes and the per hundred weight, the cwt, would change.

18 So those are the three areas, the three lines that require
19 change to localize the results.

20 Q. And just so we understand that, the plant
21 processing cost changes, that changes the arithmetic total
22 of the per gallon line, and again the per hundred weight
23 line is simply a - - an arithmetic translation of the per
24 gallon cost into a per hundred weight cost.

25 A. Yes. It's a conversion factor, by taking a

1 gallon and multiplying by 11.62 to get to a per hundred
2 weight result.

3 Q. And for each plant array, from the smallest
4 producer/handler column or set (a) through handler set (f),
5 those same lines would change.

6 A. That's correct.

7 Q. Now, could you just provide for us the results of
8 those changes when you localize the study to order five?

9 A. Yes.

10 Q. For column (a), producer/handler column (a), the
11 processing, plant processing costs for Federal order five
12 is .730. The per gallon cost, the new total is .932. And
13 the per hundred weight cost is 10.83.

14 Q. What are the - - could you just proceed then
15 across the columns with those three figures for order five?

16 A. Yes. For column (b), the two million class one pound
17 per month column, the plant processing costs are .422, the
18 per gallon cost is .585. And the per hundred weight cost is
19 6.80. For column (c), the five million monthly volume class
20 one sales, the plant costs are .391. The per gallon cost
21 is .551. And the per hundred weight is 6.40.

22 For category (d), the 12 million monthly pound
23 level, the plant processing cost is .360. The per gallon
24 is .517. And the per hundred weight is 6.01.

25 For category (e), the 18 million class one

1 monthly pound group, the plant processing cost is .317.
2 The per gallon is .444. And the per hundred weight is 5.16.

3 And finally, for the 30 million monthly volume of
4 class one pound category, the plant processing cost is
5 .303. The gallon per gallon number is .426. And the per
6 hundred weight number is 4.95.

7 That is all of the adjustments for Federal order
8 five.

9 Q. Have you made a similar set of calculations for
10 Federal order seven?

11 A. Yes, Sir. I have.

12 Q. Would you please provide them for the record in
13 the same fashion that you have for order five, beginning
14 with the producer/handler column (a) and proceeding to the
15 higher volume handlers?

16 A. Yes. I'll be happy to. And for producer/handler
17 (a), the plant processing cost is .748. The per gallon
18 number is .950. And the per hundred weight number is 11.04.

19 For category (b), the plant cost is .432. The
20 per gallon cost is .595. And the per hundred weight number
21 is 6.91.

22 For category (c), the plant cost is .401. The
23 gallon cost is .561. The per hundred weight is 6.52.

24 For category (d), the plant cost is .370. The
25 per gallon is .526. And the per hundred weight is 6.11.

1 Category (e), we have plant costs of .325. Per
2 gallon of .452. And per hundred weight of 5.25.

3 And finally, category (f), the 30 million monthly
4 class one pound group, plant costs of .311. A per gallon
5 of .434. And a per hundred weight of 5.04.

6 Q. Now, could you explain for us how you converted -
7 -

8 THE COURT: What was the per gallon for (f)? I
9 lost that one.

10 THE WITNESS: Per gallon for (f)?

11 THE COURT: Yes.

12 THE WITNESS: It is .434. For Federal Order - -

13 THE COURT: Go ahead. I wasn't sure. Go ahead.

14 Q. Now can you explain how you regionalized those
15 cost factors to order five one or seven?

16 A. Yes. The methodology that is, that I've used to
17 regionalize the statistics is based upon regional cost of
18 living statistics which are published by the U. S.
19 Department of Labor. And I have compared a number of
20 cities, and I'll mention the cities for both Federal order
21 five and Federal order seven. With the statistics that I
22 presented for Federal order 131, which is Arizona/Las
23 Vegas.

24 And the cities that were utilized in this
25 comparison for Federal order five are Charlotte, and

1 Knoxville. And for Federal order seven, I've utilized
2 Atlanta, New Orleans and Memphis.

3 And it's my opinion that using those cities gives
4 us a reasonable representation of the cost of living within
5 Federal order five, and Federal order seven. And as you
6 can see from the results that I just presented, the cost
7 structure in both the Federal order five and seven is
8 slightly lower than the cost structure in Arizona/Las
9 Vegas. And thus we have a slightly lower plant costs.

10 Q. Would you turn to Herbein (c) and (d), please?
11 Can you just tell us what Herbein (c) and (d) are?

12 A. Yes. Herbein (c) and (d) are graphic
13 presentations of what appears on Herbein (a) and (b). And
14 Herbein (c) shows the per gallon cost for the five - -
15 excuse me. For the six different plants that we presented.
16 And for Herbein (d), that shows the per hundred weight
17 results for those same six plants. Same six size and
18 plants.

19 Q. And the numbers that you testified to a couple of
20 minutes ago, with respect to orders five and seven could be
21 graphed in the same manner that the numbers for orders 131
22 and 124 were graphed on Herbein (c) and (d).

23 A. Yes. They can be and the purpose of showing the
24 graphs was to show the trend and allow for interpolation of
25 results and the trend lines are very similar to those that

1 are shown on Herbein (c) and (d).

2 Q. What does this information with respect to orders
3 five and seven indicate with respect to the ability of a
4 processor at the three million pound per month level to
5 compete in the fluid marketplace?

6 MR. RICCARDI: Your Honor, I object. This
7 witness has no qualification or foundation to be able to
8 draw that conclusion. He has no information provided here
9 that allows him to do that.

10 THE COURT: I've made some notes. I'm not sure
11 that I got your question exactly. Do you want to rephrase
12 it?

13 MR. BESHORE: Let me restate it.

14 Q. With respect to fluid milk plant processing
15 costs, can you - - do you have an opinion with respect to
16 what the cost trends as you've described them, depicted on
17 Herbein (c) and (d), show with respect to the ability of a
18 three million pound per month plant, to be competitive with
19 fully regulated three million pound per month plants?

20 MR. RICCARDI: Any objection would be no
21 foundation, Judge.

22 THE COURT: I'll overrule the objection. Go
23 ahead.

24 Q. Yes. I believe that this study, Mr. Beshore
25 clearly shows that as the volume of class one milk going

1 through a plant causes costs to be lower. And
2 significantly lower as we get into the larger categories.
3 At three million pounds, the benefit of processing larger
4 volumes is large enough to eat up or use up the advantage
5 that a producer handler has from being exempt from
6 participating in the pool.

7 Q. In your opinion, Mr. Herbein, if a fluid milk
8 processing plant with processing in excess of three million
9 pounds of fluid milk products per month has a regulated
10 cost advantage of, in the order of seven to ten cents per
11 gallon, is that a material competitive advantage with
12 competitors who have a higher cost?

13 MR. RICCARDI: Object to that, Judge. No
14 foundation of fact. Hypothetical, therefore it's not
15 relevant.

16 THE COURT: Well, I'm going to overrule. I presume
17 he's a CPA who counsels different dairy processing firms.
18 He has to give them advice from time to time on how you
19 make or break yourself as a profit making institution, so
20 I'll allow it. Go ahead.

21 A. The, in my experience, it does include counsel of that
22 sort and participation in developing bids to customers.
23 And the, an eight or ten cents per gallon advantage is a
24 major advantage and would allow for very disreputable
25 activity in the marketplace. Customers change for a penny

1 or two a gallon, many times. And school bids are determined by
2 mils per half pint. So that's clearly a material amount.

3 MR. BESHORE: I have no further questions at this
4 time for Mr. Herbein on direct, and he's available for
5 cross examination.

6 THE COURT: All right. Ms. - - let me ask you
7 this. We looked at Herbein (a), (b), (c), and (d). What
8 about the rest of them, (e) (f) (g) (h) (i) (j) and (k)?
9 Is there any need to adjust any of those? I haven't looked
10 at them individually, so - -

11 MR. BESHORE: I don't have any questions on
12 direct to ask of Mr. Herbein with respect to those.

13 THE COURT: Do they have the same pertinence to
14 orders to five and seven that they had to the hearing you
15 testified to in - - gave testimony to - -

16 THE WITNESS: Yes, they would. They study a
17 different subject, and the subject is enumerated on in the
18 heading. This is doing a comparative analysis of return to
19 producer/handlers and regulated distributing plants
20 supplying a warehouse store.

21 And that was a particular issue in those hearings
22 which if we had warehouse stores, and if that were an issue
23 here, that would clearly be something that could be
24 obtained from this. I have not made adjustments to the
25 plant costs that appear on those schedules.

1 THE COURT: I see. So it may be that those
2 particular ones don't have pertinence, or relevance.

3 MR. BESHORE: They're relevant. You know, and
4 are pertinent, two ways. First of all I could ask Mr.
5 Herbein, we need to.

6 Q. Would the cost adjustments be the same factors on
7 those exhibits that you've indicated in terms of
8 regionalizing them, that you've indicated for (a) and (b)?

9 A. Yes, the process would be the same. We would
10 need to adjust plant and distribution on those schedules by
11 exactly the same factors, which are percentages. And after
12 doing those adjustments, then the conclusions would be
13 reduced because the costs would be lower. And the
14 conclusions would be - - the results would be the same.

15 MR. BESHORE: The arithmetic, Your Honor, the
16 arithmetic can be done on the basis of what we had. I
17 didn't propose to do it. The other part of that is, that
18 it's the information is relevant and pertinent as a case
19 study of what could happen. And it was very fact specific
20 there. But it's what could happen here, that we want to
21 prevent.

22 THE COURT: We'll see if anybody here has
23 problems doing the arithmetic - -

24 MS. DESKINS: Your Honor?

25 THE COURT: Yes.

1 MS. DESKINS: I would raise the same objection
2 you do as to relevancy. On some of these it refers to the
3 uniform price for Federal order 131. Have they explained
4 how that needs to be changed too, in order to make it
5 relevant for this hearing?

6 THE COURT: I think that's what you just did, did
7 you not, Mr. Beshore?

8 MR. BESHORE: Yes. All the information with
9 respect to prices and cost regionalization is in this
10 record to convert it if we want to. But it's independently
11 relevant. Because it shows what could happen here. What
12 has happened elsewhere and could happen here. We don't
13 have to have dead bodies before the secretary can make
14 regulations to prevent carnage.

15 MR. RICCARDI: But we do have to have a factual
16 basis to show any disorderly marketing, and there is zero.
17 And Judge, what we're really doing here is, we're taking, I
18 don't care if we apply the Federal rules or not. We're
19 taking something that they claim occurred, and by the way,
20 the secretary still hasn't ruled. And saying because it
21 may happened out here, we should do it here.

22 THE COURT: That's right. That's what they're
23 saying.

24 MS. DESKINS: And that is not something that this
25 Court should permit.

1 THE COURT: That's for the secretary to decide
2 under his power to look at potential - -

3 MR. RICCARDI: I understand - -

4 MS. DESKINS: Your Honor, - - my relevancy
5 objection. When Mr. Beshore says the numbers can be done
6 based on what they said, do they need to put in the rest of
7 the exhibit? I mean, if they put in the record what they
8 say should be done, - -

9 THE COURT: I'll tell you what we're going to do.
10 I'm going to let you look at that, and you tell me if you
11 have problems doing it, or talk to Mr. Beshore to see if
12 you can do it.

13 MS. DESKINS: I can tell you right now without
14 even consulting my client, we would have major problems
15 trying to figure out what's going on.

16 THE COURT: Let's hold onto that for a minute.
17 Let's - - I - - we're talking about a possible motion to
18 strike everything after (a), (b), and (c), as exhibits. And
19 we're going to think about that for a while. Let's go to
20 Mr. Riccardi.

21 EXAMINATION

22 BY MR. RICCARDI:

23 Q. Mr. Herbein, you're being paid two hundred fifty
24 dollars for your time that you are spending in preparation
25 for and at this hearing, correct?

1 A. Yes, Sir. That's approximately correct.

2 Q. And you are retained by DFA or Deans for this
3 particular hearing? Or both?

4 A. DFA.

5 Q. DFA retained you to do the study out in 131, and
6 124 starting back in summer or early fall of 2003, correct?

7 A. Yes.

8 Q. And the information that you have presented
9 through what was marked there as exhibit 25 is that study
10 that was used specifically for order 131. Am I correct?

11 A. Yes.

12 Q. Now as I remember, seems like going back in
13 ancient history, but we'll go through some of it. They way
14 you compiled this information is, you took out of your own
15 database a series of fifty clients of the firm, and out of
16 that, you selected fifteen to twenty, correct?

17 A. Yes. There are approximately 20 plants included
18 in this study.

19 Q. And none of those plants were in 131. Correct?

20 A. That's correct.

21 Q. Now are any of those plants that you're using,
22 this study from that you did for 131 in either five or
23 seven?

24 A. No.

25 Q. As I also recall, you did not have any specific

1 information in your study regarding the actual processing
2 costs for any particular producer/handler, correct?

3 A. No.

4 Q. And you didn't have any specific costs regarding
5 transportation for any particular producer/handler, correct?

6 A. No transportation for producer/handlers was
7 included.

8 Q. And there was no specific information, no plant
9 costs for any producer/handler either, correct?

10 A. No. That's not correct.

11 Q. You use plant costs from what producer/handler?

12 A. The producer handler (a) in Herbein (a) and (b).
13 That is a producer/handler from our database.

14 Q. And what producer/handler is that?

15 A. Two producer/handlers, actually.

16 Q. What producer/handlers are those?

17 A. The identity of those producer/handlers is
18 proprietary.

19 Q. So you haven't provided us the underlying data
20 for any of your study or your adjustments, correct?

21 A. No.

22 Q. You don't intend to present that to the
23 secretary, today, correct?

24 A. No. That's correct.

25 Q. So as I understand it, I hope I have, this

1 something that you just reminded me of instead of going to
2 my issue. Take a look at the graph which would be Herbein
3 actually (c) and (d). But let's use the per gallon graph.

4 So as I understand your testimony, the information
5 regarding the cost structure of fluid milk plants set forth
6 on Herbein (c), the 90 thousand would be in fact
7 producer/handler, and the rest of it from two million to
8 thirty million would be a regulated handler, correct?

9 A. That's correct.

10 Q. And you testified, I believe, on direct, that a
11 difference of eight to ten cents per gallon is a
12 significant amount and could result in a loss of bids by a
13 regulated handler to a producer/handler. Correct?

14 A. Yes. That was my answer to Mr. Beshore's - -
15 that's part of my answer to Mr. Beshore's question.

16 Q. What's the difference, let's take a 12, this
17 regulated plant, on Herbein (c), let's take a 12 million
18 pound - - I mean, a 12 million gallon plant and an eighteen
19 million gallon plant. Is that what we are looking at?

20 A. Yes. There are - - those are two categories.

21 Q. What's the difference in the cost per gallon to
22 the - - for the 12 million versus the 18 million?

23 A. In once case, it's the difference between 55.5
24 and 47.7. Or that's 7.8 cents. And in the other case, it's
25 - - the copy's a little bad here. Just a moment.

1 THE COURT: 5-9-1, and I guess that's 6-0-9.

2 THE WITNESS: It's actually 5-9-1 and 5-0-9. It's
3 5-0-9. So we have five, one and five zero, that's 8.2
4 cents.

5 Q. And that's the cost structure of two regulated
6 handlers depending on their size, correct?

7 A. Yes, that is reflective of the lower plant costs
8 that a larger plant has because of the absorption of fixed
9 expenses over a more milk volume going through the plant.

10 Q. So a larger regulated handler has an eight cents
11 or more price differential between a lower volume regulated
12 handler and that would also, I assume, based upon your
13 opinion, cause disruption and loss of bids or business from
14 one to the other, correct?

15 A. That would cause the larger of the two to have a
16 cost advantage over the smaller of the two.

17 Q. So Dean's for example, if it had a larger plant
18 operating at 18 million versus a smaller plant of an
19 independent at two million, would have a significant
20 difference and a significant price advantage, a competitive
21 price advantage over the smaller regulated handler, correct?

22 A. It would with respect to their plant costs. They
23 wouldn't with respect to their raw milk.

24 Q. I didn't ask you a question about the raw milk,
25 Mr. Herbein. I asked you about the plant costs. The plant

1 costs, the processing costs would give a significant
2 competitive advantage to a company like Dean's, if it was
3 operating at 18 million versus a smaller processor whether
4 regulated or otherwise, correct?

5 A. Yes. The plant costs are lower for the larger
6 plant.

7 Q. Now. You do not have in your study, and you do
8 not have by your testimony any specific processing costs
9 for a producer/handler in five or seven, correct?

10 A. That's correct.

11 Q. You don't, in fact - - let me ask you a question.
12 How many producer/handlers are there in five, currently?

13 A. I'm not sure. I'd have to study that.

14 Q. Are there any?

15 A. I don't know.

16 Q. How many producer handlers in seven?

17 A. I don't know that specifically, either.

18 Q. How many pounds of milk, if you know per month
19 are producer/handlers selling into either of these markets?

20 A. I have not studied that.

21 Q. Tell me one example of disruptive marketing
22 caused in five or seven by a producer/handler in the last
23 year?

24 A. I have not studied producer/handlers in five or
25 seven.

1 Q. Tell me why you decided to use - - let me back
2 up. I apologize. Did you use, in doing your regional cost
3 of living, did you use CPI numbers or PPI numbers?

4 A. CPI numbers.

5 Q. Why? Why not use the producer price index? Are
6 we talking about a consumer here, or are we talking about a
7 company that's doing business?

8 A. We're talking about an index that covers a broad
9 perspective and when the same indice is used in different
10 parts of the company, the adjustment is a relative
11 adjustment so it's appropriate to use -- there are a number
12 of different indices that could be used. I chose CPI.

13 Q. And the reason you chose the CPI or Charlotte,
14 and Knoxville versus any other cities is what?

15 A. They are major population centers where most of
16 the milk in these markets are consumed. So if you, it's
17 just logical to use the more significant parts of the
18 country - - of the region.

19 Q. What region of 131 did you use in your original
20 study?

21 A. In 131?

22 Q. That would be the Phoenix/Las Vegas market, in
23 case you wanted to know.

24 A. We used Las Vegas, and Phoenix.

25 Q. What's the current population of Phoenix

1 metropolitan area?

2 A. I don't know that.

3 Q. What's the current population of Las Vegas
4 metropolitan area?

5 A. I don't know that without checking my study.

6 Q. Well, I'd like to see it, if you've got it.

7 A. I don't.

8 Q. What's the population of Charlotte?

9 A. I don't know the population.

10 Q. What's the population of Knoxville?

11 A. Don't know the population. It was obviously
12 considered when I went to the major cities, but I don't
13 have that data here.

14 Q. How did you make adjustments between the
15 population of Phoenix and Charlotte or Knoxville, if you
16 can't tell me what the populations of Phoenix and Charlotte
17 and Knoxville are?

18 A. I used the population to determine and to develop
19 my judgment as to which metropolitan areas within Federal
20 order five and seven should be used. So I looked at the
21 population. Looked at the cities, looked at the map of the
22 Federal orders, looked at the cities that appeared there,
23 and I'm familiar with both Federal order five and seven
24 from having clients in those regions, and knew what the
25 major cities were.

1 Q. The transportation costs that you used for
2 adjustments, if you - - let me strike the question and go
3 at it this way. Did you assume in (a), (b), (c), (d), (e),
4 and (f), when you made your adjustments that there was a
5 transportation cost involved in producing and transporting
6 the milk by the producer/handler?

7 A. No. There is no transportation costs in Herbein
8 (a) and (b).

9 Q. (c), (d), (e), and (f)?

10 A. None in (c), none in (d).

11 Q. And (e) and (f) you used transportation costs?

12 A. Yes. (e) and (f) has transportation.

13 Q. Processing costs for (a), (b), (c), or (d), was
14 this a new plant? Did it have new equipment? Was it an
15 older plant with older equipment?

16 A. The plants included in my study, Mr. Riccardi,
17 are a wide variety of plants that have been in the business
18 for a number of years, and they are constantly modernizing,
19 so there is new equipment, there is some old equipment.
20 There are new building, there are some old buildings.

21 Q. And so you got 15 to 20 selected clients that you
22 hand selected without giving us the data, and you're
23 telling me that it's a wide variety of processing costs and
24 wide variety of plants. Is that what your testimony is?

25 A. My testimony is not exactly that.

1 Q. Let me see if I can get at it this way. Is the
2 producer/handler in (a), (b), (c), or (d) a producer/handler
3 that has a new plant or an old plant?

4 A. There are two producer/handlers in (a), and
5 they're both longstanding small traditional what I call
6 juggling operations.

7 Q. Are they efficient?

8 A. They've been in business for a number of years.

9 Q. Does that mean that they're sufficient?

10 A. Well, they've survived.

11 Q. And so survival is equivalent to efficiency in
12 your opinion?

13 A. Over a period of time, one must have some level
14 of efficiency to be able to survive.

15 Q. How much time have you spent in doing this work
16 in preparation for your testimony in this particular
17 hearing?

18 A. For today?

19 Q. That would be true.

20 A. About two days. Two and a half days.

21 Q. When were you given this assignment?

22 A. Several weeks ago.

23 Q. For the first time?

24 A. Yes.

25 Q. What were you asked to do?

1 A. I was asked to review and update the information that
2 I presented at the Phoenix hearing, to see if it would
3 apply and could be adjusted to Federal Order five and seven.

4 Q. Did you call the market administrator in five or
5 seven to gather any information?

6 A. No. I have - - we all have ready access to the
7 information through the fine on-line website of the USDA.

8 Q. Did you interview any producer/handlers in five
9 or seven?

10 A. I did not.

11 Q. Did you interview any regulated handlers in five
12 or seven?

13 A. I spoke with, I guess that's an interview. I
14 spoke with several regulated handlers.

15 Q. By the way, on another topic, the section (a) of
16 your exhibit, that producer/handler information came from a
17 producer/handler in Pennsylvania, right.

18 A. That's correct.

19 Q. And Pennsylvania is not a Federal - - not
20 regulated by a Federal order, but a state regulated?

21 A. Pennsylvania has a regulated - - part of
22 Pennsylvania is Federally regulated. And part is not.

23 Q. And the producer/handler that you used for
24 Section (a) is in the state regulated section, correct?

25 A. It's in a state regulated section. That's

1 correct.

2 Q. Now, you're used to doing things like audits on
3 behalf of client, you're sometimes requested to do that as
4 part of your business? Correct?

5 A. Yes.

6 Q. And now you did not do any kind of an audit of
7 any producer handler to obtain the information contained in
8 your report, correct?

9 A. The information contained in my report for the
10 producer/handler - -

11 Q. Let me explain the situation. Did you audit the
12 information or not? Did you have audited information?
13 Tam's the only information I asked you.

14 A. I extracted this information from our client
15 files, which were - - these two producer/handlers that are
16 included here was from their financial statement and tax
17 returns prepared by our firm, not audited.

18 Q. That was the only question I asked. Now, you
19 didn't have audited information from any producer/handler
20 in five or seven, to make this extrapolation, correct?

21 A. I had no producer/handler information from five
22 or seven.

23 Q. Is the supposed producer/handler that you're
24 looking in five - - well, let me ask you that question.
25 Maybe I'm wrong. Are you making assumptions in your

1 testimony today regarding any particular producer handler
2 in five or seven, hypothetical or otherwise?

3 A. No. The purpose of this presentation was to
4 demonstrate to the secretary what can happen and what does
5 happen as the size of a fluid milk plant increases.

6 Q. And the size of a fluid milk plant increasing,
7 whether regulated or otherwise, means that there should be
8 economies of scale if it's efficient, and as it gets
9 larger, they're going to have an advantage because the
10 costs will decrease, whether they're regulated, or a
11 producer/handler. Correct?

12 A. That's right. The plant costs, that's what I said
13 before, and my testimony is that as a plant processes more
14 volume, it's costs per gallon go down.

15 Q. So is it your testimony that we should, the
16 secretary should regulate a company like Dean Foods,
17 because as it's plant size increases, and it's efficiencies
18 get better, it's going to be able to unfairly compete on
19 cost against a smaller regulated handler in this area?

20 A. It's - - my recommendation to the secretary is,
21 in dealing with raw milk. The secretary doesn't, as far as
22 I understand it, regulate plant costs. So we're here
23 presenting information about raw milk.

24 Q. Is it your testimony that a regulated handler in
25 five or seven cannot compete with a producer/handler

1 currently?

2 A. With - - hypothetically, if we had a
3 producer/handler that was large like we discussed when you
4 and I were - -

5 Q. And I'm not asking you that. Is it your
6 testimony that currently, as the evidence exists in this
7 market, based upon the information provided by the market
8 administrators, is it your testimony that right now, that
9 there is any problem with a regulated handler competing
10 with a producer/handler as it exists?

11 A. I haven't studied that.

12 Q. So you don't know one way or the other.

13 A. I do not.

14 Q. In fact, that means that there isn't any problem
15 currently between a regulated handler being able to compete
16 with a producer/handler. Correct?

17 A. I don't know.

18 Q. So you don't know one way or the other.

19 A. I do not.

20 Q. In fact, that means that there isn't any problem
21 currently between a regulated handler being able to compete
22 with a producer/handler. Correct?

23 A. I don't know.

24 MR. RICCARDI: Your Honor, can I take a short
25 break?

1 THE COURT: Yeah, (Positive response). Let's
2 take five minutes.

3 (OFF THE RECORD)

4 THE COURT: Are we ready to proceed?

5 MR. RICCARDI: Yes. Thank Your Honor. Your
6 Honor, the government has made a motion, you have directed
7 some of your attention to it, and that is with regard to
8 Herbein study, particularly when we get to exhibit (e) and
9 beyond. It's headed Comparative Analysis of Return to
10 Producer/Handlers and Regulated Distributing Plants
11 Supplying a Warehouse Store.

12 Like the rest of this study, which I will
13 continue to object to, it is directed solely and
14 exclusively to order 131, and that portion of it to, in
15 particular in my belief, my client, Sarah Farms.

16 There is a substantial amount of cross
17 examination I would have on that Judge. I don't intend,
18 however, to open the door. What I would request is, I
19 would join in the government's motion to the extent that
20 the Court were to grant that obviously, other than some
21 follow-up based upon the questions, and my request to
22 include not only my cross examination from Phoenix, but
23 also the direct and all of the cross in Alexandria as a
24 separate exhibit which we would prepare and submit to the
25 Court than for right now, I would sit down.

1 To the extent the Court were to allow this in,
2 then I have some examination remaining based in part on a
3 lot of the information in that portion of the study.

4 THE COURT: Mr. Beshore?

5 MR. BESHORE: Well, perhaps we can allay some of
6 Mr. Riccardi's concerns. We would certainly stipulate, I'm
7 speaking for Dairy Farms of America now, that any
8 information in this record with respect to Arizona cannot
9 be used in the Arizona proceedings.

10 THE COURT: Well, yes. I'm sure that's true.

11 MR. BESHORE: Apparently that's Mr. Riccardi's
12 concern that the Arizona proceedings where his client
13 operates are going to be litigated here, and they aren't.

14 MR. RICCARDI: They are, Judge, but that's not my
15 issue. My issue is that that portion, I think all of the
16 report. But certainly that portion of it which is related
17 factually to something that has nothing to do with order
18 five and seven be brought into this proceeding when it
19 isn't related to anything. But if we're going to bring it
20 in, then I want to cross examine on those issues.

21 THE COURT: Well, here's where we are. I was thinking that
22 we might strike Herbein (e), (f), (g), and so forth, the
23 ones at the end, because of what I heard. But then again,
24 it occurred to me as thinking about it, it's probably
25 referred to in its statement that we have from him. And we

1 strike it, then, in reading what he said at Tempe would
2 become confusing. So my feeling now is to allow it. I
3 think you want your cross examination all brought in.

4 MR. RICCARDI: I do, Judge. If we're going to do
5 it that way, I do want all my cross examination brought in.

6 THE COURT: And you feel the same way, Ms.
7 Deskins?

8 MS. DESKINS: We have a continuing objection.

9 THE COURT: Objection's - - but if it comes in,
10 you'd just as soon the whole thing be in.

11 MS. DESKINS: Well, no.

12 THE COURT: Other than that, what I talked about,
13 strike it. But I meant the - -

14 MS. DESKINS: Your Honor, I would point out that
15 what any party could do is take his testimony, make it into
16 a statement, and present it here. And that would resolve
17 the problems.

18 THE COURT: I understand. That would probably be
19 preferable in the future. What we're going to do though,
20 we're going to receive exhibit 57 in its entirety, and we're
21 going to let you also bring in, Mr. Riccardi, your - - the
22 other materials that you had at the continuation of the
23 hearing. And use that with your brief. You know, just
24 bring it in then and probably attach it as a copy to your
25 brief, or whatever you need to.

1 MR. RICCARDI: Do we do it that way, Judge, or
2 should we, in the interim, depending on how long this
3 lasts, get it prepared as a specific exhibit to be
4 presented in this hearing?

5 THE COURT: If you do that, that would be better.

6 MR. RICCARDI: Well, we'll give it a try. Here's
7 our problem. We just got released the transcript from
8 Alexandria. We're in the process of trying to make any
9 changes to it, but subject to those issues, if we could get
10 it available, we will make it available and mark it as an
11 exhibit.

12 THE COURT: If it comes after we close the oral
13 testimony, you can send it on to the hearing clerk, and we
14 will give it a number or something, make a motion or do
15 something with it, to get it in. So we'll do that. And
16 having said all that, I'm not going to say anything more.
17 As far as the evidentiary weight to be given to the
18 witness's testimony, that will be for the assistant
19 secretary, the administrator to decide. Very well.
20 Anything further from the witness?

21 MR. RICCARDI: Your Honor, I was going to have
22 some cross examination on those points, but I was going, at
23 this point, allow Mr. Miltner start his cross examination
24 and then finish mine up on those topics.

25 MR. MILTNER: Brian Miltner.

1 THE COURT: Yes, Sir. Give your full name.

2 MR. MILTNER: Brian Miltner.

3 EXAMINATION

4 MR. MILTNER:

5 Q. Good morning, Mr. Herbein.

6 A. Good morning, Mr. Miltner.

7 Q. I would like to go over what's now referred to
8 Herbein (a) and (b). And the numbers and the derivation of
9 the numbers on that exhibit if I might. And am I correct
10 that the six categories on Herbein (a) and (b) contain a
11 total of 20 plants?

12 A. Yes. Approximately 20 plants.

13 Q. And those 20 plants were selected from a pool of
14 50 plants pre-screened by your office.

15 A. Yes. They've been selected from our database of
16 plants by me personally.

17 Q. And of those 50 plants from which these 20 were
18 selected, those 50 came out of a database of 150 that
19 you're office maintains?

20 A. Our database doesn't a hundred and fifty active
21 plants. Some of the 150 are no longer operating, have been
22 merged or sold. So the 50 is approximately the active
23 plants in our database.

24 Q. I don't think it's been put directly in the record
25 here, I'm sure it's in your testimony from Tempe. But those

1 20 plants were broken down into these six categories. And
2 if my recollection serves me, there are two plants in the
3 producer/handler category, correct?

4 A. Yes.

5 Q. That's column (a).

6 A. That's correct.

7 Q. There's two plants in column (b).

8 A. Yes.

9 Q. And the remaining columns each have four plants?

10 A. I think that's right, yes.

11 Q. Of your 50 active plants, how many of those
12 plants produce around two million pounds, or process two
13 million pounds of class one production each month?

14 A. Less than ten.

15 Q. And of those active plants, how many produce five
16 million - - produce five million pounds of class one each
17 month?

18 A. I'm going by my knowledge of the database.
19 Between five and ten.

20 Q. And so for those categories, you took the
21 universe of those plants that would fit into the categories
22 you've established, and you picked two for column (b), four
23 for column (c) through (f).

24 A. Yes.

25 Q. Hand selected those from your pool of 50.

1 A. That's correct.

2 Q. And then from the plants you selected, you took a
3 simple average of those selected plants' processing costs.

4 And you averaged those together, and that's what's reflected on
5 this table, subject to your adjustments for location.

6 A. Yes.

7 Q. So let's start with column (a). You have a plant
8 processing cost of, and this is the printed number, as it
9 appears on the exhibit from Tempe, 80.6 cents for order
10 131. So for simplicity, you have two plants, and one of
11 which may have had a processing cost of roughly sixty
12 cents, one of them may have had a processing cost of
13 roughly a dollar. They're averaged together, and that's
14 where you come up with the 80.

15 A. That's correct. And I, your methodology is
16 right. I don't recall the precise numbers for the two, but
17 I am sure the range would not have been 60 to a dollar.

18 Q. Do you recall what that range might have been?

19 A. No, I don't. Not precisely.

20 Q. But you're certain it wasn't sixty cents and a
21 dollar.

22 A. Yes.

23 Q. Could it have been as close as 70 cents and 90
24 cents?

25 A. I don't recall.

1 Q. But certainly, there was a range. I mean, not
2 much of a range, because there's only two. But - -

3 A. There's definitely a range. And I just don't
4 remember exactly what that range was.

5 Q. And a similar methodology, actually an
6 identically methodology for column (b). And so you had two
7 plants, one with a higher cost, one with a lower cost.
8 They averaged to 46.6 cents.

9 A. That's correct.

10 Q. But again, we don't know what the lower cost was
11 and what the higher cost was.

12 A. No. I don't recall. This is an average of those
13 two plants.

14 Q. Now for column (c) through (f), we have obviously
15 twice as many plants. We have four in each category. So
16 those were averaged and came up with the number that you
17 have for plant processing costs. And similarly we would
18 suspect that there would be some sort of spread in those
19 plants. Correct?

20 A. Yes. There clearly is, and that's the reason
21 that I used an average, so that, and this is the normal
22 method of presenting costs for a cross section. That is
23 deemed to be representative of a particular type of
24 operation. So in this case of the five million pound
25 category, those four plants are averaged together, so that

1 we have a representative statistic that we can assume that
2 plants of approximately five million pounds per month of
3 class one sales would have costs of approximately this
4 level. That's the purpose of this study.

5 Q. You have a cost of approximately that. We can
6 make that assumption based on the four plans you have
7 averaged together. But certainly, there will be plants
8 that have higher processing costs than the average, and
9 plants with lower processing cost than the average.

10 A. Yes. That's the way an average works.

11 Q. And we don't know whether those processing costs
12 are ten percent higher than the average, fifty percent
13 higher than the average, or fifty percent below the
14 average, because we don't have that data to analyze.

15 A. That's - - was that a - - No. Because in my
16 selection of these plants, - - I, we used judgmental
17 selection so we wouldn't have something that was very
18 unusual. For example, in our database, we have companies
19 that have, and I believe this is in our - - in my testimony
20 from the previous hearings, we have companies in our
21 database within these size categories, two that I can think
22 of for sure, that have glass bottles in their plant. And
23 they would not be appropriate to be included because their
24 costs are far different than the average. I selected
25 companies here that were traditional, normal, by size

1 category. So the range of from high to low within the
2 average is not significant.

3 Q. You mentioned two of the plants in your database
4 are glass bottling plants, and they would fit into these
5 categories. Which categories would those plants fit into?

6 A. They're not in these statistics.

7 Q. But you said they would fit into one of these
8 categories. I understand they're not reflected in your
9 averages. Which category would they have fallen into?

10 A. I believe that they would be, one would be in the
11 five million pound category, and the other something
12 smaller than that.

13 Q. And those plants are presumably profitable,
14 ongoing, concerns. They're in existence, they're supplying
15 customers, and presumably, they're profitable, or at least
16 they're not losing their shirts.

17 A. They're ongoing businesses, yes.

18 Q. So of your fifty active plants, we've ruled out
19 two of them. And we have 28 others that you might have
20 selected, but you didn't select.

21 A. Yes.

22 Q. And why were those plants not included in your
23 study?

24 A. For a lot of different reasons. It's also not
25 necessary - - some of it was because of unusual

1 characteristics in some of the other plants that made them
2 not appropriate for this study. And some were excluded
3 because we didn't have to study fifty plants to get a
4 representative presentation for this proceeding.

5 Q. And for the record, our previous discussion of
6 judgmental selection was in Alexandria, not in Tempe,
7 correct? I'll tell you, that's the fact.

8 A. I'll accept it. I remember the questions.

9 Q. And part of them was in response to comments made
10 in the hearing about your study not being this study,
11 Herbein (a) through (whatever we're going to admit). Not
12 being a peer review study. Correct?

13 A. That was the line of questioning, and I guess my
14 answers to that, or my opinion about that is that I don't
15 agree with that.

16 Q. And that's reflected in the record from
17 Alexandria. And did you not offer some testimony that as
18 an accounting firm you are subject to peer review?

19 A. That's correct. Herbein and Company is subject
20 to peer review by other CPA's.

21 Q. And that conversation was about a month ago, and
22 at that time, this particular study had not been peer
23 reviewed. Is that still the case today?

24 A. That is correct. It has not been peer reviewed.

25 Q. So what you're asking the secretary to do is use

1 this report to determine the propriety of changes to the
2 producer/handler regulations. Is that what this study is
3 intended to do?

4 A. Yes. It's to provide the secretary with
5 information as the secretary makes the decision as to what
6 should happen. And I believe this is valuable information
7 that should be considered.

8 Q. And in preparing this, you made a judgmental
9 decision to select CPI rather than PPI, did you not?

10 A. I made that decision.

11 Q. And you made a judgment as selection to select
12 certain metropolitan areas for your price comparison of
13 Charlotte, Knoxville, Memphis, and New Orleans rather than
14 others, did you not?

15 A. Yes. That was my individual determination.

16 Q. Did you make any analysis as to whether the
17 processing plants located in these particular orders,
18 orders five and seven were located closest to those
19 metropolitan areas?

20 A. I looked at the list of regulated plants and the
21 plants that are regulated in that area serve the
22 metropolitan areas along with others that I studied. So I
23 think there's a definite connection between the plants and
24 the metropolitan areas that I used.

25 Q. But the labor costs and such would not

1 necessarily reflect the Atlanta market if the plant itself
2 were not in the Atlanta market. If the labor force was in
3 a different area. Would that be accurate? Would that be
4 an accurate statement?

5 A. Certainly. There are differences within, there
6 are labor differences, utility differences, and other cost
7 differences within our Federal markets, and within the
8 regions that are analyzed for economic purposes. And the
9 reason for using more than one city is to get an average,
10 again, so that we have something that's representative of
11 the market. And that's what I - - that's what I have here
12 is something that's representative of order five territory
13 and order seven territory.

14 Q. Have you had the opportunity to review exhibit 48
15 at this hearing, which is the exhibits that accompanied Mr.
16 Holland's testimony for Southern Marketing Agency?

17 A. I have not. Could you speak up? There's a lot
18 of noise behind me. I'm having trouble hearing you.

19 Q. That's understandable. You have not reviewed
20 exhibit 48?

21 A. I have not.

22 Q. And you have not seen items 14 (a) and 14(b) of
23 that exhibit which lists sixty some I believe, metropolitan
24 statistical areas within orders five and seven?

25 A. No.

1 Q. And is labor a consumer good?

2 A. No. Not - - no.

3 Q. It is not included in the basket of goods
4 measured, that measure the consumer price index? The cost
5 of labor?

6 A. Indirectly, the wage level is a result of the
7 consumer price index.

8 Q. The consumer price index, though, is a basket of
9 goods which is tracked by the government to reflect what it
10 costs a consumer, an individual to maintain a standard of
11 living. To purchase goods. Correct?

12 A. Yes.

13 Q. And what types of items would be in that basket
14 of goods?

15 A. Housing, automobiles, food, things of that sort.

16 Q. Energy, cars, computers, those types of things.

17 A. Yes. Yes.

18 Q. The producer price index is a different basket of
19 goods altogether, is it not?

20 A. Yes.

21 Q. What type of goods or services might be included
22 in that basket of goods?

23 A. I'm really not able to give you a list of those.

24 Q. But it's to measure manufacturing costs,
25 production costs, rather than consumer costs. That's the

1 purpose of a producer's - -

2 A. I think, yes.

3 Q. In addition to asking the secretary to accept
4 your judgment as to the selection of cities, the selection
5 of price indices, the selection of plants, you're asking
6 the secretary to accept the fact that your selection,
7 reflected normalcy in this marketing area, correct? You
8 selected were because they were representative, and
9 reflected normal plants.

10 A. Yes.

11 Q. And you're asking the secretary to accept that
12 judgment you had made, are you not?

13 A. Yes. Based on my experience.

14 Q. And no doubt you have a great deal of experience
15 in cost accounting. And dairy cost accounting in
16 particular. But there's no way for us, or the secretary to
17 verify your selections, is there?

18 A. Selections of what?

19 Q. Of any of these items. Of the plants, for
20 instance.

21 A. I believe the secretary can review the testimony
22 that I presented, which I believe explains thoroughly what
23 I have done, what my methodology was. What the database is
24 that was used. The credibility of the database. And I
25 believe that that should be clear in the hearing record.

1 Q. The credibility of the database I don't think is
2 the issue as much as your selection of material from that
3 database. Are you willing at this hearing in this order to
4 provide us with the underlying data for these averages?

5 MR. BESHORE: His proprietary database?

6 MR. MILTNER: Yes, his proprietary database.

7 A. No. That is, as I testified before, our
8 agreement with our clients that participate in that
9 database is that they're individual statistics will not be
10 shared with anyone, and I'm also governed by the code of
11 professional ethics of the - - of CPA's, that I cannot
12 disclose without permission, a client's information. And
13 the final part of that is that it's my sworn testimony that
14 the statistics that we've used and that are included in our
15 database are real numbers from real companies that we
16 provide accounting services for. So there is great - - I
17 have great trust in those numbers as being real, and being
18 representative.

19 Q. Mr. Herbein, for the record, we are not
20 questioning the integrity of the data in your database, nor
21 are we questioning y our voracity. But again, because that
22 data is not available, the propriety of your selections
23 cannot be tested or evaluated by the secretary nor the
24 other participants in the hearing. Is that correct? It's
25 unavailable to us. Is there any way for us, for anybody to

1 verify the propriety of your selections based on the
2 information you are submitting to the secretary?

3 A. Yes.

4 Q. How might that be?

5 A. The, my data can be tested by using publicly
6 available information such as the Cornell Study of Dairy
7 Plants, as one example.

8 Q. The Cornell Study. Is that a peer reviewed
9 study?

10 A. I'm familiar with reviews of CPA firms. Dr.
11 Canootzin's peer review to me sounded like one educator
12 reading another educator's report. I'm not sure about the
13 peer review of Cornell, but the Cornell Study - -

14 Q. You're not sure if it's a peer reviewed study or
15 not.

16 A. If I may, the Cornell Study is widely utilized in
17 dairy litigation and hearing and so forth. And you could
18 utilize that as a way of reviewing my statistics if you
19 question them.

20 MR. MILTNER: May I have one minute, Your Honor.

21 THE COURT: Sure. Off the record for a second or
22 two.

23 MR. MILTNER: Your Honor, I don't believe that I
24 have any more questions for Mr. Herbein at this time.

25 THE COURT: Mr. Riccardi, you have some more

1 questions?

2 MR. RICCARDI: I do, Your Honor. Although it's
3 12:10 here.

4 THE COURT: I don't know how many questions you
5 have.

6 MR. RICCARDI: Well, Your Honor, I'm going to
7 have a bit of time probably half an hour, maybe less.

8 THE COURT: What's the sentiment? Does everybody
9 want to break now? The witness, we could also be getting
10 the witness out and maybe getting him on his way. I don't
11 know - - would you prefer to finish?

12 THE WITNESS: I'm fine. My departure is later
13 this afternoon.

14 THE COURT: Let's then break, and we'll be back
15 here at 1:00.

16 (OFF THE RECORD)

17 THE COURT: You were giving testimony before, and
18 you're back on the stand. And we took a break so that Mr.
19 Riccardi could get some thoughts together, notes together.
20 Mr. Riccardi?

21 MR. RICCARDI: I'm ready to do that, but I think
22 that Mr. Miltner has a few follow-up questions.

23 EXAMINATION, CONTD.

24 BY MR. MILTNER:

25 Q. Mr. Herbein, before we broke for lunch, you

1 suggested that your data could be verified by looking at
2 the Cornell Study. I assume that you're familiar with the
3 Cornell Study?

4 A. Yes.

5 Q. Do you know what the range of plant sizes
6 contained in the Cornell Study is?

7 A. Not without looking at it.

8 Q. Would it - - does it sound correct if I
9 represented to you that the study contained plants between
10 11.7 million and 51.5 million pounds of processing per
11 month?

12 A. I really don't recall, and I used the report. I'm
13 familiar with it. But I don't recall that detail.

14 Q. If in fact the smallest plant contained in the
15 Cornell Study was roughly 12 million pounds per month, that
16 would mean that the first three categories of your study
17 would be far smaller than the smallest plant studied by
18 Cornell. Would that be accurate? If in fact there was a
19 12 million pound number?

20 A. Sure. The numbers speak for themselves.

21 MR. MILTNER: That's all I have, Your Honor.

22 EXAMINATION

23 BY MR. RICCARDI:

24 Q. I assume that you have not seen either exhibit
25 ten or exhibit 41 at this hearing, exhibit ten being a

1 compilation of statistical material for the Appalachian
2 Marketing Area for January through June of 2003. You
3 haven't seen that, have you?

4 A. No, I'm sorry. I arrived this morning and have
5 not seen any of the previously submitted exhibits.

6 Q. So that would mean that you didn't take at least
7 these exhibits into consideration in your testimony this
8 morning, correct?

9 A. I'm not sure what the exhibits are, but I haven't
10 seen them.

11 Q. Let me do this, because I assumed you didn't have
12 a copy, so I made you a couple copies. I have handed you
13 what has been admitted as exhibits in this hearing, exhibit
14 41 and exhibit ten. And let me go back on some of the
15 testimony that you provided, and then we'll get to the
16 relationship between these exhibits and your testimony. As
17 I understand it when you did your regional cost of living
18 analysis, using the CPI as opposed to the PPI, you picked
19 certain cities within Federal order numbers seven and five
20 and those would be Charlotte, Knoxville, Atlanta, New
21 Orleans and Memphis. Am I correct in my recitation of your
22 testimony today?

23 A. Charlotte, Knoxville for five. Atlanta, New
24 Orleans and Memphis for seven.

25 Q. Now lets start with five then, which would be

1 exhibits number ten. And I understand you haven't seen
2 this before. So let's go through it for a moment. If you
3 open up exhibit ten and you look at what would be the
4 second page, there's a map of the Appalachian marketing
5 area covered by Federal order number five. Am I correct?

6 A. Yes.

7 Q. Now, it's different from 41 because 41 actually
8 lists cities, which listed here for pool distributing
9 plants is the name of the plant. So what I'd like for you
10 to do is to flip over to table 19, which is page 147 of
11 exhibit number ten near the back.

12 A. I'm sorry the page number.

13 Q. Page number would be 147. It's marked at the
14 bottom. It's the last table as part of table number ten.

15 A. I have it.

16 Q. Now you'd agree with me, starting at 147 and
17 going to 148 that there's a list of the handlers and plants
18 subject to Federal order number five contained therein,
19 correct?

20 A. That's the heading to table 19.

21 Q. Can you point out to me, please, the number of
22 pool distributing plants that are listed there that are
23 located either in Charlotte or Knoxville?

24 A. On page 147 and 148 there are no plants listed
25 with Charlotte or Knoxville addresses. However, as I said

1 in earlier testimony today, these plants do business in
2 those cities, in the metropolitan areas of those cities.

3 Q. But let's talk about that for a second if we can.
4 I have a plant that's located in Charlotte or Knoxville,
5 and by the way there isn't one. But let's assume
6 hypothetically there is. If in fact I have to take a look
7 at the cost of living, actually we should look at the cost
8 of production. But let's look at the cost of living. I still
9 have to look at issues like local labor costs, don't I?

10 A. You would incur in your plant wherever it's
11 located the localized costs for all of the items that you
12 purchase.

13 Q. And so we have to look at an area that's closest
14 to the plant to be able to do a more specific study as to
15 what the plant costs would be to make adjustments, wouldn't
16 we?

17 A. No, not necessarily. Depends on what the purpose
18 of your study is.

19 Q. If I want to get the most accurate information,
20 then I want to get the information that's localized to
21 where the plants are located, correct?

22 A. Not necessarily.

23 Q. If I want to find the specific information
24 regarding costs for that area, that plant, I want to get
25 the cost that are associated with that local area, don't I?

1 A. If you're studying one plant, and your, the
2 purposes that determine the costs for that one plant, it's
3 obvious that you would gather information for that plant in
4 that region only.

5 Q. Let's go and get to the point that you're just
6 talking about. For order number five, you took two cities
7 only, correct?

8 A. I took two cities: Charlotte, and Knoxville.

9 Q. And those are located in what states?

10 A. Charlotte, North Carolina, and Knoxville,
11 Tennessee.

12 Q. So in looking at the Appalachian marketing area,
13 get back to the map, page 120 as part of exhibit ten, you
14 have no information regarding Indiana, correct?

15 A. That's correct.

16 Q. You have no information regarding Kentucky.

17 A. I did not select a city out of Kentucky.

18 Q. You have no information regarding Virginia.

19 A. That's right.

20 Q. You have no information regarding South Carolina.

21 A. That's right.

22 Q. You have no information regarding Georgia.

23 A. That's right.

24 Q. You have no information regarding West Virginia.

25 A. Yes.

1 Q. Now, in trying to do any kind of statistical study,
2 isn't it true that to make the statistics meaningful,
3 because we can do anything with stats, that we would have
4 to get at least a representative sample in the large enough
5 area. In this case the marketing area of exhibit five of -
6 excuse me. Of Federal order five, part of exhibit ten, to
7 make our statistics more meaning to the secretary. Correct?

8 A. No. Not necessarily.

9 Q. So we can pick one city and use that as the
10 adjustment for the CPI as opposed to the PPI, that would be
11 meaningful.

12 A. If that selected city was representative of the
13 rest of the marketplace. And as I said under direct,
14 Charlotte and Knoxville, in my opinion and in my
15 experience, in Federal order five, they're representative
16 of the geography that you just pointed out.

17 Q. In order to say that something is representative,
18 I have to import enough information to be able to say, I've
19 looked at ten cities, and in my opinion the following two
20 cities, five cities, or eight cities are representative of
21 the entire marketing area. Do you have your notes here to
22 be able to tell me how you went through that analysis, Sir?

23 A. Certainly. I'd be glad to do that.

24 Q. Do you have anything here as to what cities you
25 used to de-select from?

1 A. The approach that I used in forming my opinion,
2 Mr. Riccardi, was to look at the regulated plants that are
3 actually on this map and in other Federal order information
4 that I looked at to see how many regulated handlers in
5 order five, since we're talking about five, that our firm
6 has done work for, that I was familiar with their cost
7 structure. And so that's the way I satisfied myself with
8 the five or six other companies that are in this regulated
9 area that I'm familiar with their costs.

10 Q. Now. What cities did you de-select in deciding
11 on the two that you did pick?

12 A. I didn't de-select. I looked at, as I said under
13 direct, I looked at the map, and selected Knoxville and
14 Charlotte. As two major cities in this regulated area. I
15 looked at the results of that. I looked at the plants that
16 we'd studied within Federal order five, and the conclusion
17 that I came to was that to use those two cities was
18 reasonable for my presentation to the secretary.

19 Q. But hang on a second. I thought that you didn't
20 have any type of plants in the 20 that you used in your
21 analysis for 25 that were in five or seven.

22 A. That's correct.

23 Q. So you don't have the data for any plants that
24 are located within five or seven, correct?

25 A. That's not correct.

1 Q. There's no data in exhibit number 25 from five
2 and 7, correct?

3 A. There's no data in 25, in exhibit 25 from order
4 five or seven. But that's a different statement than do I
5 have, have I done, has our firm done work for those, for
6 other companies in this area. They happen not to be in our
7 database.

8 Q. So it's not in your database, so you don't have
9 the actual information in the database, but you do work for
10 some of the people who have plants in five. Is that your
11 testimony?

12 A. We have done substantial work for plants located
13 in Federal order five. And their statistics are not in the
14 database that I used to select the information for exhibit
15 25.

16 Q. Tell me the people you do work for that are in
17 five.

18 A. You're looking for names.

19 Q. That would be true.

20 A. Mayola, which is in Newbern, North Carolina on
21 the map.

22 Q. So do you have statistics for Mayola showing
23 their processing costs?

24 A. Here? No.

25 Q. Anywhere.

1 A. Yes.

2 Q. Can we have those?

3 A. They're proprietary.

4 Q. So in Mayola, you've got the stats but we can't
5 analyze the data. Is that what your testimony is?

6 A. Yes.

7 Q. Anybody else?

8 A. Sure. Hunter Farms.

9 Q. At Highpoint?

10 A. Yes.

11 Q. You have the data regarding their processing
12 costs.

13 A. Yes.

14 Q. Do they use CPI or PPI to make any adjustments in
15 their own internal financial data?

16 A. I don't know that.

17 Q. But again, we can't have that data.

18 A. That's correct.

19 Q. Anybody else?

20 A. Valley Rich.

21 Q. In Roanoke?

22 A. Yes.

23 Q. Anyone else?

24 A. Milkco.

25 Q. In Asheville?

1 A. Yes.

2 Q. What data did you look at from the ones that were
3 in five?

4 A. Their financial information that we have in our
5 files.

6 Q. Does the financial information have the
7 processing costs?

8 A. It has processing costs, it has, it has a lot of
9 financial balance sheet, income statements, size of the
10 plants.

11 Q. And those are readily available to you?

12 A. As part of our assignment as CPA's, yes.

13 Q. But confidentiality doesn't prevent you from
14 telling me the names of those plants right?

15 A. No. I don't think it does. It's pretty generally
16 known who we do work for, so I'm not hesitant about that,
17 and I don't think, as a matter of fact, I know the clients
18 wouldn't be - -

19 Q. Did you ask them?

20 A. Not specifically this morning, no.

21 Q. Are you going to tell them afterwards?

22 A. I probably will.

23 Q. Anybody else?

24 A. Southern Belle.

25 Q. And what work do you do for Southern Belle?

1 A. I've done some route analysis work for them, cost
2 benchmarking on delivery statistics.

3 Q. They - - client?

4 A. Yes.

5 Q. So the data again, would be available but you're
6 not going to share it with us.

7 A. That's correct.

8 Q. Let's go to, if you're done in terms of people
9 you've done work for then I want to go to exhibit 41, which
10 would be Federal order number seven, the southeast
11 marketing area. And I think you've told us it was Atlanta,
12 New Orleans and Memphis that you chose in terms of doing
13 your CPI analysis and this one actually helps us a little
14 more because the plants on the map, which are on the - -
15 really the second full page of the exhibit, exhibit 41 show
16 where the plants are.

17 Southeast marketing area pool distributing
18 plants, December 2003. You see that there are plants in
19 fact located in Atlanta, Memphis, and New Orleans, correct?

20 A. Yes. I see that.

21 Q. But you did not include in the analysis that you
22 did any plants in Alabama or Mississippi, no plants in
23 Arkansas, no plants, I think that's Missouri, and no plants
24 in that other portion, I think that's of Kentucky a little
25 bit north of Tennessee.

1 All of that area, you did not include any cities
2 in your analysis. Correct?

3 A. That's correct.

4 Q. Did you in fact have any specific data from any
5 plants in Atlanta, Memphis or New Orleans that you used?

6 A. In the preparation of exhibit 25, if that's your
7 question, the answer as I said before is no.

8 Q. That's my first question. My second question is, in
9 terms of the analysis that you did, that is your regional
10 cost of living adjustment as you testified to, any specific
11 information regarding processing costs or any other costs
12 for plants located in Atlanta, New Orleans or Memphis?

13 A. Again, not in the preparation of 25. And my
14 methodology, Mr. Riccardi, is the same for Federal order
15 seven as it is for Federal order five, and that is, upon
16 reviewing the information for the three cities that I
17 selected, and reviewing the information that I have access
18 to from work that we've done for processing fluid milk
19 plants regulated and located within this Federal order, I'm
20 satisfied that the results that I'm showing to the
21 Secretary for this adjustment are proper.

22 Q. I understand that you're satisfied, but I'm not.
23 That's why I'm asking the questions. Let's go back to
24 exhibit 41. Are the cost of living, the CPI adjustments
25 the same for Birmingham as they are for Atlanta?

1 A. I don't know.

2 Q. Are they the same for Nashville as they are for
3 Memphis?

4 A. I don't know.

5 Q. Are they the same for Springfield as they are for
6 New Orleans?

7 A. I don't know.

8 Q. Are they the same for Little Rock or
9 Fayetteville, as they are for Atlanta, Memphis or New
10 Orleans?

11 A. I don't know. However, it's my opinion that the
12 compilation of the three cities that I studied end up with
13 an average that is representative of the market.

14 Q. Arithmetic average?

15 A. Yes.

16 Q. So you took the three and you divided them and
17 you came up with a number?

18 A. Yes.

19 Q. Well, I'm not any type of - - I became a lawyer,
20 so therefore, I don't know anything about numbers. But I
21 can do that. Sir, is that analysis? Is that what you
22 represent to the secretary to be analysis? Take the CPI
23 numbers from three selected cities, divide them by the
24 number of cities and come up with an average? That's what
25 you did.

1 A. Yes. That's precisely what I did.

2 Q. And that's what you did for five, too.

3 A. Absolutely.

4 Q. You took two cities, you divided them and you
5 came up with a number.

6 A. Absolutely.

7 Q. Ever have any type of training in economics
8 analysis other than your training as a CPA?

9 A. As an undergraduate, I had several economics
10 courses. Took some as electives.

11 Q. And the methodology, they taught you was to pick
12 a couple of cities and divide them by the number?

13 A. I don't think we covered that in my undergraduate
14 as I recall.

15 Q. Let's talk about something else. Get back to 25,
16 which we have marked as part of - - as I understand it,
17 exhibit 57. The end portion of that which I think the
18 Judge has called Herbein (e) through the end, which is
19 Herbein (k). That is headed, A Comparative Analysis of
20 Return to Producer/Handlers and Regulated Distributing
21 Plants Applying a Warehouse Store for the Period January to
22 June 2003. I read that right?

23 A. Yes, you did.

24 Q. As I understand that, that is a particular
25 analysis related to a particular warehouse store also known

1 hypothetically as Cosco, as I recall. For a particular
2 area, that is order number 31, am I right?

3 A. You are right.

4 Q. Have you done any analysis like that for five or
5 seven?

6 A. No.

7 Q. Do you intend to do any analysis like that for
8 five or seven?

9 A. No.

10 Q. So with regard to that portion of your testimony,
11 that comparative analysis relates to 131 and has nothing to
12 do with five or seven, right?

13 A. The only reason for including it, we believe it's
14 worthy of the Secretary's consideration of what competitive
15 situations can develop or could develop in these markets
16 with unregulated large producer/handlers.

17 Q. I'm not going to repeat everything I did, because
18 we'll deal with that later in the Judge's decision as to
19 what comes in and what doesn't. But let me see if I can
20 parcel it down a little bit. You have no idea how many
21 producer/handlers are in five or seven, correct?

22 A. That's correct. I've made no study.

23 Q. You have no idea whether there are more
24 producer/handlers now that there were at order reform or
25 less. Correct?

1 A. That's correct. I've made no study.

2 Q. And you have no idea what the volume of
3 production of any producer/handler, even if one exists, is
4 for five or seven, correct?

5 A. That's correct.

6 Q. Do you even know if there's a Cosco store located
7 in any of these areas?

8 A. I've made no study.

9 Q. One of the conclusions that you reached through
10 the latter portion of the study that you did for 131 and
11 I'll try to boil it down, was that your opinion was that a
12 regulated handler couldn't compete effectively, I guess, or
13 compete at all with a producer/handler for the warehouse
14 business like Cosco. Correct?

15 A. That's correct. The producer/handler had a milk
16 cost advantage that was significant, and through the put,
17 rather not put the regulated handler in a losing situation,
18 because of the price structure and margin structure in a
19 warehouse store.

20 Q. That's your opinion. On the other hand, what we'd
21 also know is this: That your firm represents two regulated
22 handlers, one in the northwest, and one in Colorado, or
23 previously represented somebody in Colorado, that were
24 regulated handlers and did have or continue to have
25 agreements with Cosco to supply stores. Correct?

1 A. Yes.

2 Q. And to use some of your testimony from before, we
3 have to assume reasonably that they're doing it because
4 they're making money at it right?

5 A. They're doing it. That we know.

6 Q. And therefore, we have to assume, since they're
7 reasonable folks, because obviously, they're represented by
8 your firm, that they're doing it to make a profit. They're
9 not any kind of a charitable organization. Right?

10 A. They certainly try not to be charitable and you
11 have to remember, and the record should reflect that fluid
12 milk plants and other food manufacturers, there are
13 different levels of fixed cost absorption. So it's not
14 unusual for a company to take a piece of business that I,
15 in studying the pricing, would say, that piece of business
16 is at a loss when doing proper and complete cost accounting
17 where they would take that piece of business, because it
18 absorbs all variable cost and contributed something to
19 fixed. So typically, that's what you find in these major,
20 in somebody's major pieces of business.

21 Q. A couple of things. First of all, we've looked
22 at the newspapers enough in the last few years to realize
23 that baseball has accountants, and the player's union has
24 accountants, and they come up with different conclusions as
25 to whether or not teams are making money based on the same

1 data. Correct? And so looking at data like that,
2 depending on what you're using it for, you can show that
3 somebody's making money or losing money, right?

4 A. Well, if you're following the same rules from
5 accounting perspective, you should come to approximately
6 the same conclusion. It's a matter of corporate objective,
7 many times.

8 Q. And let's leave this area. The corporate
9 objective for your, for the plant in the northwest and the
10 one in Colorado, I know was to make money. And those
11 regulated handlers were able to go ahead and make contracts
12 with Cosco. Correct?

13 A. They have contracts.

14 Q. Now lastly, and hopefully, I'll leave the area
15 and let you go ahead and talk about other things with
16 whoever wants to ask you any questions. In your
17 comparative study that you did for 131, that you didn't do
18 here, you did not include for the producer/handler any
19 costs of balancing in your analysis. Correct?

20 A. That's correct. I did not.

21 MR. RICCARDI: Your Honor, subject to other
22 questions being asked, and motions that I'm going to have,
23 I'm done.

24 THE COURT: Any other questions, Ms. Deskins.

25 EXAMINATION

1 BY MS. DESKINS:

2 Q. Sharlene Deskins, office of general counsel. Mr.
3 Herbein, I have a couple of questions to try to clarify
4 things, because I'm a little bit confused about what's in
5 the record. Please don't give away any proprietary thing.

6 I'm not trying to ask that, so if I do get into that area,
7 don't give away proprietary information.

8 A. You have my word.

9 Q. I'm just trying to understand some of the changes
10 you have made to what has been marked as Herbein (a), (b),
11 (c), and (d). So let's start with (a). Everywhere where
12 it has 131, that should be changed to order number - - that
13 should be changed to five?

14 A. What I placed on the record in direct, would be
15 for each one of the six sized categories, three numbers,
16 which I produced for both Federal order five and Federal
17 order seven. So that we actually have, we would have two
18 columns, one with Federal five, one with Federal order
19 seven, under each of the six categories.

20 Q. So that would be on eight (a) and (b), Herbein
21 eight (a and b).

22 A. Yes. Eight (a) and (b). And then that same
23 information flows through, even though we didn't attempt to
24 report the graphic presentations, those same numbers would
25 flow through to (c and d).

1 Q. For the graphs for (c and d), you're saying then,
2 that the numbers would change these graphs.

3 A. Yes.

4 Q. How would it change the graphs in (c and d)?

5 A. The plotting of the statistics from (a and b)
6 onto (c and d) would simply be at a slightly lower level
7 because as I mention in my direct testimony, a cost
8 structure in Federal order five and seven is slightly lower
9 than it is in 131 and 124. So the graph, if we're looking
10 at (c), would simply, as you can see, it starts at 108, - -
11 1008 and 108. It would start at 93 and 95. So slightly
12 below the one dollar statistic shown under left axis of the
13 graph. And so you would just post, graphic software, you
14 simply put the numbers in the software, and it produces a
15 linear graph like this.

16 Q So the graph as it is now in both (c and d), the
17 secretary shouldn't rely on. It's your testimony about how
18 a graph should be plotted.

19 A. Yes, correct.

20 THE COURT: Let me ask this. Mr. Beshore, are
21 you thinking in your brief that you might supply another
22 graph?

23 MR. BESHORE: Yes.

24 THE COURT: They probably will have it in their
25 brief, then with clear numbers.

1 Q. Then the other question I had here about the
2 database. The database that you used for orders 131 and 124
3 to create what the original numbers in Herbein (a, b, c,
4 and d), you used again for orders five and seven, correct?

5 A. Yes.

6 Q. You didn't select a new database based on that
7 overall 50 database that your firm has?

8 A. No. It's the same statistics. If you look at
9 the exhibits from the other hearings, they are the same.

10 Q. Did Mr. Beshore or anyone else give you any
11 criteria to use on how to select the people for that 20
12 database that you used originally?

13 A. The original selection went, goes way back to our
14 initial engagement, which was will you and can you producer
15 plant costs and packaging costs for fluid milk plants of
16 different sizes. And the answer to that was, yes, we have
17 access to that data. And we took it from there and
18 developed some logical cost and size breaking points. Two
19 million pounds is pretty much the smallest fluid milk
20 processing plants that exist today. There are some
21 smaller, but that's kind of the small group.

22 And then the next logical group was five million
23 from our database and my experience. And that's how Mr.
24 Beshore and I, I presented what I thought was a cost - -
25 excuse me, a size category. And we completed our study and

1 here we are.

2 Q. The reason I'm asking is because in the statement
3 that was put in, you said how you picked the size that
4 would go into that database was based on information that
5 Mr. Beshore and Mr. Holland had requested from the milk
6 market administrator. And that would have been for order
7 131 and 124?

8 A. And that led to, and thank you for that question.
9 That really was pertaining to the average size of the
10 producer/handlers in the Pacific Northwest. That was one
11 of the things that was produced by the Secretary, and that
12 did have a bearing in our size selection, so that we would
13 have, - - we would study smaller than that average size,
14 and larger than that average size.

15 Q. In this case, I'm just wondering if the database
16 that you chose on that original criteria, is that going to
17 translate to order number five and seven?

18 A. Yes. It's my testimony that the theory, which is
19 either every complicated or very simple, depending on how
20 you look at it, as plants get larger, their costs are
21 smaller on a per gallon basis. And that theory and that
22 fact exists in five and seven. As well as it did in 131
23 and 124.

24 Q. So for that general statement, then, you don't
25 need any of these exhibits from Herbein eight (a through, I

1 think it's k), then for that conclusion. Right?

2 A. That's correct. That conclusion is drawn from
3 Herbein (a, b, c, and d).

4 Q. But you said general, that general conclusion.

5 A. Yes.

6 Q. Because I was just, in response to some
7 questions, you did say that you have some clients who are
8 covered with order number five and order number seven,
9 correct?

10 A. Yes.

11 Q. But they're not included in the database upon
12 which this Herbein (a through k) is based.

13 A. That's correct.

14 Q. Another question I had is, in your analysis where
15 you changed these numbers for (a through d), did you take
16 into account any of the transportation costs that you need
17 to order five or seven?

18 A. Transportation as to the market administrator's
19 regulations?

20 Q. Yes.

21 A. No. Because I'm, my study is based - - strike
22 that. My adjustments are based upon plant costs only.
23 I've done nothing with respect to the class one raw milk
24 price, or cost, rather on the processor side.

25 MS. DESKINS: Just one moment. I have no further

1 questions, thank you.

2 THE COURT: Any other questions? Mr. English?

3 EXAMINATION

4 BY MR. ENGLISH:

5 Q. Good afternoon, Charles English for Dean Foods
6 and Prairie Farms.

7 A. Hello, Mr. English.

8 Q. Actually I have a very few questions, and the
9 first one is a merely technical one. A number of times,
10 especially by Mr. Riccardi, and I think maybe by others,
11 there have been references to exhibit 25. Is it fair to
12 say that the only exhibit 25 you have referred to is what
13 is really the attachments to exhibit 57.

14 A. That's correct. And we should be referring to
15 them as Herbein (a, b, c, d, - -)

16 Q. Attached to exhibit 57.

17 A. That's correct. In all instances, I have made no
18 comments about exhibit 25 in this proceeding.

19 Q. Now, Mr. Riccardi asked you a number of questions
20 regarding whether or not you've studied disorderly
21 marketing conditions, and whether or not there were sort of
22 an existing producer/handler problem in orders five and
23 seven. Do you recall that?

24 A. Yes, I do.

25 Q. Do you also recall attending in Arizona and

1 Seattle and Alexandria hearing, hearing the same counsel
2 for Sarah Farms asking a number of questions about whether
3 it was fair to change the rules and regulate a
4 producer/handler after it had already been established?

5 MR. RICCARDI: Objection, Your Honor. Has
6 nothing to do with any issue in this case, and I asked
7 specific questions out of another pending Federal order
8 hearing that has nothing to do with these issues. And I
9 don't think it's fair, and I don't think any issue regarding
10 that should be brought into this proceeding.

11 THE COURT: Tell me what you - -

12 MR. ENGLISH: The questions being asked about
13 whether or not you can regulate before there's a plant
14 there or after, is - - this witness can say whether or not
15 that is the position that was taken by Sarah Farms. Sarah
16 Farms took the position that it was unfair to regulate once
17 they'd already built the plant. We're damned if we do, and
18 we're damned if we don't. I think that question's a fair
19 question.

20 MR. RICCARDI: Your Honor, it's an argument for
21 the brief, or an argument that they can make but it's not a
22 fair question.

23 THE COURT: I'm going to let him ask the question
24 then you can argue it in the brief, and we'll go on. We'll
25 have the question.

1 Q. You remember the question, Sir?

2 A. Yes, Sir, I do.

3 Q. Do you recall such questions being asked by the
4 counsel for Sarah Farms?

5 A. I do.

6 MR. ENGLISH: Thank you, I have no further
7 questions.

8 THE COURT: Mr. Beshore, anything more?

9 MR. BESHORE: Thank you, Your Honor.

10 EXAMINATION

11 BY MR. BESHORE:

12 Q. Mr. Herbein, you've referred in cross examination
13 from Mr. Miltner and Mr. Riccardi, to a number of clients
14 of your firm that were fluid milk plants in order five.
15 Did you, did your firm also have clients that were fluid
16 milk plants in order seven?

17 A. Yes.

18 Q. And did you take into account your knowledge of
19 those clients and their operations in making the comments
20 that you have, in reaching the conclusions you have with
21 respect to the cost structure of fluid milk plants in order
22 seven?

23 A. Yes. It's a critical component of the
24 formulation of my opinion that I'm presenting here. Having
25 knowledge of the marketing conditions and the cost

1 structures and the existence of organized labor, and the
2 highway systems and its topography. Those are all
3 important characteristics that fortunately, from my
4 experience, I'm able to bring into this project.

5 Q. Did you, how many clients in order seven?

6 A. We've done substantial work for five plants in
7 order seven.

8 Q. Are you at liberty to disclose the identity of
9 any or all of those plants?

10 A. Yes.

11 Q. Could you provide that information for the
12 record?

13 A. Yes. Plants that we've done accounting, cost
14 accounting work, and dairy consulting work for, regulated
15 by Federal order seven are Barber's, Barbay, Browns, Blue
16 Bell Dairy, and Publix Dairy.

17 Q. Now, with your knowledge of plant costs in order
18 seven from those clients, were you able to make a judgment
19 when you adjusted the plant processing costs onto Herbein
20 exhibits (a and b), for, when you adjusted those costs with
21 the regional CPI number, were you able to make a judgment,
22 exercise your professional judgment with respect to whether
23 that adjustment was appropriate?

24 A. Yes.

25 Q. And what was your conclusion?

1 A. My conclusion was, and I think I've use this
2 accounting term before. A smell test is important when
3 doing work like this. And it was my opinion based on my
4 experience, before doing the calculations, that these were
5 lower cost areas than Phoenix. And than 132. And when I
6 applied the adjustment factor that I determined using CPI,
7 as we've heard earlier, the numbers are lower. And they
8 were reduced by an amount that I considered to be
9 reasonable and within my expectations.

10 Q. Based on your experience with those specific
11 plants within order seven.

12 A. Yes.

13 MR. RICCARDI: Is he leading, Judge?

14 THE COURT: Well, he did lead, but we'll allow
15 it. Go ahead.

16 MR. BESHORE: It is redirect examination, even if
17 we were under - -

18 MR. RICCARDI: Redirect doesn't give you the
19 right to lead.

20 THE COURT: You don't normally lead on redirect,
21 but on the other hand we do try to speed things up, and
22 sometimes it helps.

23 Q. When you're doing, you referred to doing
24 benchmarking studies for clients with respect to costs. If
25 you're doing a benchmarking study for a client, and I think

1 you were talking about a client in Kentucky, would you
2 regionalize information you have from other areas to the
3 Kentucky area using conversion factors of some, adjustment
4 factors of some nature?

5 A. Yes. It's imperative that you do that for labor
6 rates and so forth. To store the costs for gallon or
7 quart, substantially.

8 Q. Is that the kind of adjustment factor that you've
9 done there with Herbein exhibits (a and b)?

10 A. Yes. You'd use that precise approach.

11 Q. In your experience, you testified in your
12 experience with testimony before other regulatory rate
13 making dairy bodies, such as Pennsylvania Milk Marketing
14 Board.

15 A. Yes, Sir.

16 Q. Is the CPI a factor used in any of those
17 proceedings?

18 A. Yes, it is.

19 Q. For changes in - - in what way is it used?

20 A. The Pennsylvania Milk Marketing Board established
21 several years ago a methodology for adjusting a portion of
22 the retail, the intra-store, the retail price methodology,
23 and it now includes a CPI adjustment to the in-store
24 handling costs. And so that the record's clear, what that
25 is, we have wholesale prices into the store for fluid milk

1 products, and to that is added an in-store handling cost
2 statistic which is designed to cover the cost of receiving
3 the milk at the store, cooling the milk at the store,
4 handling the milk at the store, and checking it out when
5 the consumer buys the product. And studies were done of
6 what those costs specifically were, and the milk marketing
7 board decided that it was unnecessary to produce studies
8 each and every year for that statistic. And they now take the
9 base studies and adjust them on a monthly basis for CPI change.

10 Q. So at least one other regulatory authority that
11 sets minimum prices relating to costs of packaging and
12 distributing fluid milk products uses a CPI on an
13 adjustment factor.

14 MR. RICCARDI: Leading, Judge.

15 THE COURT: It is leading, but we'll allow it.

16 A. That is correct. That is what they do.

17 Q. Now, let me ask you to turn to Herbein exhibit (c
18 and d) for a moment, the graphs. You were asked whether
19 there are differences in costs per gallon from the 12
20 million pound per month level, to the - - 18 million pound
21 per month level to the 30 million pound per month level.
22 Do you recall that?

23 A. Yes, I recall those questions.

24 Q. And indeed, there are efficiencies, or economies
25 of scale which reduce the costs of producing per unit as

1 plants get larger. Is that correct?

2 Q. That's correct.

3 A. Now, within any given category, what is the
4 competitive situation if a plant at 12 million pounds has a
5 minimum regulated raw milk price for class one products,
6 and another plant of the same size does not?

7 MR. RICCARDI: Objection, Your Honor. Beyond the
8 scope of his expertise.

9 THE COURT: I think it's in the scope of his
10 expertise. I'm not sure if it's something that we've been
11 dealing with precisely.

12 MR. BESHORE: It's exactly what we've been dealing
13 with.

14 MR. RICCARDI: We haven't, Judge. There's been no
15 questions asked along those lines with this particular
16 witness.

17 MR. BESHORE: Maybe I haven't asked the question
18 correctly, then.

19 MR. RICCARDI: Then we're beyond, because we're in
20 redirect, he can't ask it.

21 THE COURT: Let's see what the witness can do
22 with it. go ahead.

23 A. The issue in profitability and costing for a
24 dairy plant such as the 12 million and 18 million pound
25 plants has two primary cost components. One is graphically

1 presented here, and that's the plant costs. And the other
2 is - - the other major cost is, as we all know, is raw
3 milk. And in the studies that we've done in preparation
4 for this proceeding, based upon the studies we did for 121
5 and 124, and 131, there is a substantial raw milk
6 difference where the unregulated producer/handler has a
7 cost advantage in addition to the size consideration. And
8 by cost advantage, meaning their cost of raw milk is less
9 than the regulated handler.

10 THE COURT: Let me insert, that's when they're
11 using their own supply of milk.

12 THE WITNESS: That's correct.

13 THE COURT: but that doesn't take into
14 consideration, I'm going to save some cross, but it doesn't
15 take into consideration the need to balance their milk
16 supplies from time to time.

17 THE WITNESS: That's correct. I'm speaking of
18 the base comparing their, the blend price with the class
19 one price. That's the primary comparison.

20 THE COURT: Without the cost of balancing
21 factored in.

22 THE WITNESS: That's correct. Which is generally
23 not all that significant. I mean, it is a factor. There's
24 no question about that.

25 Q. Let me ask you a couple of questions finally

1 then, Mr. Herbein, about peer review. You were asked at
2 some length about whether your study has been peer reviewed
3 before being presented to the secretary in this proceeding.

4 My question is, in the accounting profession, is peer
5 review, is there any such thing as "peer review" prior to
6 release or completion of a professional project?

7 A. No.

8 Q. What is the function and role of peer review in
9 the accounting profession?

10 A. Peer review in the accounting profession, first
11 of all, there's - - it's a requirement for licensing. So
12 for Carl Herbein and Herbein and Company to have our - -
13 for me to have my individual licensing, and for our firm to
14 be licensed in the state of Pennsylvania, and in other
15 states where we do business, requires a peer review once
16 every three years. And the peer review is conducted by
17 other CPA's that have the authority of the American
18 Institute of CPA's to conduct those audits. And they, the
19 reviewers, select from our client list work that we've done
20 after the work has been issued and is being used by
21 regulatory bodies, banks, shareholders, whoever uses the
22 financials, and they do the review after the fact.

23 And the theory there, which I think has worked
24 very well for the majority of CPA firms in the country, is
25 that the findings are that in our firm's case, I'm happy to

1 report that we've had eight peer reviews in our history,
2 and the reports are all clear, clean. We have no
3 exceptions, no modifications to our reports.

4 And those reports are a matter of public record.
5 They're on record at the American Institute of CPA's. So a
6 user of a Herbein product can go into the AICPA's website
7 and find Herbein and Company, and drill down to our reports.

8 Used to be, you'd have to write a letter to get a
9 copy of the report. Now it's electronic. So that's the
10 process within CPA firms.

11 Q. So if the secretary is interested, or anyone in
12 the room, or reading these proceedings, or considering them
13 is interested in Herbein and Company's peer review report
14 cards, they are publicly available on the American
15 Institute of CPA website, and anyone can review them for
16 that purpose.

17 A. That's correct.

18 Q. So when you're asked whether your project here
19 was peer reviewed, there's no process to do it ahead of
20 time in your profession.

21 A. That's correct.

22 Q. And you might as well have been asked whether you
23 had filed with the SEC, I guess before you came here.

24 A. Yes. I didn't do that either.

25 MR. RICCARDI: Your Honor, it's argumentative.

1 THE COURT: I'll let you win one. It's
2 argumentative. I'll strike that.

3 MR. RICCARDI: Thank you, Judge.

4 MR. BESHORE: I have no further questions.

5 MR. RICCARDI: Since there's new information
6 given, I'd like to ask a couple more question, Judge, if, I
7 beg your indulgence on this.

8 EXAMINATION

9 BY MR. RICCARDI:

10 Q. And now I'm confused, so I'll see if I can at
11 least clarify things in my mind. With regard to the - -
12 and I'm going to talk about Federal order number seven, Mr.
13 Herbein, for a moment.

14 Here's what we know. With regard to the information
15 in the base document, exhibit 57, there is nothing in the
16 data that you looked at that has anything to do with
17 Federal order number seven or five. Correct? There's no
18 information in there that had anything to do with a
19 handler, a plant, or anything in five or seven, correct?

20 A. The exhibits, Herbein (a, b, c, and d), as I've
21 said before, the base data was derived without using plants
22 located in five or seven. However - -

23 Q. That was my question. That was my only question.
24 I have other questions. You answered that one, let me go
25 to the next one.

1 MR. BESHORE: I think he's entitled to - -

2 MR. RICCARDI: No, he's not, Judge. I didn't ask

3 - -

4 MR. BESHORE: And explain his answer.

5 MR. RICCARDI: If you allow me to finish and stop
6 interrupting me, I'd finish.

7 MR. BESHORE: I want you to stop interrupting the
8 witness.

9 MR. RICCARDI: I am doing what I have to do.

10 THE COURT: Wait, wait. Don't argue with one
11 another. I'm going to say that that answer was sufficient
12 and responsive to the question. Go on to the next one.

13 MR. RICCARDI: Thank you, Your Honor.

14 THE COURT: If we need explanation, you'll bring
15 it out here.

16 Q. Now, next question is this. You gave in response
17 to a question that was asked of you on redirect for the
18 first time, that there were several plants, fluid milk
19 distributing pool plants in order number seven that your
20 firm had either done business with or is doing business
21 with.

22 A. Yes. That was my testimony.

23 Q. I think one of those was Barbara Pure Milk
24 company in Birmingham, Alabama?

25 A. Yes.

1 Q. And the other was Barbee's Dairy in West Weego,
2 Louisiana?

3 A. Yes.

4 Q. Do you have a list in front of you?

5 A. I do.

6 Q. Did you prepare that over lunch?

7 A. No.

8 Q. One of those was Publix Supermarkets. That's in
9 Lawrenceville, Georgia.

10 A. That's correct.

11 Q. Now, when you selected the cities for seven, you
12 didn't have Birmingham, or West Weego, or Lawrenceville
13 located in the cities for the CPI adjustment, correct?

14 A. That's right.

15 Q. And you said you made some adjustments. The only
16 adjustments that I'm aware of is, you picked the three
17 cities, you found the numbers, and you divided by the
18 number of cities. Correct?

19 A. I, yes.

20 MR. RICCARDI: That's all I needed. Thanks.

21 THE COURT: You're completed and now Mr. Miltner's
22 coming up?

23 MR. RICCARDI: That's correct.

24 EXAMINATION

25 BY MR. MILTNER:

1 Q. Mr. Herbein, I have just a couple of follow up
2 questions, piggy backing what Ms. Deskins asked you. Is it
3 your intent that your testimony before this hearing stand
4 for anything more than the proposition that as plant sizes
5 increased, production costs per gallon go down?

6 A. The primary use of our, of my testimony is to
7 demonstrate to the Secretary that as plants get larger,
8 their costs go down. I believe that there are other useful
9 ancillary things that can come from my testimony. But that
10 is the primary focus of what we're presenting here today.

11 Q. Do you intend that the secretary take into
12 account the numbers that you've calculated and provided to
13 us on orders five or seven?

14 MR. BESHORE: Let me object to any more questions about
15 what Mr. Herbein intends the Secretary to do with the
16 questions. I mean, his testimony is factual and expert
17 opinion information which the proponents, and other hearing
18 participants, can use to argue whatever points are
19 pertinent to the Secretary. And they're not limited by
20 what he, in his mind may intend. And that's what's being asked.

21 THE COURT: He is telling us, though, what his
22 purpose was as explained to him by you and giving testimony
23 here, and his main purpose was to demonstrate, I gather,
24 that as plant handlers become larger, their costs go down.
25 That's his primary situation. But you'll make other

1 arguments, perhaps based upon data that's revealed through
2 his computations.

3 Go ahead, Sir.

4 MR. MILTNER: Thank you, Your Honor.

5 Q. Isn't it your intent that the Secretary also rely
6 upon the numbers that you provided to us that we wrote in
7 on Herbein eight through (a and b), this morning? Or this
8 afternoon?

9 A. Yes.

10 MR. MILTNER: Your Honor, we would ask that Mr.
11 Herbein's testimony be struck in that there's no way for us
12 to verify the accuracy of the numbers here. He's taken the
13 numbers from a database, hand selected that data. We don't
14 know why the other data was excluded. My supposition is
15 that because it didn't support the conclusions they were
16 trying to reach, and we would ask that the entirety of the
17 testimony be struck.

18 THE COURT: Your motion's denied. There's quite a
19 bit of support for his data in the way that he's explained.

20 But even - - well, I'm not going to go into an academic
21 explanation. We take that as data comes forward, then it's
22 tested by examination you have done, and you can argue
23 these things in brief.

24 Is there any other questions for the witness?

25 Thank you, Sir, you're excused. And who would we be

1 looking to next as a witness?

2 MR. BESHORE: The next witness will be Dr. Roger
3 Krien. And he's here. He's just left to reproduce a few
4 more copies of his statement.

5 THE COURT: Do we want to take someone else while
6 we're waiting for him? I don't know how long he'll be. I
7 mean, Gary Lee, is Gary Lee here? You gave me - -

8 MR. BESHORE: He's here and his testimony's been
9 handed out.

10 THE COURT: His testimony has been handed out, so
11 I'm wondering if he would like to take the stand and just
12 move along for a while. Do you have a problem with that?

13 MR. BESHORE: No. We can deal with this at
14 another point. It's just, based upon the Court's rulings,
15 what we're going to want to do, obviously, is include the
16 entirety of the cross examination from Phoenix. I think
17 it's already part of 57. Rather than remark an exhibit,
18 that may be the way to go. And then we told you we would
19 get you the examination from Alexandria before the end of
20 the hearing.

21 THE COURT: Yes, that's true. Let's be sure that
22 ruling is understood. And there's no objection apparently
23 by the other side. But let the ruling be understood.
24 Inasmuch as they brought in a direct statement, and since
25 it was his cross examination, I would think that whoever

1 was privy to that is entitled to say I want everything.
2 And that's what they've asked for, it's been agreed to, and
3 that's the way it's going to be.

4 The witness has been sworn, he has a statement.
5 We're marking that for identification as exhibit 58. And I
6 take it that the same rules apply, if there's any variance
7 between your testimony and your written statement, you want
8 the written statement to be the one that's applicable,
9 except when you say I want my oral statement to change it.
10 Right?

11 MR. BESHORE: Your Honor, in addition to the
12 statement, and attached to the statement, are two tables.
13 One's a map, per capita milk production, the other is just
14 for uniform prices. The witness intends to refer to. I
15 would propose they just be part of exhibit 58. I don't
16 know if you want to make them 58 (a) and (b), or however.

17 THE COURT: That's good. 58(a) for the map, and
18 58(b) for the statistics which are attached.

19 MR. BESHORE: And the witness will refer to those
20 in his testimony.

21 (Whereupon, the document referred to was marked
22 for identification as exhibit number 58 (a and b)).

23 THE COURT: Please proceed.
24

25 Whereupon,

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GARY LEE

Having been first duly sworn was called as a witness herein
and was examined as follows:

EXAMINATION

BY MR. BESHORE:

Q. Mr. Lee, why don't you give the statement, then
we'll have a few more questions.

A. My name is Gary Lee. I'm employed by Prairie
Farms Dairy, Inc. as the vice-president procurement and
planning. I've been employed by Prairie Farms since 1973.

Prairie Farms Dairy, Inc. is a Capper-Volsted
cooperative. Through ownership and joint venture, Prairie
Farms operated 31 plants that process and package fluid
milk, soft cultured products, ice cream, ice cream mix,
frozen novelties, butter and anhydrous milk fat. Twenty
four of these plants are regulated by a federal order. One
plant on order 30, fifteen on order 32, three on order 33,
two on order five, and three on order seven.

Prairie Farms wishes to express its opposition to
Proposals one, two, three, and four, and its support of
proposal five. We feel that the fluid milk industry from
farm to consumer would be better served by having more
federal orders, not fewer.

Order reform left a dead zone in Illinois and in
Missouri around Saint Louis. We feel that approval of

1 Proposals one, two, three, or four, will maintain or worsen
2 problems in these areas. We support proposal five because
3 it represents our belief that we need more federal orders.

4 Also, we feel that proposal five may result in a
5 uniform price in that area that would still be higher than
6 that in order 32, but not at the current level. In other
7 words, proposal five will not raise the price in Saint
8 Louis and downstate Illinois, but may reduce the tendency
9 to lure from these areas.

10 The state of Illinois and the area in Missouri
11 around Saint Louis regulated by order 32 are deficit milk
12 production areas at least 50 weeks per year. Handlers
13 there rely on supplemental supplies of milk from other
14 areas, primarily the upper Midwest.

15 Exhibit 58 (a) shows per capita milk production
16 in the United States. It shows Illinois to be a deficit
17 production area even to cover its fluid milk consumption.
18 Per capita fluid milk consumption was estimated to be 188.6
19 pounds in 2002. Illinois had per capita milk production
20 of, it should say 162 pounds in 2003.

21 We are assuming that per capita consumption in
22 2003 was about the same as 2002. Information in exhibit
23 58(a) was provided by the order 32 Market Administrator's
24 Office. The per capita consumption figure was taken from
25 the 2004 edition of *Dairy Producer Highlights*. IN fact,

1 Illinois has lower per capita milk production than several
2 states in areas regulated by order five and order seven,
3 alleged deficit production areas.

4 We will concede that metropolitan Chicago with a
5 population of seven million people distorts the Illinois
6 numbers. Also, metropolitan Chicago is located adjacent to
7 Wisconsin and its milk production. But downstate Illinois
8 and Saint Louis are not located adjacent to Wisconsin. It
9 takes money to get milk from the upper Midwest to the lower
10 Midwest and that money is not provided by current returns
11 on order 32, I'm sorry. Order 30 versus order 32.

12 At the same time, there appears to be enough
13 money to attract milk from parts of order 32 to the area of
14 order five and order seven. Exhibit 58(b) shows the
15 statistical uniform prices for the base zones of order 30
16 and order 32, and order five zoned to Evansville, Indiana,
17 and order seven zoned to Murray, Kentucky, since January
18 2000. Evansville and Murray were chosen because plants
19 located there are the order five and order seven plants
20 closest to order 32.

21 Analysis will show that in most months, the order
22 32 price difference by itself will not cover the cost of
23 transportation from Wisconsin or Minnesota to Saint Louis
24 and downstate Illinois. These additional costs are
25 generally covered by over order premiums, give up charges,

1 loose pooling standards and other payments.

2 At the same time, much of Illinois and Missouri
3 are located near or adjacent to order five, or order seven.

4 Dairy farmers located in those areas can ship to order
5 five or order seven plants and potentially receive a higher
6 price with little or not additional hauling cost.

7 A case in point. On October 31, 2001,
8 representatives of Dairy Farmers of America met with
9 representatives of Prairie Farms. At that meeting DFA
10 informed Prairie Farms that they could no longer provide us
11 with supplemental milk, beginning January 1, 2002, at our
12 order 32 plants.

13 DFA said that the returns did not cover the expense of
14 bringing milk from outside the immediate Illinois and Saint
15 Louis areas. Also, they said they could ship milk from
16 downstate Illinois and Saint Louis areas to markets in
17 order five or order seven and get a better return.

18 Prairie farms has been able to withstand this
19 hardship up to now. However, we have done so largely at the
20 expense of other buyers of milk in the area. If milk
21 production in Illinois and Missouri continue to decline, we
22 will all probably face greater hardships in the future.

23 If the purpose of proposals one, two, three or
24 four, is to maintain or enhance returns to dairy farmers,
25 that is fine and proper. However, order reform was forced

1 on the industry on a nationwide scale. Since then we have
2 addressed concerns on an order-by-order basis. Examples
3 are simultaneous pooling on state and federal orders and
4 the producer/handler issue.

5 Although Prairie Farms would not benefit from Proposal
6 five, we support the concept. Proposal five was part of a
7 larger proposal that we made with Dean Foods. The
8 department has chosen not to consider that larger proposal.

9 We feel that the realities of today's dairy environment
10 show that the current order system needs to be reconfigured
11 and inequities forced on some dairy farmers by the
12 department need to be fixed system wide, simultaneously.

13 The Department should not adopt proposals one,
14 two, three or four in isolation without looking at their
15 impact on other marketing areas. Speaking only for order
16 32, adoption of any of these proposals would worsen the
17 already significant problem of obtaining milk in Saint
18 Louis. The Department cannot reasonably respond to alleged
19 disorderly marketing conditions in Georgia by exacerbating
20 disorderly marketing conditions in Saint Louis.

21 Finally, regardless of which proposal the
22 department recommends, we support setting the
23 producer/handler exemption at three million pounds per
24 month. As the dairy industry evolves, and increasing
25 number of dairy farm operations have the critical mass and

1 access to capital necessary to operate processing plants
2 that can compete with regulated processors.

3 We support entrepreneurship, and creativity in
4 the dairy business, but feel that giving large
5 producer/handlers a regulatory pass will cause market
6 disruption and jeopardize the future of the Federal order
7 system.

8 Q. Sir, you stated that you've been employed by
9 Prairie Farms since 1973.

10 A. Yes.

11 Q. In what capacities have you been employed by
12 Prairie Farms

13 A. I am in charge of the procurement of all milk and
14 all dairy ingredients for Prairie Farms. Handling producer
15 relations, overseeing producer payroll.

16 Q. Is it fair to say this is not your first Federal
17 order hearing you've attended?

18 A. Yes, that is correct.

19 Q. You have attended a number?

20 A. This is probably the sixth time that I have
21 testified, yes.

22 Q. And did you prepare this testimony, this initial
23 draft?

24 A. Yes, I did.

25 Q. You've referenced a couple of times, most

1 specifically on page four, the idea of proposal five. And
2 then the idea that proposal five is part of a larger
3 proposal. For the record, what was the larger proposal?

4 A. The larger proposal was to create two new Federal
5 orders in areas that are deficit milk production areas,
6 plagued by the low uniform prices to farmers.

7 The second part of our proposal five was to take
8 parts of Western Kentucky and western Tennessee, a little
9 bit of southern Indiana, the entire state of Illinois, and
10 the state of Missouri around Saint Louis, those counties
11 that are currently in order 32, and create a lower Midwest
12 milk marketing order.

13 Q. And the department chose not to hear that
14 proposal at this time.

15 A. That is correct

16 Q. But your understand that they put in their file,
17 and may or may not consider in the future, correct?

18 A. Yes.

19 Q. What was the purpose of the combined proposals,
20 these two new orders?

21 A. We were trying to get the Department to recognize
22 that these are areas that do not have adequate local milk
23 production to meet fluid needs of handlers in that area,
24 but also do not, under the order, provide a uniform price
25 attractive enough on its own to attract milk from the upper

1 Midwest, and is also so low that there is a tendency to
2 move milk out of that area into the current order five,
3 and/or order seven.

4 Q. And looking for a moment to 58(b), and you've
5 expressed the difference, just for instance, in December of
6 2003, the difference in the blend price between order 32
7 and order five, is that a dollar sixty seven?

8 A. That is a dollar sixty seven. (\$1.67), and that
9 is order five (f), and minus 90 zone, back at Evansville,
10 Indiana.

11 Q. Which compared to a class one price in Saint
12 Louis would be?

13 A. Which is only 20 cents lower.

14 Q. Or higher.

15 A. I'm sorry. No, the price, the class one price in
16 Saint Louis under the order is twenty cents lower than the
17 price in Evansville.

18 Q. So you pay twenty cents lower in class one but
19 your dairy farmers receive a dollar sixty seven less in the
20 blend price.

21 A. That is correct.

22 Q. And similarly, that would be the analysis for a
23 dollar seventy two for order seven?

24 A. At Murray, Kentucky, which is in the minus 70
25 zone.

1 Q. Which relates to Saint Louis at 40 cents?

2 A. Yes.

3 Q. Is this an example of what yesterday was referred
4 to by Mr. Holland as disorderly marketing condition with
5 difference of blend prices?

6 A. Yes, it is.

7 Q. Are you competing for a milk supply in Saint
8 Louis with plants from orders five and order seven, with
9 those blend price advantages?

10 A. Yes, we are.

11 Q. Has that affected your ability to procure milk?

12 A. At times.

13 Q. Isn't that what you discussed in your testimony
14 when Dairy Farmers of America said that they would not be
15 willing to supply supplemental milk?

16 A. Yes.

17 Q. And if the proposals one through four are
18 adopted, is that going to leave the situation sane, the
19 playing field, is it going to make it better, or is it
20 going to make it worse for you?

21 A. At best it will leave it the same. It will
22 probably worsen it.

23 Q. For instance, if you raised the performance
24 standards on former order five, to what is effectively
25 order seven now, what will happen vis a vis those - -

1 A. It should raise the relative price in Evansville,
2 Indiana.

3 Q. And if you look strictly at the market
4 administrator data that indicates that there is a
5 difference between five and seven, and you merged the two
6 and everything else stayed the same, arguably as to order
7 seven plants you're competing with, it should raise their
8 plant price, correct?

9 A. Yes.

10 Q. On the other hand, if the Secretary were to adopt
11 proposal five, while there's no direct benefit, do you see
12 any benefit to Prairie Farms vis a vis at least sales to
13 the south?

14 A. I see it as a step in the right direction. I see
15 it as giving us hope that the lower Midwest proposal might
16 be revisited.

17 Q. Did you bring up with you the testimony of Mr.
18 Holland? Could you turn to exhibit 47 page 12.

19 A. YES.

20 Q. There was a statement in the first paragraph, the
21 carrier paragraph on page 11. The acute milk deficit with
22 milk production insufficient to even provide a sufficient
23 reserve above the class one needs, is a condition unique to
24 the southeast. Do you have any comment on that statement?

25 A. I would disagree with that statement. He may be

1 making a generally correct statement for the southeast, but
2 it is also applicable in parts of order 32, particularly in
3 areas around Saint Louis and downstate Illinois. And for
4 that matter, probably all of the state of Illinois.

5 Q. Turning to page 15 of exhibit 47. There's a
6 statement, the continued existence of two Federal milk
7 marketing orders across a single fluid milk market inhibits
8 market efficiency in supplying and balancing the market.
9 Creates unjustified blend price difference, encourages
10 uneconomic movements of milk, and results in the
11 inequitable sharing of the class one proceeds of the single
12 market. Do you have any comment about that statement as it
13 might apply to Saint Louis?

14 A. That statement is true, right now in any border
15 area between two federal orders. It's not unique to the
16 area between order five and order seven. In fact to me,
17 gets less problematic than the conditions we're facing and
18 in, near the Saint Louis and southern Illinois area.

19 Q. Can you say that in the context that you have
20 plants pooled on both orders five and seven?

21 A. Yes.

22 Q. You have producers pooled on both orders five and
23 seven?

24 A. No.

25 Q. Did you also bring exhibit 53, introduced today

1 by the market inspector?

2 A. Yes, I did.

3 Q. If you would turn to exhibit 53, page one, which
4 is non-pooled plant sales into Federal order seven. And
5 the middle column, for Central Federal Order 32. Do you
6 understand that to be sales by plants, regulated?

7 A. I'm sorry. I do not have that one. But I saw it
8 earlier.

9 Q. You now have exhibit 53 in front of you?

10 A. Yes.

11 Q. And do you see the middle column of page one?

12 A. Yes.

13 Q. And that is, does that represent sales from
14 Federal order 32 plants into Federal order seven?

15 A. Yes.

16 Q. Do you note any change over time from 2000 to
17 2003, from sales of Federal order 32 plants into Federal
18 order seven?

19 A. They decline considerably.

20 Q. And you, from your own professional experience
21 have information to provide this record as to some or all
22 of that decline?

23 A. I can address some of it. The Sav-A-Lot
24 warehouse, that Mr. Hitchell referred to in his testimony
25 this morning that Kroger company has a tough time hanging

1 onto as a customer, is actually a customer they procured
2 away from us.

3 Q. And when you say procured away from us, you mean
4 Prairie Farms at a regulated order 32 plant?

5 A. That's correct.

6 Q. And when you say they procured away from us,
7 would that be the Winchester Plant in Kentucky that has
8 locked in to order five?

9 A. I think it was at the Murfreesboro plant, which
10 is in order seven.

11 Q. Order seven.

12 A. Yes.

13 Q. Thank you for the correction. And is that an
14 example of what your testimony is about, having to do with
15 the relative cost for carrying milk, and what can happen in
16 the marketplace as a result?

17 A. Yes.

18 Q. Now with respect to producer/handlers, that same
19 information with respect to the lost sale in this instance
20 to a regulated handler, when you testified at the end of
21 your statement about dairy farm operations having the
22 critical mass and access to capital necessary to operate
23 processing plants that compete with regulated processors,
24 is that a price example that would concern you if you were
25 dealing with an unregulated plant?

1 A. Absolutely.

2 Q. And in your experience, selling to modern
3 customers, at what level do customers, are customers
4 willing to change business?

5 A. A fraction of a cent per gallon.

6 Q. And in fact, that's what happened to you with
7 respect to the lost sales at Sav-a-Lot?

8 A. I don't remember the exact price difference but
9 it was very small per gallon.

10 Q. And you were here for the testimony of Mr.
11 Herbein?

12 A. Yes.

13 Q. With respect to a three million pound plant, if a
14 three million pound plant had limited product lines and
15 package sizes, would it only be volume that can lower the
16 costs of that plant?

17 A. A three million pound plant that had a limited
18 offering of products and package sizes should be a very
19 efficient plant that would only become more efficient with
20 more volume. And may have distinct advantages over a
21 larger plant that is a multi-product plant.

22 MR. MILTNER: Just one second, Your Honor. I
23 have no further questions at this time, the witness is
24 available for cross examination, and I move the admission
25 of exhibit 58, 58(a), and 58(b).

1 THE COURT: No objections? Received.

2 (Whereupon, the document previously identified as
3 exhibit number 58, and 58(a and b) was received into
4 evidence).

5 THE COURT: Who will ask question?

6 MR. RICCARDI: I have some.

7 THE COURT: Mr. Riccardi.

8 EXAMINATION

9 BY MR. RICCARDI:

10 Q. Mr. Lee, I believe that you testified on direct
11 examination that you'd had some previous experience in
12 Federal order hearings and that would go back to the time
13 of Federal order reform in '99, 2000, I assume?

14 A. And prior.

15 Q. And before we get to that, because there's some
16 questions I want to ask you in that area, you indicate in
17 your statement that Prairie Farms has a variety of
18 ownership and joint ventures and they operate a number of
19 plants. 31 total with 24 being regulated by a Federal
20 order. Are those joint ventures, any of them with Dean Foods?

21 A. No.

22 Q. Does, at this point, Prairie Farms have any type
23 of a contractual relationship with either Dean Foods, or
24 any Dean Food related companies or subsidiaries?

25 A. No.

1 Q. You have been involved, I think you testified in
2 the dairy industry since at least starting in 1973, is that
3 correct?

4 A. Yes. Actually prior to that. It's a growing
5 outfit with Prairie Farms since '73.

6 Q. Are any of the 31 plants that Prairie Farms
7 operates simply fluid milk plants as opposed to multi-
8 product plants?

9 A. Yes.

10 Q. How many of those are fluid milk plants?

11 A. Approximately 12.

12 Q. And of those fluid milk plants, how many skews do
13 they have?

14 A. I don't know.

15 Q. The decision to make those 12 plants fluid milk
16 plants as opposed to multi-product plants, that was a
17 business decision raised by Prairie Farms, correct?
18 Decided by Prairie Farms.

19 A. Yes, as business conditions evolved, some plants
20 are, product lines are dropped and others are added. Yeah,
21 (Positive response). It's a business decision.

22 Q. So that, for example, in the fluid plants,
23 because of the fact you might have a limited, more limited
24 number of products, you're able through processing,
25 savings, and efficiencies to be able to reduce your costs

1 of production in those plants versus the multi-product
2 plants, correct?

3 A. In general.

4 Q. It depends on the age of the plant, depends on
5 the age of the equipment?

6 A. And also depends on the product mix and the
7 plant. If it's only processing one type of milk or various
8 types of milk, it depends on how many different package
9 sizes you're processing there, how many different labels
10 you're processing. Every one of those represents a
11 stoppage of equipment, a change over and then a startup.

12 Q. So that, if tomorrow, for whatever reason,
13 Prairie Farms decided that it wanted to change over all of
14 its plants to simply fluid milk plants, it could do that.

15 A. Theoretically.

16 Q. Theoretically. In order to obtain some of the
17 cost savings that may be available in a reduced product
18 line.

19 A. Yes.

20 Q. If, assuming it's available Prairie Farms needs
21 milk in a particular month, does it have any arrangement to
22 be able to buy that milk from another source?

23 A. Yes, we do.

24 Q. Is there any limitation on the number of pounds
25 that you can purchase, assuming it's available?

1 A. We have arrangements with four, actually five
2 other organizations and there is an understanding that a
3 certain amount of milk is made available to us.
4 Supplemental milk, and anything over and above that will be
5 priced based on market conditions.

6 Q. And you take those agreements into consideration
7 on a monthly basis, in determining any kind of balancing
8 that you may have in that particular month. Correct?

9 A. Yes.

10 Q. And a balancing cost is a real cost to Prairie
11 Farms, correct?

12 A. Yes.

13 Q. And a balancing cost is a real cost to any dairy
14 processor, correct?

15 A. As far as I know.

16 Q. And it would also include producer/handlers,
17 correct?

18 A. I would assume so. I can't speak from personal
19 knowledge.

20 Q. You don't know about producer/handlers, because
21 you haven't operated a producer/handler, correct?

22 A. I've never worked for one, but I'm familiar with
23 some, yes.

24 Q. But assuming that what we have is a situation
25 where you got a producer who also has to handle his

1 product. That is, a dairy farmer who also has to process,
2 then we've got capital requirements, and management and
3 production, processing and distribution. Correct?

4 A. Yes.

5 Q. Because those are the sum of the capital
6 requirement that Prairie Farms has.

7 A. Yes.

8 Q. And you also have management skill required in
9 all of those operations just like Prairie Farms would.
10 Correct?

11 A. Yes.

12 Q. All of the sales that you've testified about on
13 direct, that you disclosed to us, those have all been lost
14 to regulated handlers, correct?

15 A. Yes.

16 Q. Now, you're aware that back at the time of
17 Federal order reform there were some proposals that were
18 made with regard to the further regulation of
19 producer/handlers, and that the Secretary declined to do
20 so, correct?

21 A. Yes.

22 Q. You're also aware that the issue of consolidation
23 in the dairy industry was an issue back in '99, 2000
24 although it may have accelerated today, correct?

25 A. Yes.

1 Q. Have you looked at the information available at
2 this hearing to see how many producer/handlers there are in
3 either Federal order five or seven?

4 A. No, I have not.

5 Q. Do you know whether or not the price, I mean, the
6 number, excuse me, has gone up or down in the last four
7 years?

8 A. Not in the order five or seven areas, no.

9 Q. Producer/handlers are regulated. They don't get
10 a regulatory pass. They have to meet certain regulations
11 in order to be a producer/handler, correct?

12 A. They don't get a regulatory pass in terms of
13 health regulations that they must adhere to, and tax
14 regulations and so on. But in terms of the Federal order,
15 as long as they only utilize their own production, they
16 get a regulatory pass.

17 Q. They are regulated in the sense that they have to
18 meet the requirement to be a producer/handler, and they are
19 subject to audit by the department. Correct?

20 A. I wouldn't say regulated. I would say monitored.

21 Q. We'll let the Department decide what they do. In
22 - - you have plants in order 30, 32, and 33, correct?

23 A. Yes.

24 Q. Are you aware that in each of those orders, that
25 in the producer/handler requirements, that producer/handler

1 is permitted, has an allowance to purchase up to a hundred
2 fifty thousand pounds of milk per month and still retain
3 the producer/handler status. Are you aware of that?

4 A. Yes.

5 Q. Are you aware that the only three orders in the
6 Federal system in which there is no allowance, zero is
7 five, six and seven?

8 A. I was not aware of that.

9 Q. If in fact balancing costs are real, as you
10 testified previously, and a producer/handler in five and
11 seven has no allowance to go out and purchase one gallon of
12 milk, that puts the producer/handler at significant risk in
13 trying to meet his balancing needs in this area, correct?

14 A. I would assume so.

15 Q. And if we're trying to reach some kind of fair
16 equitable solution, we should at least give, in five, six,
17 and seven, the producer/handlers the ability to be able to
18 go out and balance their need by buying up to some
19 percentage or amount of milk, correct?

20 A. Well, no. When I look at it, the company that I
21 work for is a producer/handler. It's just that we have 850
22 milking units, rather than one. But all we are is a
23 cooperative, pooling our farmers' resources, processing it
24 and packaging it and going to the marketplace with us, and
25 we're abiding by the Federal order regulations. And I'm

1 saying, if someone else is going to get into the same
2 business as we are in, and attempt to operate on even a
3 fraction of the scale that we're operating at, they ought
4 to play by the same rules.

5 Q. The fact is, Prairie Farms doesn't own any cows,
6 right?

7 A. No, we do not.

8 Q. So you don't have the capital requirements of
9 going out and purchasing cows, correct?

10 A. The individual dairy farmers that own Prairie
11 Farms made that capital expense as well as the capital
12 expense of funding the company, back at its origin.

13 Q. I didn't ask you about that. I asked you about
14 Prairie Farms. Prairie Farms doesn't have the capital
15 requirement to go out and purchase cows or operate a dairy.
16 Correct?

17 A. If Prairie Farms is an organization owned by
18 dairy farmers, then yes, we did have the individuals did
19 have that capital outlay.

20 Q. And then the individuals, if you want to use that
21 analogy, didn't go out and put their capital up to go and
22 build their own processing plants next to their individual
23 dairies, did they?

24 A. No.

25 Q. And in fact, if as we talked about before, if

1 there's a problem that you run into in any particular month
2 where you need milk, there's no limitation on the amount of
3 milk that you can buy, assuming it's available and assuming
4 you have the money, right?

5 A. Those last two points are the key points.

6 Q. I understand that. Whereas producer/handler in
7 this area, can't go out and buy a gallon. Can they?

8 A. Apparently not.

9 Q. You talk about in your statements, I want to make
10 sure I get it right, some type of, it's bottom of page
11 four. The alleged disorderly marketing conditions in Georgia.

12 A. That word might be struck and replaced with
13 southeast.

14 Q. Well, let's strike it and put the southeast in.
15 The alleged disorderly marketing conditions you're talking
16 about are not created by producer/handlers. They're
17 created in fact by regulatory handlers and the problem with
18 trying to get enough milk. Right?

19 A. I wouldn't say that the problem in the southeast
20 was created by the handlers. I would say that the problem
21 in the southeast was created by the line between order five
22 and order seven being drawn where it was. And if the line
23 was fifty miles south, or fifty miles north, the same
24 problems would exist.

25 Q. Which has nothing to do with producer/handlers,

1 correct?

2 A. No.

3 MR. RICCARDI: Thanks.

4 THE COURT: I just want to make sure that I
5 understood the no to - -

6 MR. RICCARDI: Yeah, (Positive response). Let me
7 make sure.

8 THE COURT: You know, that double negative thing.

9 MR. RICCARDI: I've got it, Judge. I'll see if I
10 can clear it up.

11 Q. Your testimony was, as far as you know, that the
12 disorderly marketing conditions that are created by where
13 the line was drawn has nothing to do with producer/handlers.

14 A. To the best of my knowledge, that is correct.

15 MR. RICCARDI: That's all I asked you.

16 THE COURT: Questions? Mr. Beshore.

17 EXAMINATION

18 BY MR. BESHORE:

19 Q. Good afternoon, Gary.

20 A. Hi.

21 Q. The, for clarifications. The plants that Prairie
22 Farms operates, which are regulated on order seven, your
23 statement says there are three of them. Could you identify
24 those?

25 A. They are the three plants that are part of the

1 Highland Dairy Company, which is a joint venture between
2 Prairie Farms and DFA. They are located in Springfield,
3 Missouri, Fayetteville, Arkansas, Fort Smith, Arkansas.

4 Q. Now, those plants are in a different procurement
5 area generally, than Saint Louis plants, are they not?

6 A. It almost depends on which week you ask that
7 questions.

8 Q. The area in between, milk in between times will
9 go to Saint Louis and sometimes to Springfield. But the
10 majority of the milk to plants in Arkansas and Highland, I
11 would gather comes from Southern Missouri and Oklahoma and
12 Arkansas.

13 A. Yes.

14 Q. Now, the proposal one, when you commented on
15 your, what you would anticipate for its impact on Prairie
16 Farms, what are you anticipating it's going to do to the
17 blend prices, in orders seven and five, if proposal one is
18 adopted?

19 A. I would assume that in the current order five
20 area, the relative uniform price would go up. And in the
21 current order seven area, it would stay approximately the
22 same, perhaps go up a little.

23 Q. What leads you to believe it would go up in the
24 current order five area?

25 A. Because it was proposed to essentially adopt the

1 cooling provisions from order seven, which are just a
2 little tighter than those on order five, which should make
3 it more difficult to associate milk with the order, and
4 therefore increase class one utilization and the uniform price.

5 Q. So it would be - - if that were to be the effect,
6 by the way, you're Saint Louis and Southern Illinois
7 plants, are they primarily competition with order five?
8 Raw milk procurement?

9 A. There is producer milk located in those two areas
10 that's going to order five and order seven plants on an
11 almost daily basis. Not Prairie Farms member milk, but
12 other member milk.

13 Q. So both orders procure some milk out of the
14 Southern Illinois - -

15 A. Southeast Missouri.

16 Q. Southeast Missouri area.

17 A. Yes.

18 Q. So if the result of order one is to increase as
19 you analyze it, would be to increase the blend price of
20 order five, I assume it would decrease it somewhat in order
21 seven then. I mean, it's a zero sum scenario, is it not?

22 A. I don't know why. You should in total have less
23 total milk associated with the new order as opposed to the
24 two individual orders. I would think it would have a
25 neutral effect on the current order seven.

1 Q. If there's less total milk pooled, wouldn't that
2 mean there's more milk available to other orders that are
3 in competition with those orders for milk supply?

4 A. Perhaps.

5 Q. I mean, there's no other, there's no other way it
6 could work, right? If the milk's not going to be pooled
7 there, it's going to be pooled - -

8 A. But will the milk that's not needed in the new
9 area be located in our procurement area or will it be in
10 Northwest Indiana, or southern Michigan, or where will it
11 be?

12 Q. Well, wherever it is, there'd be a little domino
13 affect that would loosen things up in your area to some
14 extent, if there's milk pushed back off of that
15 southeastern pool, it's going to loosen it up to some
16 extent in your area. Wouldn't you agree with that?

17 A. Theoretically.

18 Q. I have just one other area. The
19 producer/handlers. As a regulated pool plant operator, one
20 of the - - fluid milk plant operator. One of your major
21 financial obligations on a monthly basis is to pay the pool
22 bill.

23 A. Yes.

24 Q. Every month for the market administrator. When
25 you're talking about, and I would assume, I wouldn't assume.

1 For Prairie Farms, that's millions of dollars a month, is
2 it not?

3 A. Yes, it is.

4 Q. You pay your farmers the blend price. And in
5 addition, you pay the classified use value to the Federal
6 market administrator in each order and it's millions of
7 dollars per month, correct?

8 A. Yes.

9 Q. So when you're talking about a regulatory pass
10 for producer/handlers, producer/handler has all the other
11 expenses that you have. Balancing, plant operating, et
12 cetera, but he doesn't have the bill to the market
13 administrator. That's the pass he gets. Correct?

14 A. That is correct.

15 MR. BESHORE: Thank you. I don't have anything
16 else right now.

17 THE COURT: Ms. Carter?

18 EXAMINATION

19 BY MS. CARTER:

20 Q. Antoinette Carter, with USDA, good afternoon, Mr.
21 Lee. Just a few questions regarding the plants that you
22 have noted in your statement on page one. You indicated
23 that there are two plants that are currently regulated
24 under Federal five, the Appalachian order?

25 A. Correct.

1 Q. Could you identify those in terms of where
2 they're located?

3 A. There's a plant called Hoosier Dairy in Holland,
4 Indiana that is Prairie Farms. And there is a plant called
5 Ideal American Dairy in Evansville, Indiana, that is a
6 joint venture plant half owned by Prairie Farms, half owned
7 by DFA.

8 Q. In terms of your source of supply for each of
9 these plants, is it supplied by your member cooperative,
10 solely supplied, or where does your source of supply milk
11 come from?

12 A. The Evansville plant is supplied entirely by DFA.
13 The Holland Indiana plant is supplied by local dairy
14 farmers in that area as well as some milk from Foremost
15 Farms and DFA.

16 Q. And I believe you've identified three plants that
17 are currently operated under the southeast order. Can you
18 comment on the source of supply for those plants?

19 A. In our joint ventures, the 50/50 arrangement is,
20 we are the managing partner. Our partner has the right or
21 the obligation to arrange for the milk supply. So for
22 those three plants, DFA arranges for the milk supply. And
23 on any day, what mix of milk they put in there of their own
24 members or someone else's is their decision.

25 Q. And you indicated that you have a joint venture

1 with Dairy Farmers of America. Is that the only joint
2 venture you have, or are there others?

3 A. No. We have five joint ventures.

4 Q. Are you at liberty to comment on those, or - -

5 A. Sure. We have three with DFA, Ideal American
6 Dairy, which was, I mentioned just a few minutes ago in
7 Evansville Indiana, the Highland Dairy Company which
8 operates six plants, the three on order seven, Springfield,
9 Missouri, Fort Smith, and Fayetteville Arkansas.

10 Chandler in Norman, Oklahoma and Wichita, Kansas.

11 Those three plants are in order 32.

12 And then we also, the DFA have the Roberts Dairy
13 Company which has a plant in Kansas City, Missouri, Omaha,
14 Nebraska, Des Moines, Iowa, Iowa City, Iowa, and an ice
15 cream plant in Norfolk, Nebraska.

16 And in Rockford, Illinois, the Muller Pinehurst
17 Dairy is a joint venture between us and Midwest Dairymen's
18 Company, and then in Saint Louis, Missouri, we have a
19 butter plant that is a joint venture with Land O' Lakes.

20 Q. Just one final question. On page one of your
21 statement, you indicate or make a statement regarding the
22 anticipated level of the uniform price under proposal
23 number five. Could you explain, what's the basis of your
24 statement? On what basis are you making that statement?

25 A. I'm theorizing that if proposal five is adopted,

1 the lower Mississippi Valley order would have a higher
2 uniform price than we have in order 32. But perhaps not at
3 the level we're currently witnessing.

4 Q. And why do you think that would exist?

5 A. Mr. Thompson gave some evidence yesterday, and
6 it's just a belief that that will probably be a little
7 lower utilization order than the current order itself.

8 MS. CARTER: Thank you, that's all I have.

9 THE COURT: Yes, Sir?

10 BY MR. STOKER: First off, Gary, thank you for
11 coming and testifying today. I appreciate that.

12 THE COURT: Mr. Stoker, I forgot to call you.

13 MR. STOKER: Sorry. Just kidding. Randall
14 Stoker, Dairy Programs.

15 EXAMINATION

16 BY MR. STOKER:

17 Q. In reference to your statement on page three, the
18 second paragraph, it says analysis will show that in most
19 months, the order 32 price difference by itself will not
20 cover the cost of transportation from Wisconsin to
21 Minnesota, for Minnesota to Saint Louis, and down state
22 Illinois. Is there anyway that you could provide for the
23 record this analysis?

24 A. I submitted an analysis like this at the order 32
25 hearing in November of 2001. I could add one when we file

1 briefs, but no, I didn't not do such an analysis.

2 Q. Also, the following sentence reads, these
3 additional costs are generally covered, and you mention
4 four things. First, over order premiums, second, give up
5 charges, third, loose pooling standards and four, other
6 payments?

7 A. Um hum. (Positive response.)

8 Q. Could you elaborate a little bit on each of
9 those, just for the record, so we'll know what those are?

10 A. I consider over order premiums an amount of money
11 that we pay every day for a supply of milk. Because most
12 of our supplemental suppliers will not supply at order
13 return, so they expect something over and above the order.

14 Then at certain times of the year when we need
15 more milk than what is available, under our normal
16 supplemental supply arrangements, we may call someone, ask
17 if milk is available, they will say you are robbing it from
18 our cheese plant, you're robbing it from our butter powder
19 plant. We not only want the over order premium, we want
20 you to cover our plant inefficiencies. I call that a give
21 up charge.

22 When I say loose pooling standards, some people
23 in the upper Midwest, even though their basic return to
24 supplying milk to order 32 is not all that good, they enjoy
25 the fact that for every load of milk that they ship, they

1 can use that to qualify three or four or five more that
2 they can keep at home, and still draw the order 32 uniform
3 price.

4 Other payments, that was just a peculiarity to
5 Prairie Farms that I was referring to.

6 Q. And the last question is, in your cross
7 examination by Mr. Beshore, you mentioned that you paid
8 your producers the blend price, is that correct?

9 A. That is correct.

10 Q. You are a cooperative, is that correct?

11 A. That is correct.

12 Q. So you're not required to pay the blend price,
13 but you do.

14 A. We are not required to, but politically, you
15 don't dare.

16 MR. STOKER: Thank you, that's all I have.

17 THE COURT: Mr. English?

18 EXAMINATION

19 BY MR. ENGLISH:

20 Q. Clarification for the record, when you say
21 politically you don't dare in reference to the last answer,
22 you mean you don't dare pay less than the blend price.

23 A. Right.

24 Q. And so as a matter of fact, Prairie Farms does
25 return at least the blend price.

1 No. 59 and now if you'd be so kind as to read it with your
2 name, etc.

3 (Whereupon, the exhibit referred to was marked for
4 identification as Exhibit No. 59.)

5 MR. CRYAN: Yes, sir. I'll read my statement
6 into the record.

7 EXAMINATION (reads his statement into the record)

8 My name is Roger Cryan, it's C-R-Y-A-N. I have
9 been Director of Economic Research for the National Milk
10 Producers Federation for four years. Prior to that, I was
11 an economist in the Atlanta Milk Market Administrator's
12 office. I have a Ph.D. in agricultural economics from the
13 University of Florida.

14 The National Milk Producers Federation, in
15 Arlington, Virginia, is the voice of America's dairy
16 farmers, representing over three-quarters of America's
17 70,000 commercial dairy farmers through their membership in
18 National Milk's 34 member cooperation associations. That
19 is to say National Milk's membership is made up of Dairy
20 Farm Cooperatives and those cooperatives have 70,000, three
21 quarters of the of the 70,000 commercial dairy farms in the
22 U. S.

23 The Federation agrees with those parts of
24 proposals 5 and 7 that would limit the producer-handler
25 exemption to 3 million pounds and states its support for

1 those proposed provisions that would do so, in any Federal
2 Orders emerging from this hearing. NMPF is participating
3 in this hearing because the producer-handler issue is one
4 of national scope. National Milk supports such a limit in
5 every market, in order to address both current, potential
6 future market disruption arising from the distortions of
7 the producer-handler exemption.

8 The current producer-handler exemption began as a
9 matter of expediency, not principle, and after 70 years
10 conditions demand its modification. Changes in technology
11 and the growth of the largest dairy farms offer a new model
12 of producer-handler. Large producers can now capture
13 sufficient economies of scale in processing their own-farm
14 milk in order to exploit the artificial raw milk price
15 advantage offered to exempted producer-handlers - an
16 advantage of as much as 16¢ per gallon and 7 to 9¢ a gallon
17 in the markets currently under consideration. Such a
18 producer-handler can, by itself, disrupt the orderly
19 marketing of milk in a market. More importantly, such
20 large producer-handlers could proliferate across a market,
21 causing even greater disruption in aggregate. This could
22 thoroughly undermine the pooling of market values.

23 Under the heading:

24 Original Basis for the Current Producer-Handler Exemption

25 The Federal milk marketing order program has its

1 origins in the Agricultural Adjustment Act of 1933, which
2 generally authorized the Secretary of Agriculture to enter
3 into agreements with producers and to license handlers, in
4 order to "restore normal economic conditions in the
5 marketing of milk and milk products." The Department
6 combined these powers to implement marketing agreements
7 enforced by licensing in numerous markets. These licenses
8 are the direct antecedents of the modern milk marketing
9 orders.

10 Although many markets were supplied primarily by
11 handlers who procured milk from producers and cooperative
12 associations, in the Kansas City market producer-handlers
13 sold 50% of the milk and cream consumed when the market's
14 license was instituted in 1935. This license was to
15 regulate them. However, the market administrator
16 encountered considerable resistance from a substantial
17 number of these producer-handlers, who generally failed to
18 submit reports and who refused to make payments to the
19 equalization fund when they did submit reports. Most of
20 the rest followed suit when the market administrator failed
21 to enforce these requirements on non-compliers.

22 Successive amendments to the marketing agreement
23 were made to lessen the burden on producer-handlers, but
24 since no effective enforcement accompanied even these, non-
25 compliance among producer-handlers continued to grow. In

1 July of 1935, unable or unwilling to surmount the practical
2 difficulties of enforcement, the department abandoned its
3 attempts to regulate producer-handlers beyond reporting
4 requirement. That is, producer-handlers were exempted from
5 regulation as a matter of administrative expediency. That
6 point is to be highlighted, a matter of expediency. This is
7 the status that producer-handlers of all sizes enjoy today
8 in all Federal order markets.

9 In May 1935 the Supreme Court invalidated the
10 National Industrial Recovery Act for its excessive
11 delegation of Congressional authority to the executive
12 branch. The marketing agreement and licensing provisions
13 of the Agricultural Adjustment Act of 1933 gave the
14 Secretary and the President similarly broad and ambiguous
15 powers over agriculture. In August of 1935, for this
16 reason, Congress amended this Act to codify the previous
17 practices of the USDA, re-establishing the licensing of
18 handlers as Federal milk marketing orders. Significantly,
19 these 1935 amendments included language "providing a method
20 of making adjustments in payments, as among handlers
21 (including producers who are also handlers) to the end
22 that the total sums paid by each handler shall equal the
23 value of the milk purchased by him at prices fixed" by
24 USDA. I should point out that the phrase, including
25 producers who are also handlers which is contained in the

1 parentheses in the statement, is in the original text.
2 That's not my addition, that's from the original text of the
3 legislation. In other words, the regulation of producer-
4 handlers was specifically authorized. This language has
5 been retained to the present day, as part of a continuous
6 system of milk market regulation; for example, the recent
7 creation of the Central Federal Milk Marketing Order
8 incorporated the Greater Kansas City Order, which had been
9 continuously in force since its December 1936 establishment
10 as a successor to the license discussed above.
11 Sources for this are identified in the text of my exhibit.

12 A Changing Industry

13 The early difficulties in regulating producer-
14 handlers gave way over the years to indifference about
15 their regulation, due to their shrinking numbers and small
16 size. Even today, in many markets, such as the
17 Appalachian-Southeast markets, most producer-handlers fall
18 under the 150,000 pound size exemption, so that only in one
19 market there's a large share of fluid milk market belong to
20 the handlers exempted as producer-handlers. Until
21 recently, the substantial growth in the scale and
22 efficiency of large fluid milk processors meant that even
23 the largest farms were unable to take advantage of the
24 scale economies; with relatively high unit costs, producer-
25 handlers did not proliferate, and in fact, they declined in

1 number and volume processed.

2 In 2002, however, there were 380 dairy farms with
3 over 2000 cows, compared to only 235 just four years
4 earlier, when they were first counted. A 2000-cow dairy
5 produces roughly 3 million pounds per month. The average
6 farm in this category produced 5.6 million pounds per month
7 in 2002 (compared to an average of only 4.7 million in
8 1998). These 380 farms now produce 15% of the U.S. milk
9 supply. They are large enough to exploit both the
10 producer-handler raw milk price advantage and economies of
11 scale in fluid milk processing. Their share of production
12 means they could capture a large share of the Class I sales
13 in an individual market or nationally, if many of them
14 adopted this model.

15 The Cost Advantage of Producer-Handlers.

16 Fluid milk bottling plants have increasing
17 economies of scale. That is, they have decreasing costs
18 per gallon as their size increases. This has been
19 consistently demonstrated in industry and academic studies.

20 These economies of scale flatten out, so that the
21 advantages of increasing plant size are greater near the
22 bottom of the range than near the top. That is, after they
23 reach a certain size the advantages of getting bigger are
24 smaller than they are at the bottom of the range.

25 Table I and the attached graph show results from

1 several studies, including two studies in Maine, a
2 nationwide study conducted by Cornell University, and the
3 numbers presented by Mr. Herbein.

4 The next table has been dropped from this
5 statement.

6 Table 2 shows -

7 THE COURT: So you want to scratch out.

8 MR. CRYAN: I would scratch the sentences that
9 say Table 1A and Table 1B. I tried to streamline this
10 version and I'll move on to the next paragraph.

11 A producer-handler, by avoiding Federal order
12 regulation as a distributing plant, can pay, effectively,
13 the uniform price for its milk at that plant. (As the
14 market price for producer milk on the market, this is the
15 appropriate transfer price for analysis of vertical
16 integration.) That is to say, well - I'll address that at
17 the end. Its regulated competitors pay the Class I price
18 for the same milk. Table 2 shows selected statistics for
19 all Federal order markets, including a calculation of the
20 price advantage that a producer-handler has in each market,
21 equal to the Class I price minus the uniform price. (The
22 difference between the Class I price and the uniform price,
23 at the base point, will be the same across the market,
24 since both are adjusted by the same location differential.)

25 I'll clarify here. There was a lot of discussion

1 in another hearing about what the transfer price is, what
2 the proper transfer is - defining the price that a
3 producer-handler's farm is paid by his plant - even though
4 there are good ways to set that price, the real issue is
5 that if you put a plant and handler together, they produce
6 milk, they process it and they sell milk at the market
7 price, whether it's a producer handler or regulated plant
8 and the difference between the two is that the regulated
9 plant will pay the difference between Class I and the
10 uniform price into the market pool so that the point is not
11 what the transfer price is, but the difference between the
12 total price, the total cost, all other things being equal,
13 is going to be the difference between Class I price and the
14 Uniform price and that's the maximum advantage of the
15 exemption for - - is that difference.

16 And that table includes calculations on a per
17 gallon basis that are included in the later tables.

18 This price advantage is greatly outweighed by the
19 high processing costs of very small plants, and so is
20 neither the primary basis for a small producer-handler's
21 business nor a disruptive force on the market. Even if
22 there is no principled justification for the small
23 producer-handler plant, it has little impact on the market.

24 However, as producer-handlers become larger, their price
25 advantage can become the primary basis for their existence.

1 A large producer-handler can now enter the bottling
2 business, even with uneconomic processing costs, purely to
3 exploit this regulatory exemption.

4 Tables 3 and 4 show the advantage or disadvantage
5 that regulated plants and producer-handlers of various
6 sizes have compared to an average sized plant in each of
7 the two market under consideration. We believe that this
8 shows quite clearly the perverse incentive that this
9 antiquated exemption offers to the establishment of
10 uneconomic processing plants. I've knocked the Cornell
11 results out because they were - they did not cover the
12 range, as was discussed earlier, the range of plant sizes
13 in the study is well beyond the plant size that we're talking
14 about, the size of the plant that we're talking about limiting.
15 Produce Equity.

16 The producer equity exemption violates the
17 principles of producer equity upon which the Federal orders
18 rest. In the best case, which is vertical integration of
19 efficient milk production with efficient milk processing,
20 the exemption robs the producer pool to pay producer-
21 handlers. In the worst case, which is uneconomic
22 reorganization of farms into producer-handlers, the
23 exemption also creates deadweight losses in the market
24 whose whole cost is borne by pooled producers.

25 Orderly Marketing

1 Such an exemption also threatens orderly
2 marketing. As stated above, farms with over 3 million
3 pounds of monthly production now produce about 15% of the
4 U.S. milk supply, equal to about 40% of U.S. fluid milk
5 sales. These numbers are steadily increasing. I expect by
6 this year or next year it will probably be equal to about
7 50% of U. S. fluid milk sales. The ability of such farms
8 to exploit such an exemption threatens both the producers
9 and the handlers currently supply U. S. markets.

10 Further, such producer-handlers, even if they
11 bottle all of their milk and buy or sell no more, can now
12 sell to wholesalers or retailers at an advantageous price.

13 Such wholesalers or retailers can either balance their own
14 supplies of milk, at the expense of pooled market
15 participants; or they can raise and lower their prices
16 seasonally, so that consumers will balance their supply at
17 other stores, also at the expense of pooled market
18 participants.

19 Regular home delivery once provided an argument
20 that a producer-handler could balance its own supply; it is
21 the only marketing channel that has, at some point, been
22 consistent enough to make this claim. However, home
23 delivery has declined from 30% of fluid milk sales in 1963
24 to less than one half of one percent in 1997. And, I would
25 point out that today, much of the home delivery is on a

1 spot basis from internet based grocers who will bring you
2 an order, in many cases milk that is no longer delivered on
3 a regular basis.

4 The conclusion must be that no producer-handler plant
5 can truly balance its own supply. No producer-handler can
6 truly be made to balance its own supply per regulation.

7 The Need for a Limit.

8 There is no justification for the producer-
9 handler exemptions generally; but the Federal order
10 objective of orderly marketing demands an end of the
11 exemption for large plants. However, a recognized
12 difficulty in limiting the producer-handler exemptions (as
13 opposed to the simplicity of eliminating it) is determining
14 the appropriate level for that limit. The analysis
15 discussed above offers one approach, and its results
16 suggest a limit in the neighborhood of 3 million pounds.

17 Three million pounds is also the limit recently set by
18 Congress as the limit for exemption from payment of the
19 Fluid Milk Promotion assessment. There are some
20 similarities between the Federal milk marketing orders and
21 the order under which the fluid promotion program operates.

22 Both make certain individual fluid milk marketing
23 responsibilities into common ones. The Fluid Milk
24 Promotion threshold of 3 million pounds is implicitly a
25 level above which the individual handler's responsibility

1 to the market as a whole is great enough to require a
2 contribution to the common mission. Also the Supreme Court
3 has explicitly identified promotion programs as necessarily
4 an integral part of larger schemes of regulation; and in
5 that sense, these orders are part of the same program, and
6 administered by the same agency.

7 In a dynamic dairy market, any attempt to fix a
8 limit too finely may be self-defeating. Technologies
9 change, and market prices and rates of Class I utilization
10 change, and there is a risk of setting a limit that is too
11 high, leading to uneconomic investment that may be lost
12 when the limit is re-adjusted.

13 NMPF believes that the limit should be set at the
14 same level in all markets, and concludes that 3 million
15 pounds is the appropriate level, and supports the proposals
16 to set the limit at that level in any market or markets
17 emerging from this proceeding.

18 I will ask also that notice be given to the
19 publications listed at the end of that before I make some
20 additional comments. Is that -

21 THE COURT: I think you're going to have to say
22 each one out loud and I'll say yes or no, depending upon
23 objections.

24 MR. CRYAN: Okay. The first one is:

25 *An Analysis of Processing and Distribution*

1 *Productivity and Costs in 35 Fluid Milk Plant.* This is a
2 Cornell Research Bulletin by Eric Erba, Richard Aplin and
3 Mark Stephenson.

4 THE COURT: Any objection on that one?

5 No response.

6 THE COURT: Official notice is given, go ahead.

7 MR. CRYAN: Actually what appears to be the next
8 item is actually the continuation of the first one, that
9 includes the URL, the internet address for that document.

10 The second item, the true second item on this
11 list is *Fluid Milk Processing Cost: Current State and*
12 *Comparisons* in the Journal of Dairy Science of April 2002
13 by T. J. Dalton, G. K. Criner and Jake Halloranin and that
14 also has the website address following the listing.

15 THE COURT: Any objection to that?

16 No response.

17 THE COURT: Official notice is given.

18 MR. CRYAN: The statistics I used were drawn from
19 the *Dairy Market Statistics, Annual Summary 2002.*
20 Published by the Agricultural Marketing Service.

21 THE COURT: Official notice is taken of that.

22 MR. CRYAN: I also used numbers from the *Federal*
23 *Milk Marketing Order Statistics, Annual Summary, 1999 &*
24 *2002*, published each year by the Agricultural Marketing
25 Service.

1 THE COURT: Official notice is taken of that.

2 MR. CRYAN: I used the February 2003 issue of the
3 *Milk Production*, a monthly publication from the National
4 Agricultural Statistics Service.

5 THE COURT: Official notice is taken.

6 MR. CRYAN: Finally I ask that notice be taken of
7 *Early Development of Milk Marketing Plans in the Kansas*
8 *City, Missouri Area*. Marketing Research Report No. 14,
9 published in 1952 by the US Production and Marketing
10 Administration, Dairy Branch, which is the precursor of the
11 Agricultural Marketing Service.

12 THE COURT: Official notice is taken.

13 MR. CRYAN: Thank you. I'd like to make some
14 points.

15 THE COURT: You have to explain your tables now.

16 MR. CRYAN: Oh, the tables. Okay, I can explain
17 the tables.

18 The first table shows the Fluid Milk processing
19 costs by plant size according to several studies. The
20 first one listed are the numbers that Mr. Herbein presented
21 earlier today. The two curvy lines there identified as
22 Herbein for FO 5 and FO 7 are based on numbers that he
23 presented for various plant sizes and the thicker line that
24 runs through that is fitted using a statistical method, it
25 is fitted to the data that he has presented. The next item

1 after that on that table are results from the Cornell
2 Study, that's an equation that was based on their results.
3 They had average size result and average cost, they
4 expressed their results in mathematical terms, in terms of
5 elasticity. The expressed elasticity as a basis for an
6 equation, with all other things being equal, starting at
7 the tabrush cost and size point. I discussed that with the
8 author of that study and he agreed that that was a
9 reasonable representation.

10 And then there are two other items, two other studies
11 from the State of Maine. The State of Maine has a Milk
12 Commission that operates a full - program and their full -
13 regulations depend upon their estimate of plant processing
14 costs. So they will periodically commission a plant cost
15 survey that usually only works at a couple plant sizes.
16 I've used the numbers from that study just as another
17 indication that Mr. Herbein's numbers are consistent in the
18 general shape of all these other studies. That is to say,
19 his numbers are consistent in general shape, even in
20 functional form, with the Cornell study and with they are
21 consistent in terms of the general facts of the main
22 studies. They are not identical, in terms of the numbers
23 they show because there are some items in the main studies
24 and the Cornell study that are not captured the same as in
25 the Herbein studies but they are substantially comparable.

1 Table 2 is based mostly on the numbers from the
2 annual summary of milk pool on federal orders that's
3 published in the Annual Summary of Dairy Market Statistics.

4 The Annual Summary for Dairy Market Statistics, the Annual
5 Summary for 2003 was put out in the Dairy Market News this
6 week but I don't have the rest of the numbers for this
7 table.

8 They show the pounds of milk pooled on each
9 market, the Class I pounds pooled on each market, the
10 percentages of utilization, the uniform price and the Class
11 I price for hundred weight.

12 From those I calculated the difference between
13 the Class I price and the uniform price per hundred weight
14 which represents the upper limit of the producer-handlers
15 market price advantage and then that's been divided by 11.6
16 or 11.63 to get to that same difference converted into
17 gallons, the advantage per gallon.

18 As you can see from that, in the Appalachian
19 Market the advantage per gallon is 7.4¢ a gallon, and the
20 Southeast Market the potential advantage is 9.1¢ per
21 gallon.

22 The final last three columns show the number of
23 full distributing plants in each market, the volume of
24 packaged sales, that is Class I sales in each market by
25 pool plants and then those numbers are used to calculate

1 the average pounds per month per plant for pool
2 distributing plants.

3 So basically, that represents the average size of
4 a Class I plant, a full distributing plant in each market.

5 Table 3 identifies the cost advantage of
6 producer-handlers, each of the sizes identified by Mr.
7 Herbein. The disadvantage from the economies of scale from
8 the small size, compared to the average plant. On the top
9 are the numbers identifying the plant cost per gallon for
10 each of the sizes, each of the plant sizes as given to us
11 by Mr. Herbein. The price advantage on the third line is
12 the difference per gallon between the Class I price and the
13 Uniform price and the fourth line is the plant cost minus
14 that advantage.

15 So, effectively, it corrects the plant costs for
16 the price advantage that the plant gets for being
17 unregulated.

18 The 5th and 6th lines show the volume and plant
19 costs for regulated pool distributing plant and then
20 finally there are comparisons of the cost of the average
21 plant against the producer-handler plant of each size with
22 and without the producer-handler advantage and we can see
23 that the cross over is between two million pounds and
24 eighteen million pounds. That is where you go from having
25 a clear disadvantage, whether you're regulated or

1 unregulated, where you have a clear advantage whether
2 you're regulated or unregulated is between two million and
3 eighteen million pounds and a look at the graph will show
4 that it would seem to be - I mean, the range somewhere
5 between 2 million and about 14 million, 2 million and 13 million
6 is kind of the range where there is an ambiguous result there.

7 All these numbers are consistent with the 3
8 million pound cap.

9 Table 4 is essentially the same with the number
10 for Federal Order 7. It's changed only with the plant
11 costs that Mr. Herbein calculated differently for Federal
12 Order 7 and the price advantage per gallon for Federal
13 Order 7, everything else is the same. The average pool -
14 the average Class I for Federal Order 7.

15 Those are my tables and the points I wanted to
16 address, based on some things I've heard this afternoon.

17 I have heard discussion about the balancing cost
18 that producer-handlers bear that regulated plants do not
19 bear and that should weigh into the decision. The
20 implication that that should weigh into the decision as to
21 whether producer-handlers are, would be unfairly
22 disadvantaged by regulation. I would point
23 out that if a producer-handler once becomes regulated they
24 may then balance their supplies on the market just like any
25 other plant. So that any cost that they bear from not

1 having access to the rest of the market to balance their
2 supplies are gone because they will have access to the rest
3 of the market, just like any other regulated plant. That's
4 the first point.

5 It's been brought up, it's been asked whether or
6 not the Secretary decided not to regulate producer-handlers
7 under (inaudible) and I have stated, in another hearing,
8 and I will state here that I was working for AMS, the
9 Federal Audit System at the time and I understood that the
10 Federal formulation staff was seriously overworked at the
11 time, they had a deadline and they could not address every
12 single issue, some issues were specifically - for some
13 areas the decision was made to minimize the change in
14 regulation and I believe that that was a decision to defer
15 any changes rather than to ratify those, that status quo.
16 Some issues were more important than others and they had to
17 be addressed. That was my -

18 There are no potential regulated producer-
19 handlers in the Southeast, as I understand it. I may be
20 incorrect about that but that's my understanding. That
21 actually would make this the ideal time to address this
22 issue because it would be corrected, the inequities of the
23 producer-handler exemption would be corrected before anyone
24 has made investments and regulatory assumptions that should
25 not stand.

1 That's it.

2 THE COURT: Questions? Mr. Ricciardi?

3 EXAMINATION

4 BY MR. RICCIARDI:

5 Q. Mr. Cryan, how many producer-handlers are there in
6 Federal Order No. 7?

7 A. I don't have that information. I believe it's been
8 provided by the Market Administrator.

9 Q. You don't know?

10 A. I believe there are none but I don't believe there
11 are any under 3 million.

12 Q. And in 5 currently?

13 A. I'm not aware of any, but I don't have that
14 information. That's been provided by the Market
15 Administrator.

16 Q. In the Federal orders that we're talking about now,
17 not any others, there are no producer-handlers in 7, I
18 believe there's one in 5 and the record will reflect that.

19 If, in fact, what we have is the advantage that
20 you seem to be testifying about, the fact is that not very
21 many, in reality no producer handler has taken advantage of
22 the advantage in the last three years, correct? Not in
23 this area.

24 A. If that's the case, if there are no producer-handlers
25 then they have not taken advantage of it.

1 Q. There's been a consolidation in the dairy industry
2 that has accelerated over the last two or three years, do
3 you agree with that?

4 A. There are larger producers and fewer smaller
5 producers, that's right.

6 Q. And what happens on economy as a scale, if you heard
7 some of the testimony today you'll remember this, is as you
8 increase the size of a plant, a regulated plant, and you
9 get to numbers like 12 million or 18 million, the fact is
10 that if it's efficient it's going to be able to produce milk
11 at a lower cost, correct?

12 A. Yes.

13 Q. So the larger that you get, you consolidate -

14 A. All other things being equal, the larger plant will
15 process at a lower cost.

16 Q. Therefore, if you consolidate and you have larger and
17 larger regulated handlers, then they're going to have an
18 advantage, based upon the fact that they have the ability
19 to process milk at a lower cost, correct?

20 A. They could. The average plant size right now are 13
21 and 15 million.

22 Q. Let's talk about a couple of other issues. Let's talk
23 about the, since you brought it up in the last portion of
24 your testimony, the balancing - the fact is the producer-
25 handler assumes the full costs and risks associated with

1 operating a production facility, correct?

2 A. As an unregulated producer-handler he does.

3 Q. He also would assume the full risks of processing and
4 distribution of his own milk, correct?

5 A. As an unregulated producer-handler he would.

6 Q. You don't have to say unregulated producer-handler,
7 sir, you can tell me the answer. The answer is that he
8 assumes the full risk, correct?

9 A. And if he became regulated he would not, he would be
10 able to balance in the market.

11 Q. And if, in fact, someone who is regulated decided to
12 become a producer-handler then they would go from being a
13 regulated handler to a producer handler and assume the
14 risks that producer-handler would have, correct?

15 A. Yes, that would be harder than going the other way.

16 Q. Both of them would require some economic investment,
17 they'd have to have some capital to be able to do that,
18 either way, correct?

19 A. It doesn't require capital to become a regulated
20 handler, or a producer-handler to become a regulated
21 handler.

22 Q. Depending upon whether or not what we wants to end up
23 doing is to continue to milk cows and just go into
24 processing or make whatever change he wants in his
25 business, that costs some kind of money, correct?

1 A. Well if he makes - that's not relevant to a shift to
2 producer-handler, he can change his business however he
3 wants.

4 Q. He can, as can a regulated handler, correct?

5 A. Yes.

6 Q. Okay. Now, I noticed, I've seen it somewhere before,
7 that you did make some changes in Exhibit 59 by asking us
8 to make deletions on what would be the third page and the
9 reason is, essentially, this is -

10 A. This is substantially the same testimony that I gave
11 in Phoenix with respect to the same issue in the
12 Arizona/Las Vegas market and the Pacific Northwest market.

13 As I said, we are testifying here because this is an issue
14 of national significance, it is a national issue and it's
15 being addressed order by order but the arguments are
16 identical across the country.

17 Q. You would like to change the producer-handler
18 regulations currently to put in a 3 million hard cap per
19 month in every one of the federal orders out there,
20 correct?

21 A. We support a 3 million cap, that's correct.

22 Q. Now, I want to look at some of your tables because I
23 really don't understand a couple of things and maybe you
24 can help me.

25 Let's take a look at Table 1, in Exhibit No. 59.

1 This is to represent processing costs of fluid milk plants
2 by size and the top, the monthly volume, is the size of
3 what you have underneath it, correct. You've got, for
4 example, the second one in would be 2 million, the third 5
5 million, the fourth 12 million, etc. Correct?

6 A. Correct.

7 Q. Now, you had -

8 A. Each line identifies it's own volumes. That is to
9 say, there are pairs of lines. You can't go down the
10 column. It's not 12 million pounds all the way down that
11 fourth column. It's 12 million, 12 million, 27.7 and 14
12 and 15, those are not - it's not an integrated table. They
13 are identified line by line however the graph is integrated
14 in the sense that the graph is all put together on the same
15 scale.

16 Q. By the way, I see that there are lines that are
17 represented in the graph, since you brought that up, and
18 there appears to be one solid like in the middle, that's
19 your line isn't it?

20 A. That is the - a fitted regression to the (inaudible)
21 numbers from Federal Order 7, not for Federal Order 5.

22 Q. So that's the Cryan line, then, that solid line,
23 right?

24 A. No, it's a exponential trend line.

25 Q. But you put it in there, it's your line, right?

1 A. I added the line but it's a statistical, it's a series
2 of statistics based on the numbers that are in there and I
3 did read Dr. Knudsen's study and he said -

4 Q. I didn't ask you about that - Your Honor?

5 WITNESS: Am I allowed to?

6 MR. RICCIARDI: I didn't interrupt him, Judge.

7 THE COURT: Wait a second. I think we will
8 restrict the testimony to the question. Ask another
9 question.

10 MR. RICCIARDI: Thank you, I will.

11 WITNESS: I'm sorry, Your Honor, can I ask you a
12 question?

13 THE COURT: Yes.

14 WITNESS: This is an explanation of the line that
15 he's asking me about. He's indicated that it's my line -

16 THE COURT: Yes, but it's cross examination, he
17 asked you a question. We're going to let him do a certain
18 amount of cross examination. We're won't cut you off,
19 you'll be able to explain.

20 WITNESS: Okay, thank you.

21 THE COURT: It's just that we want him to have
22 his (inaudible).

23 MR. RICCIARDI: Exactly, Judge, thanks.

24 Q. With regard to the information in Table 1 - that is
25 information that you simply took from Mr. Herbein's

1 testimony, correct? That's not any data that you went
2 ahead and prepared. It's his information, correct?

3 A. Those are Mr. Herbein's numbers which, I believe, are
4 the best available.

5 Q. I didn't ask that. All I'm asking you is, are those
6 the numbers you took, that's all I asked you, correct?
7 That's what I want you to tell me. Those are his numbers,
8 right

9 A. That's right.

10 Q. Okay, thanks. Appreciate it.

11 Herbein, under 2 million has got cost for Federal
12 Order 5 of .585. What does that represent, as you
13 understand it?

14 A. Those are processing costs per gallon.

15 Q. And down at 7 he's got .95, excuse me, .595, what is
16 that?

17 A. Processing costs per gallon for a 2 million pound
18 plant.

19 Q. And Cornell, the next line, .447, what is that?

20 A. That's the processing cost, per gallon, for a 13.3
21 million plant.

22 Q. So, if we try to match up the figures under Mr.
23 Herbein's report with the Cornell study, we don't match them
24 up line by line. We can't, can we because Cornell started
25 with 13 million, right?

1 A. They match up on the graph.

2 Q. I'm asking you right here, on this line -

3 A. I explained the table to you, I'm sorry you don't
4 understand it.

5 Q. Let me see if I can help you out. With regard to the
6 cost under 2 million, which is basically 58¢, are you
7 telling us then that the Cornell study at 44¢ matches up
8 with that particular number by Mr. Herbein?

9 A. I'm sorry you don't understand the tables, I'll explain
10 it again.

11 Q. I'm not asking you -

12 A. Each pair of lines is a separate, can be thought of as
13 a separate table. It is not an integrated table, column by
14 column.

15 Q. I'm not asking you that - let me start again.

16 THE COURT: Well, I think -

17 WITNESS: Your Honor, he's harassing me.

18 THE COURT: I think what he's stating is correct,
19 he's explaining how the table is almost two tables,
20 superimposed. Go ahead, sir.

21 Q. Then let's take the number of 44¢ under the 13.3
22 million monthly value under Cornell and compare it over to
23 the 12 million number that Mr. Herbein has. Are those
24 close enough to be able to make a comparison?

25 A. As I said, the numbers are slightly different.

1 There's a few items there that are put in one but not the
2 other. I'm not sure if I have that with me or not.

3 However, a comparison of what I have asked to be
4 included in the record with Mr. Herbein, what Mr. Herbein
5 has provided will clarify that.

6 Q. Well it looks to me, as a read these tables as you've
7 put them together, that Mr. Herbein has overstated the
8 costs if you compare them to the Cornell study?

9 A. As I said, it's not entirely the same costs that are
10 being considered.

11 Q. How do you know?

12 A. Because I've read both of the studies, I've looked at
13 both of the studies. I don't have it front of me but they
14 are different.

15 Q. So in what way are they different? Did one add in
16 other costs and one subtract other costs, do you have
17 transportation costs in, for example, that may not be in
18 the other numbers?

19 A. Mr. Herbein's - I don't remember what the differences
20 are but there are differences. The Cornell study does not
21 include all the same items that Herbein included.

22 Q. But if we compared them, just numbers to numbers, we'd
23 have the fact that Mr. Herbein overstated his costs by a
24 significant amount from the Cornell study, correct? If we
25 just looked at those numbers, one by one, they would be

1 overstated in Mr. Herbein's study?

2 A. If they were the same - if they represented the same
3 set of costs but they do not, so I would not say that, I
4 would not say that at all.

5 Q. Well you would say it if the costs were identical.

6 A. If the costs were identical and they represented two
7 sets of numbers then I would not say that they were in
8 line.

9 Q. Okay. One of the justifications that you provide for
10 the 3 million hard cap is the fluid milk promotion
11 assessment. Isn't it true that that's a different
12 regulatory scheme, it has nothing to do with setting milk
13 prices and federal orders?

14 A. It is my understanding that the Supreme Court has tied
15 those together through its justification for the
16 constitutionality of promotion programs, that the promotion
17 programs are constitutional in the context of a larger
18 regulatory scheme and in that sense they are effectively
19 part of the same program.

20 Q. Well, I'm not asking whether it's constitutional, what
21 I'm getting at is simply this, there are different
22 regulatory schemes between federal milk promotion
23 assessments and federal orders and minimum prices. It's
24 different.

25 A. The fluid milk promotion program is in order. It is

1 similar in many ways in its origins and its operation and I
2 think it's an irrelevant point. However, I would not
3 consider it to be the overriding point. I think that the
4 main point is the issue of the cost advantages.

5 Q. We've had this discussion before, let's get back to it,
6 the fact is at federal order reform a request was made to
7 change the rules with regard to producer-handlers and the
8 federal record will show that the secretary declined to do
9 that, correct?

10 A. The Secretary attempted to minimize the regulatory
11 changes on individual plants because of the large scale of
12 this, of the reform. As a result, there was an attempt to
13 not shift distributing plants to supply plants, or supply
14 plants to unregulated plants, or producer-handlers to
15 something else. There was an attempt to limit the changing
16 in regulation of individual plants because it was such a
17 substantial -

18 THE COURT: Let me say, I don't really think this
19 is a proper area for testimony. I think you're going to
20 have to look at whatever the Secretary said, whatever he
21 put down on the decision and that's where you find his
22 intent. I don't think we're going to try and psychoanalyze
23 the Secretary.

24 MR. RICCIARDI: And, Your Honor, and the reason I
25 brought it up was because of his testimony. I wanted to

1 cross examine the point and I would also say - let me just
2 make one more question on this area.

3 Q. You would agree with the Judge that whatever is in
4 this record, in the federal record, is what the intent of
5 the Secretary is, not your recollection of it. Correct?

6 THE COURT: Frankly, even he doesn't agree, it
7 doesn't matter.

8 MR. RICCIARDI: That's the way it is.

9 THE COURT: That's the way it is. We'll look at
10 what's on the paper, nothing else.

11 MR. RICCIARDI: And, Your Honor, I don't have
12 that particular page of the record.

13 THE COURT: You'll cite it in your brief.

14 MR. RICCIARDI: I will.

15 THE COURT: And the other side will cite it in
16 theirs?

17 WITNESS: I believe that the record indicates
18 that the Secretary made an effort to limit the shifting of
19 regulation individual plants and I believe that the record
20 will bear that out and I believe that's consistent with -

21 THE COURT: That's what I'm saying. We'll look at
22 the record and see what it is.

23 MR. RICCIARDI: We'll look at the record. If I
24 had it here I'd testify like I did before but I won't so
25 we'll get the record when we argue it.

1 Q. Now, you had difficulty in finding a transfer price
2 because, quite frankly, there is no arms length transaction,
3 no transfer of milk between the producer's side and the handlers
4 side when there's a producer-handler, correct?

5 A. By definition of transfer price is a price to define a
6 shifting of a resource within a (inaudible), so of course
7 there's no - a transfer price - you do not have a transfer
8 price when you have an arm's length transaction. The
9 transfer price is the value of something going within a
10 firm.

11 Q. And the fact is that there is no transfer and no arm's
12 length transaction when a producer takes his milk from the
13 farm to the plant, correct?

14 A. Which is exactly why there's a transfer price and not
15 a price, not a market price or a transaction price.

16 Q. There's no market price because there's no arm's length
17 transaction, correct?

18 A. There is a market price and that's the appropriate
19 measurement for, when a project is analyzed if a CPA was to
20 sit down with a producer-handler and discuss the parts of
21 the enterprise, to consider who's making a profit, which
22 parts are making a profit and which isn't, which is typical
23 for a firm to look at different divisions and isolate the
24 profitability. Some transfer price has to be established
25 between the two parts of the firm so you can do that. If

1 you say that the milk is free to the processing plant then
2 the processing plant is making a fortune and the producer
3 is losing money, you know, beyond imagination.

4 Q. Let's leave the issue of accountants out for a minute.

5 If we have one integrated entity, a producer-handler.

6 When the milk goes from the farm to the processing plant

7 there is no fail or arm's length transaction, correct?

8 A. That's correct.

9 Q. Thanks.

10 THE COURT: Any other questions. Mr. English?

11 WITNESS: Would this be a good time for me to

12 clarify the -

13 THE COURT: He's going to help you. I think.

14 MR. ENGLISH: I suspect I might.

15 THE COURT: All right, Mr. English.

16 MR. ENGLISH: First, I'm not sure if this has

17 been done yet, Your Honor, I would move, on behalf of this

18 witness, admission of Exhibit No. 59 and the attached

19 tables.

20 THE COURT: All right, they're received.

21 (Whereupon, the document referred to, having been

22 previously identified as Exhibit No. 59 and attached

23 tables, was admitted into evidence.)

24 THE COURT: He wants some help to clarify -

25 MR. ENGLISH: I'm going to ask him about Table 1.

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EXAMINATION

BY MR. ENGLISH:

Q. You were asked a number of questions by Mr. Ricciardi about Table 1 and I'll try to take them apart and if I miss something at the end we can attach.

What was it that you were attempting to show in the line that you call the fitted line?

A. I was attempting to show the general shape of the relationship between cost and size, as demonstrated by Mr. Herbein's numbers.

I'd like to clarify - I stated this in my testimony in Phoenix that this is not the ideal number, these are not the ideal numbers to fit an equation to because they are they are a set of aggregates. That the ideal would be to have all of the individual plant numbers (inaudible) to that.

I stated that in my testimony in Phoenix in a previous proceeding. A rebuttal witness made quite a point about that but, as I said, I recognize the limitation of that fit, however, as we have all heard, Mr. Herbein has an advocacy to his clients to retain their confidentiality and the numbers that I had access to I made use of as I could.

Q. And during your response to Mr. Ricciardi, which because of the nature of cross of examination was cut off,

1 you referenced, I think, the name of a witness, Dr. Kinest,
2 was that what you were going to say, was there anything
3 else you wanted to say about his analysis of plot or your
4 analysis with respect to this table or is that what you
5 were going to say.

6 A. That's all I was going to say.

7 Q. Then, similarly, as to the Cornell line, what is it
8 that the dotted line below 10 million pounds, how should
9 that be described in your words?

10 A. The dotted line represents just an extension of the
11 equation beyond the range of the data, Cornell data.
12 Cornell's data was based on plants dealing with down to
13 somewhere around the end of that line. I thought it 13
14 something was the smallest but there might have been
15 smaller. I think it was 13 million.

16 So, in effect, that dotted line is the Cornell
17 equation being extended beyond the range of their data
18 which, again, it's in there for what it's worth but
19 statistically that extrapolation, that dotted part, is not
20 as valid as the part over the data, the equation over the
21 range of the data is meaningful, much more meaningful.

22 Q. And the equation of the range of the data, does that
23 appear on the chart?

24 A. Pretty much the whole range of the data. I think the
25 range is the same range I have on the table. 13.3 million

1 to 51.4 million. That's essentially the range that the
2 solid line shows.

3 Q. And the equation, does that appear on the chart or
4 not?

5 A. It does not.

6 Q. Okay. That's okay.

7 Just for clarification, what is the $Y = 0.6718x$
8 to the -0.1316 ?

9 A. That's the equation for Herbein Federal Order 5.

10 Q. Is there anything else about Table 1 that you'd like
11 to add?

12 A. I would - I guess I would just - I guess I'll indicate
13 that the equation, the Cornell equation, is $y = 2.68$ and
14 2131 times x raised to the power of negative $.81$. Shall I
15 say that again.

16 THE COURT: That clarified it for me.

17 A. I'd also say that the reason the Cornell equation is
18 there is not because it's necessarily relevant to the
19 specific facts of the current market but it there to show
20 its similarity to Mr. Herbein's results. To show the
21 essential consistency of the principle of increasing
22 economy as a scale for milk processing.

23 Q. A couple last questions. I'm not sure what was meant
24 by the last question by Mr. Ricciardi but he said taking
25 out accountants for a moment, is the term transfer price an

1 economics term?

2 A. It is an economics terms and it is a term that's
3 applied by accountants because it has to be. One example
4 of way transfer prices are used is setting a price for
5 purposes of finding a tax in one jurisdiction or another.
6 If the company owns a Unit - if a company owns a plant - a
7 raw material supply in Canada and a processing plant in the
8 United States then some price has to be established for the
9 shipment between, for the difference in the movement from
10 one part of the plant to the other, even within the
11 jurisdiction. If one part of a plant, if one part of the
12 business has some sort of tax exemption or some sort of tax
13 incentive, a transfer price has to be defined, going from
14 one part to the other, even if it's in the same building.

15 Most typically you would use the market price for
16 that good as the transfer price. The difficulty with this,
17 for a producer-handler is specifically the producer-handler
18 exemption, the issue that a plant in the market, other
19 processing plants pay one price and producers get a lower
20 price. Because that gap is eliminated, the fact that that
21 gap is eliminated for producer-handlers complicates the
22 analysis of defining the transfer price and is also the
23 crux of this testimony, of this issue, this producer-
24 handler issue.

25 Q. To the extent you've used the term transfer price,

1 you've used it as you have been educated as an economist?

2 A. That's right.

3 Q. Do you have any other clarifications you want to add
4 to your testimony?

5 A. I believe, no I think I'm done.

6 Q. Thank you so much.

7 A. Thank you.

8 THE COURT: Mr. Beshore.

9 EXAMINATION

10 BY MR. BESHORE:

11 Q. Good afternoon, Dr. Cryan. I thank you for coming
12 here to Atlanta today.

13 A. Thank you.

14 Q. I'm going to ask you just a couple questions about the
15 series of documents listed in your statement, Exhibit 59,
16 from which you requested official notice to be taken, and
17 for which official notice was taken.

18 Is one of those documents what you've referred to
19 as the Cornell Study?

20 A. Yes, I'm sorry it is.

21 Q. And which document is that?

22 A. The source for all the discussion of numbers from
23 Cornell, all the numbers associated with Cornell in my
24 testimony are derived from that publication.

25 Q. Which is the first publication on your list, is that

1 correct?

2 A. That's right. The first publication, actually what
3 looks like two items is really one item. It's a typo that
4 there a line break in between.

5 Q. Okay. And that's the study by Eric Erba, Richard
6 Aplin, and Mark Stephenson?

7 A. That's correct.

8 Q. Okay. Now is one of the publications, one of the
9 documents on your official notice list, what you've
10 referred to as the main study, or main report?

11 A. Yes. The second item, Dalton, Criner and Halloran I
12 identify as the main study for 2002. I don't recall
13 whether the 1994 numbers are in that. I don't have the 1994
14 study listed, however, it's referenced in the 2002 study.
15 I don't know whether that adds it to the record but I don't
16 think it matters very much. 1994 study only two points.

17 Q. Okay, so the Dalton, Criner and Halloran publication
18 is the main report that provided 2001 data.

19 A. Right, 2001.

20 Q. And the data from that report, Plant Cost Data is
21 plotted on your Table 1 which you've just reviewed with,
22 discussed with Mr. Ricciardi?

23 A. Yes.

24 Q. There's also May 1994 and your - do I understand you
25 to say that the date - the information in May 1994 study

1 may be republished or reproduced in the Maine 2002 study?

2 A. I don't know if the 1994 numbers are published in the
3 2001 but I do know that the records for that study are in
4 the bibliography for the 2001 study. These are publication
5 dates, not dates.

6 Q. Okay.

7 A. May 2001 is the publication and here it's 2002 but
8 this research bulletin was based on it's published in 2001
9 and 2002 is the same information

10 Q. Okay. Do you know if those studies, the main study
11 and the Cornell study were subject to what's been referred
12 to as peer review before they were published?

13 A. The Maine study certainly was since it was published
14 in the Journal of Dairy Science, which is a peer review
15 journal. I don't recall whether or not the Cornell study -
16 the Cornell study, as published here I would assume was not
17 subject to peer review because it's an internal document.
18 It's a department bulletin. But, if they published those
19 results in a Journal in the meantime, then that would have
20 been subject to peer review.

21 Q. Okay. In the economics profession - by the way, you
22 don't require a license for any governmental authority to
23 be an accountant, is that correct?

24 A. No.

25 Q. Okay, but so the function of peer review in the

1 economics profession is different than it is in the
2 accounting profession as Mr. -

3 A. Peer review is essentially an academic practice. It's
4 not - it has more to do with the - a peer review doesn't
5 involve double checking the numbers. I don't think that's a
6 normal practice.

7 Q. You mean the kind of peer review that Dr. Knudsen
8 talked about doesn't involve double checking any numbers?

9 A. No. Academic peer review in economics does not
10 involve getting the raw data and double checking it. It
11 involves reading the paper and understanding it. The
12 arguments here are reasonable that the methodology was
13 correctly applied to the extent that it is demonstrated in
14 the paper but that doesn't mean that the - that does not
15 mean that anybody checked or double checked the raw
16 numbers.

17 Q. So, theoretically a paper could pass peer review for
18 methodology and didactic presentation of arguments but not
19 have correct -

20 A. I certainly don't mean to imply that it's a standard
21 practice to phony up the numbers for an economic standpoint
22 -

23 Q. I didn't mind to imply it either. Okay, that's not
24 just part of the review?

25 A. No. There are mistakes, it's not uncommon for

1 programming mistakes - a lot of methodology is now - a lot
2 academic papers are very mathematically involved, involve a
3 lot of computation and computer mistakes have been known to
4 lead to wrong results. But again, I don't know that that
5 is relevant to our discussion here.

6 Q. Okay now Mr. Ricciardi explored with you the nominal
7 or the differences in the per gallon numbers on your Table
8 1, at various volumes Herbein vs Cornell. Do you recall
9 that and you responded in part by indicating that there was
10 some differences in the components of the numbers, as you
11 recall?

12 A. Correct, and those differences should be - they should
13 be on the record -

14 Q. In Phoenix?

15 A. No, from this proceeding from examination of the
16 Cornell Paper and Mr. Irvin's submissions.

17 Q. Okay, let me read to you from Page 35 of the Cornell
18 study, just one sentence and see if this is part of what
19 you were referring to.

20 This is under the heading Plant Cost Per Gallon.
21 We did not (in bold in the publication) we did not include
22 the cost of labor for Blum- cost of packaging materials,
23 cost of ingredients, depreciation expenses on equipment and
24 structures, cost of distribution, selling expenses and
25 general and administrative expenses in the calculations of

1 cost per gallon.

2 Are those some of the items that, as Mr. Herbein's
3 testimony, in this record, discloses. He included some of
4 those that were excluded from the Cornell numbers.

5 A. I need to look at it again to make sure that those,
6 that that was - that the numbers that are being described,
7 with those exclusions, are the same numbers that I was
8 using. They did several - they did labor productivity and
9 I think they did something with a couple of those crossed
10 (inaudible) but not all of them. And I believe all of
11 those costs are included in Mr. Herbein's numbers.

12 Q. At least those that he identified in his testimony
13 were included, certainly were included.

14 A. Yes.

15 Q. Okay. I have no further questions. Thank you, Dr.
16 Cryan.

17 A. Thank you.

18 THE COURT: Anyone else. You're excused, sir.
19 Thank you very much.

20 (Witness is excused.)

21 THE COURT: Off the record.

22 (OFF THE RECORD.)

23 THE COURT: Back on the record.

24 Mr. Hollon is back on the stand, Mr. Beshore is
25 about to question him.

1 Mr. Beshore, we've given him some materials, we've
2 given them some numbers, his testimony is going to be
3 Exhibit 60, a table called Table A-1, is going to be
4 Exhibit 61,

5 MR. BESHORE: First Page which is Table A-1, a
6 multi-page exhibit.

7 THE COURT: The next one is - well, why don't you
8 explain them, go ahead.

9 MR. BESHORE: We've pre-marked four documents.
10 Exhibit No. 60 is Mr. Hollon's statement.

11 (Whereupon, the exhibit referred to was marked for
12 identification as Exhibit No. 60.)

13 Exhibit No. 61 is a multi-page set of tables
14 which begin with Table A-1 and goes through Table 11 and a
15 final unnumbered table.

16 (Whereupon, the exhibit referred to was marked for
17 identification as Exhibit No. 61.)

18 Exhibit No. 62 is a three page document,
19 Producers Structure and Federal Milk Orders, May 2001.

20 (Whereupon, the exhibit referred to was marked for
21 identification as Exhibit No. 62.)

22 Exhibit No. 63 is a two page set of - a two page
23 document from an economic research service, USDA
24 publication, September 2002.

25 (Whereupon, the exhibit referred to was marked for

1 identification as Exhibit No. 63.)

2 And Mr. Hollon will refer to the exhibits in the
3 course of his testimony. Before he presents his statement,
4 I would like to briefly have him describe the exhibits to
5 place some context in the - references to them in his
6 statement, if we might.

7 Whereupon,

8 ELVIN HOLLON

9 Having been previously duly sworn was recalled as a witness
10 herein and was examined as follows:

11 EXAMINATION

12 BY MR. BESHORE:

13 Q. So, Mr. Hollon, could we turn to Exhibit No. 61.

14 THE COURT: Well, give your name again, just so
15 we have it in place.

16 WITNESS: My name is Elvin Hollon.

17 Q. You've previously testified in this proceeding?

18 A. I have.

19 Q. And you've identified yourself and we won't go through
20 any of this again.

21 Let's start with what's been marked as Exhibit
22 61.

23 A. Okay.

24 Q. Let's start with what's been identified as Table A-1,
25 the first two pages of Exhibit 61. Could you tell us what

1 that document is?

2 A. Table A-1 is a comparison of the Class I price and the
3 Blue Price of Federal Order 5 for each month of the years
4 2001, 02 and 03. Class I price and the (inaudible) price
5 come from Market Administrator information and I earlier
6 put in the record by Mr. Gooch, subtraction for the
7 difference and divisor by a gallon ratio to get the per
8 gallon difference average for the year. January's average
9 difference per 100 weight was 68¢ per 100 weight, 5.9¢ per
10 gallon and those calculations would be the same for each of
11 the remaining years.

12 Table A2 is the identical type of comparison of
13 Federal Order 7. The data comes from the information put
14 into the record by Mr. Duprey on Class I price and
15 (inaudible) price. The calculations are the same so for
16 2000 the average monthly difference was \$1.03 and the
17 difference between Class I price and (inaudible), the Class
18 I price being higher and the average on per gallon basis
19 was 8.8¢.

20 Table B is a summary of data discussed a little
21 more fully in my testimony but it comes from information
22 that we got from the Information Resources, Inc. an
23 industry that reports data from grocery store sales. They
24 have a data base that they publish information out of
25 regularly and that you can purchase data from. We got data

1 relative to grocery store sales of fluid milk and we
2 attempted to some computations based on those - that data
3 at the average day sales and this data simply - that 30
4 million pound producer-handler would be selling a thousand
5 or a million pounds a day, 116 thousand gallons or 25.8
6 trailer loads per day and these are all conversions that
7 are pretty standard in the industry.

8 Q. If you would turn then to the next part of Exhibit 61,
9 a two page table labeled as C-1.

10 A. Table C-1 is a calculation made for Federal Order 5.
11 All of the numbers on the first page of Table C-1 come from
12 published Market Administrator sources, the Butterfat and
13 Producer Milk, the Butterfat in Class I are published every
14 month. This would be again data provided by Mr. Gooch, and
15 it's a part of his regular submission. The various uniform
16 skim price or blend price, uniform skim price, uniform
17 butterfat price, Class III and IV price, Class III skim,
18 Class III butterfat, Class IV skim, Class IV butterfat,
19 those are all regular monthly Market Administrator
20 publications.

21 The last two columns - the choice between Class
22 III and Class IV, what's the lowest skim price and the
23 butterfat price is the same.

24 The next Table, the next page, continues this
25 computation for Federal Order 5 and all of these numbers,

1 except IV, the producer-handler blend which is near the far
2 right and the uniform price test, those are numbers again
3 provided by Mr. Gooch, but every other number on the page
4 is a calculation.

5 The purpose of this table is to try and get some
6 estimate of a producer-handlers balancing costs, the
7 assumption that underlie this table is, first of all, that
8 a producer-handler would have a 90% Class I utilization in
9 his plant, that is very near the average for the order,
10 based on our SMA experience of the Class I customers that
11 we market to.

12 So, if you had a 10 million pound producer milk,
13 and the 10 million - you could use one pound or a billion
14 pounds but the ratios work out to be the same. So if you
15 had a 10 million pound producer, based on the average in
16 the market, you'd have 379,000 pounds of butterfat. You
17 subtract that from the 10 million and you'd have 9,621,000
18 pounds of skim. If you were a 90% Class I customer you'd be
19 selling nine thousand pounds or 9 million pounds of Class
20 I. You'd have an appropriate multiplication for the pounds
21 of Class I skim and butterfat. The remaining 10% you would
22 have so much skim and so much butterfat so that would be
23 your product sales mix. So those would be quantities.

24 If you take the prices from the first page, Class
25 I Skim times the Class I Skim pounds, Class I Butterfat

1 times the Class I Butterfat, you extend all those
2 multiplications across the page for his presumed 90/10
3 allocation and that he was able to market or he sold his
4 surplus at the lowest of all the Class III skim price or
5 Class IV skim and butterfat, he would have a gross value -
6 a test in this in January of 2000 of \$1,324,317. Divide
7 that back by the pounds of producer milk and that he would
8 have in his hand a producer-handler blend of \$13.24. If he
9 elected not to be a producer-handler instead a regulated
10 handler or make the farm side of his plant also be a
11 producer on the order, he would have a blend of \$13.57, so
12 that difference is what, in this hypothetical situation,
13 they gave up 33¢ a hundredweight.

14 If you perform that calculation all the way
15 through you would get for the calendar year 2000 an average
16 of 31¢ a hundred weight or 2.7¢ per gallon.

17 Q. And that's an estimate of a balance in cost?

18 A. An estimate of a balance in cost, again assuming that
19 the return is the Class price and then the lowest option at
20 Class price.

21 Q. Okay. Turning to the next 2 page table, Exhibit 61,
22 table C-2.

23 A. All of those same types of calculations would be
24 repeated. The exception being the effective prices would
25 be the Order 7 prices, instead of the Order 5 prices.

1 Q. So it's the same as C-1 except it's for Order 7 rather
2 than Order 5?

3 A. That's correct.

4 Q. Okay. The next one page exhibit, Table D.

5 Q. Table D is data that we gathered from the Market
6 Administrator data on the listing of plants. We asked each
7 Market Administrator office to furnish us, and we also went
8 to the internet and looked at the published data for the
9 plants that were listed as producer-handlers for exempt
10 plants.

11 We then went into each of the markets and talked
12 to our own marketing people and identified, from that list
13 some who were listed as exempt were - their business was
14 producer-handlers so we've got those listed for the month,
15 I think this was May of 2003 where we had some business
16 relationship, which was not a lot with producer-handlers in
17 this market. We did not have enough relationship to get
18 any greater estimate of the size, other than from Maple
19 View Farms in Federal Order 5, they were greater than 150
20 thousand pounds because they were listed as a producer-
21 handler, not an exempt plant.

22 The remaining businesses that we identified
23 through our information in the marketplace as being
24 producer-handlers, the only volume information that we
25 could come to was that they were less than 150 thousand

1 pounds. So again, these were the listings for the month of
2 May 2003, in Federal Order 5 and 7.

3 I think it's probably worthwhile to point out, at
4 this point, it may forestall a question or two, that across
5 the Federal Order reporting process there's not necessarily
6 an absolute definition that each Market Administrator has
7 to adhere to as to how they may report a producer-handler
8 or an exempt plant. So, some Market Administrators may
9 actually report producer-handlers because that's their
10 business makeup, whether they're greater or lesser than 150
11 thousand pounds. Some choose to report them as an exempt
12 plant because they're smaller than that volume, even though
13 their business makeup may be a producer-handler.

14 There was some questions of, I think, both Mr.
15 Gooch and Mr. Duprey on Monday about that fact and they
16 agreed that that was true, that there could be businesses,
17 for example in Order 7, the College of the Ozarks is
18 clearly a government or a university but it's listed with
19 these plants. So, we've sorted out here those differences.

20 Q. Okay. There were two other producer-handlers reported
21 on the handler list for Federal 7.

22 A. That is true, I should have included them, I did not.

23 Q. Well those two were - do you remember who they were?

24 A. Braum's Dairy and Martin's Dairy. Those farms/plant
25 operations are not located in the boundaries of over 7,

1 they're located in boundaries of over 32 but they
2 nonetheless market into Order 7.

3 Q. Route disposition No. 7?

4 A. Route disposition No. 7.

5 Q. Do you have any estimates from DFA, personnel or other
6 industry information with respect to the size of those
7 producer-handlers?

8 A. The Braums operation is somewhere in the range of 12
9 million pounds of milk a month.

10 MR. RICCIARDI: Your Honor, I have a problem.
11 The problem is, now I have estimates and I realize we're
12 now using hearsay. We've got now, one or two levels of
13 hearsay. I have no idea and I can't cross examine what he's
14 just testifying about concerning what their volume is
15 because Braums isn't here, somebody reporting that the
16 Braums - and whether or not some guy in the field somewhere
17 is picking up the phone and telling him. That's not the
18 kind of information that the Secretary should rely upon and
19 not the kind of information that I should have to cross
20 examine without having them here and I move to strike that.

21 MR. BESHORE: One response, with respect to
22 Braums they testified in the other proceeding, which is a
23 matter of public record and provided at least some
24 information that allows people, knowledgeable people in the
25 industry to have a very good estimate of their production.

1 THE COURT: Are we saying they're less than 150
2 thousand pounds?

3 WITNESS: No, sir, Braums is in the range of 12
4 million pounds of milk and Martin Dairy in the range of 1
5 million.

6 THE COURT: How do you know that?

7 WITNESS: One is through industry contact, the
8 other is through publications, (inaudible) and the number
9 of animals on their farm. The other is to the nature of
10 their businesses. They own some 300 businesses.

11 THE COURT: I won't strike it. I'll allow that
12 this is what witness's knowledge is. Of course, the real
13 numbers should be known to the Market Administrator in the
14 government.

15 MR. RICCIARDI: They may or they may not be Judge
16 and they may and they may not be part of this hearing.

17 I'll also tell you, based upon the information
18 requested by Mr. English, as I recall, when Braums was, in
19 fact, one of three, there was all of about a million pounds
20 in those three months so how in the world can we have 12
21 million pounds when, if they're one of three, the total for
22 that month was 1 million

23 MR. BESHORE: I don't know whether Mr. Ricciardi
24 is trying to intentionally confuse the record, but he's
25 comparing apples to oranges. Mr. Hollon can explain that

1 readily.

2 MR. RICCIARDI: My intention is not trying to do
3 anything. I'm just trying to get some information.

4 THE COURT: Well I just want to make sure the
5 record is clear. Can you explain that?

6 WITNESS: Yes, sir.

7 THE COURT: Go ahead, sir.

8 WITNESS: The information that was offered and
9 provided was the pounds that were told by those three into
10 federal order 7 so that would be a subset of Braums, and in
11 that case Martin Dairy and whoever the third one was.

12 MR. BESHORE: Promise Land Dairy.

13 WITNESS: Promise Land Dairy in that particular
14 month.

15 THE COURT: Well I'm not going to strike it, I'm
16 going to allow it. Your objection is overruled.

17 Q. And do you have an estimate, Mr. Hollon, for the size
18 of the Martin's Dairy in Humansville, Missouri?

19 A. Approximately a million pounds per month.

20 Q. Okay. Would you turn then to Table E of Exhibit 61
21 and tell us what that represents.

22 A. Tables E and F go together. Table E represents
23 information that I solicited from each market Administrator
24 Office. I asked them, in advance of the producer-handler,
25 series of producer-handler hearings to provide me with

1 information where they could and chose to with regards to
2 the number of producer-handlers in the market, and so they
3 gave me both a count and again a list just like has been
4 provided in this record so I was able to count through
5 those.

6 I asked them to provide me with a percentage of
7 the market Class I held by all producer-handlers in the
8 market and you can see in Federal Order 5 there was - ran
9 through the restriction limitation as was pointed out on
10 Monday, where there were too fee handlers to report.

11 On Federal Order 33, the Market Administrator -
12 there were more producer-handlers but the Market
13 Administrator chose to restrict that information.

14 And Federal Order 131, there were too few
15 handlers to report.

16 I also asked them for the average monthly Class I
17 volume for all producer-handlers in the market and the
18 information that I got from the various Market
19 Administrators who were able, or chose to give to me data
20 and then the average monthly Class I volume for the medium
21 sized producer handler in the market. And again, the data
22 that I got from those who provided it to me.

23 MR. RICCIARDI: A point of clarification, Your
24 Honor, on Table E so we can hopefully save some time.

25 Federal Order 6 and 7 is combined. All the other

1 ones are separated out, in terms of the number of producer-
2 handlers in the market and I wonder if that was intentional
3 or an oversight. Perhaps we can get that corrected so I
4 don't have to go through that point on cross examination.

5 THE COURT: Can you explain why there is a
6 combination of 6 and 7?

7 WITNESS: That was the way that they reported it.

8 THE COURT: Anybody know why? Who reported it,
9 the Market Administrator?

10 WITNESS: Yes. I think the answer is that there
11 is only one in Federal Order 6 so it's a frequent practice
12 to combine data where there may be - , for example, in the
13 tables when they were going back and forth about the pounds
14 of production and there was an other column, that's a
15 pretty frequent occurrence and so I think that's the reason
16 for this.

17 THE COURT: Well, that's his understanding and if
18 we need to go further I think somebody from the Government
19 can be asked that.

20 All right, go ahead.

21 Q. Was that all you had with respect to Tables E and F?

22 A. Table F continues, I further asked each of the Market
23 Administrator offices to take the data that they had given
24 me and if there were a sufficient number of producer-
25 handlers to divide them into groups, into thirds and give

1 me some descriptive statistics for each of the groupings.

2 So for the information that I - for those who
3 responded, that's the data that's out there. There was one
4 Market Administrator on 126 who responded that their data
5 was not able to be done by thirds but they did by halves,
6 so they had a combination of small and medium is the way
7 they marked it.

8 So that data did begin to give me some idea of
9 what the average size producer-handler was in the country
10 and some idea of the extremes, what were the large and what
11 were the small.

12 Q. Okay, Exhibit 61, Table G is a one page. Do G & H go
13 together.

14 A. Yes, that's correct.

15 Q. Okay, could you describe 61G and H then.

16 A. No. 61G and H is the same type of request for data of
17 each of the Market Administrator office with regard to the
18 distributing plants in their market.

19 So, in E & F I asked for data about the producer-
20 handler operations and in G I asked for data about pool
21 distributing plant. So each of them gave me numbers and
22 again, go back to the tables and add up those numbers that
23 they gave, the percentage of markets Class I share, held by
24 all distributing plants, the average monthly volume for all
25 distributing plants, many gave me information on the medium

1 size of all distributing plants.

2 Then I also went back and asked them to break
3 down the distributing plants by the same, third, third,
4 third and got data from each market again except Federal
5 131 where they was too small a number to report.

6 For example, the first block, average monthly
7 Class I volume for the smallest one third grouping of all 7
8 8 plants in the market, Federal Order 1, how many plants
9 that was the average monthly Class I volume was 1,725,000,
10 the Federal Order 32 had the largest average was 6.7
11 million. That holds all the way through. The last three
12 columns deal with percentages of Class I held by each of
13 the groupings.

14 This then gave me some idea of the average size,
15 and small and large distributing plants across the entire
16 (inaudible).

17 Q. Okay, now the next two pages of Exhibit 61 is a data
18 set, two pages, titled Table 11. Can you identify that
19 please?

20 A. Table 11 was information provided by the Arizona/Las
21 Vegas Market Administrator. It's something that's published
22 by the Market Administrator. It was also an exhibit that
23 was in the Phoenix hearing on producer-handlers. This
24 exhibit was from Market Administrator data. It's calendar
25 year 2001, 2002 and 2003. This table shows the Class I in

1 area by pool plants. The second column shows Class I in
2 area, and that's pounds of Class I sold in the marketplace
3 by other plants and there is a footnote at the end of the
4 table that points out - Note 2, it says other plants also
5 includes producer-handlers beginning March of 2001. So, as
6 you run your finger down that column you can see in
7 calendar year 2000, your average would be 13 - 14 million
8 pounds of sales. If you run your finger down to 2001, you
9 get January and February and when you get to March you see
10 that the number increases by quite a bit and so the
11 implication there is that the majority of that increase is
12 from the inclusion of producer-handlers into that number.

13 Q. Okay, and the final page of Exhibit 61, in this
14 hearing, is a one page chart entitled Federal Order 131,
15 Estimated Blend Price Calculation.

16 MS. DESKINS: Your Honor. At this point I do
17 have an objection as to relevancy. Unless there's a typo,
18 Table 11 refers to Order 131 and now this next one is also
19 131. I don't see the relevancy for this hearing.

20 MR. RICCIARDI: Your Honor, if I may I'll be
21 joining the objection.

22 THE COURT: All right.

23 MR. RICCIARDI: It is clear that what's really
24 going on here is that the proponents are attempting to re-
25 litigate some things that we are already in process of

1 litigating, 131 and 124. They've now included that they
2 did it already with Mr. Herbein and now included, as Ms. Deskins
3 mentioned, they included Table 11 from the hearing on 131

4 MR. RICCIARDI: What we have is an attempt to
5 basically bootstrap from the ongoing 131 and 124
6 (inaudible). The last two - the last three pages of this
7 exhibit, Table 11 and then the following one, is
8 information that was only related to 131. Now, I know the
9 argument is going to be made, somehow what's going to
10 happen is that that is relevant to this because it's some
11 kind of nationwide problem. Well, the fact is, Judge,
12 that's winking at the problem. The problem here is they
13 have to litigate what's going on in 507. And these pieces
14 of paper, these documents, don't have anything to do with
15 507, they should be excluded.

16 THE COURT: What would you say to that, Mr.
17 Beshore?

18 MR. BESHORE: What I would say to that is that we are
19 not in any way attempting to re-litigate the hearing, which
20 Randall has enclosed, I would note. This has nothing to do
21 with that. What we do - propose to do - in here - attempt
22 to do, I should say, is cite some of the data which
23 documents events that have occurred in the Arizona area to
24 show them, as a case study, of what can and we believe is
25 likely to happen in other markets if regulations are in

1 place to prevent that marketing disorder.

2 Now, this regulation is preventive, we agree.
3 We're not documenting chaos at this time in this order.
4 Just as the proposal that Mr. Ricciardi's client advocates,
5 he's not even a producer handler now, but he wants to
6 change the producer handler regulations here on a
7 prospective basis. That's what we're doing, it's
8 prospective. This is a case study of what can happen if we
9 don't have the regulations we're proposing.

10 THE COURT: How many times has your client
11 produced? The one that we're talking about that couldn't
12 conceivably become a producer handler?

13 MR. RICCIARDI: Less than three nights.

14 THE COURT: Less than three nights, so it
15 wouldn't be knocked out by this at all?

16 MR. RICCIARDI: Oh, no, not at all, Judge. Let
17 me just address the issue.

18 THE COURT: Yes.

19 MR. RICCIARDI: If I get a stipulation that
20 there's no disorderly marketing of 507 that's created by
21 any producer handler - and I'm (inaudible) now, then I will
22 make a motion at this point that without a disorderly
23 marketing that we cannot make any kind of change to 507 in
24 the limitation they're talking about.

25 THE COURT: Well, obviously they're not going to

1 give you that stipulation.

2 MR. RICCIARDI: Well, I think they just did,
3 Judge.

4 THE COURT: Well, I don't think so.

5 MR. ENGLISH: No, we're not, and besides which
6 you're ignoring competitive milk producers and 43 years of
7 law.

8 MR. RICCIARDI: I'd like to find out what their
9 evidence is going to be on disorderly marketing (inaudible)

10 THE COURT: All right.

11 MR. ENGLISH: Allow the testimony to come in and
12 we'll hear it.

13 THE COURT: Let me hear from Mr. English for a
14 moment.

15 MR. ENGLISH: Your Honor, thank you.

16 First of all, I think this is (inaudible) be
17 litigating. This is an administrative proceeding, not
18 litigation. That's why the rules are what they are. And
19 the record is closed and plainly closed as to Orders 124
20 and 131, and that's not what this is about.

21 Let's look for a moment what Table 11 really is
22 about in comparison to the rest of exhibits (inaudible).
23 Immediately prior to Table 11, which is (inaudible), we
24 have a number of tables, E, F and G. All of which have
25 restricted data for Order 131, as opposed to the data in

1 that table to be obtained from non-restriction. 0

2 What Table 11 is, is a non-restrictive version,
3 the best we can get, of what would be available on Tables
4 E, F, G and H for Order 131. Were it to be available.
5 That is why (inaudible). We don't have a breakdown by 130,
6 but we have the total (inaudible) in the area by class.
7 That's the best we can have, because the market
8 administrator is not going to give that.. We don't have
9 the breakdown (inaudible). So, we have at least the
10 breakdown in that column, based upon that material starting
11 to become available for that material.

12 Table 11, thus, is a methodology for completing
13 the material that is missing on Tables E, F and G and H.
14 Therefore, in a way, not allowing it would create
15 incompleteness for the rest of the exhibit.

16 THE COURT: All right. Well, I'm not going to
17 grant the objections or motions at this time. However, you
18 can renew them later after we hear some more evidence. I'm
19 not sure how it's going to be used by the witness. I think
20 the way that Mr. English puts it is very interesting, but
21 I'm not sure if that's the testimony.

22 So, we'll hear from the witness. Go ahead, sir.

23 EXAMINATION

24 BY MR. BESHORE:

25 Q. I think we were on the last page, and maybe - strike

1 that.

2 MR. BESHORE: For purposes of keeping track of
3 these could we take Table 11 and mark that as I, just the
4 next number or next letter in the exhibit. And the last
5 page of Federal Rule 131, ask that be marked as (j). So
6 when we come to them in the statement (inaudible).

7 THE COURT: 61 I will be two pages?

8 MR. BESHORE: Yes.

9 THE COURT: And 61(j) will be the final page of
10 Exhibit 61?

11 MR. BESHORE: That's correct.

12 THE COURT: Okay. What is 61(j)?

13 MR. BESHORE: 61(j) is a computation made by the
14 Market Administrator that was a part of the hearing
15 District Handler hearing. It was a comparison of the
16 effect, the hypothetical effect, on the - - price in
17 Federal Rule 131 of a producer/handler of the 18,000,000
18 pounds. It was adjusted for various - for components and
19 for location in the pool. For example, in 2000 the effect
20 of that much Class I being taken out of the pool, which is
21 what would happen if a producer/handler of that size were
22 there, would be 14 cents. In 2001, the same 14, in 2002 12
23 and through seven months in '03, which is when this was
24 made, 10 cents. And the purpose of this was to give some idea
25 of the potential impact that a producer/handler operation may

1 have if those Class I dollars weren't available to the pool.

2 THE COURT: Okay. Now, we've marked two other
3 exhibits, 62 and 63, which you refer to in your statement.

4 If you would just briefly identify those two documents.

5 MR. BESHORE: Producer Structure and Federal
6 Orders, May, 2001, Exhibit 62 is an AMS publication, it is
7 available on their website. I don't think it's available
8 in a printed booklet form, that I'm aware of. It is a
9 study done on the size of dairy farms located in Federal
10 Orders. It's commonly known in the industry and it has
11 data, methodology and a table that has - gives some idea of
12 the distribution of dairy farms within all Federal Orders
13 throughout the United States by size.

14 THE COURT: And Exhibit 63?

15 MR. BESHORE: Exhibit 63 is an ERS, Economic
16 Research Service, publication. It's published in the
17 Agriculture Income and Finance Outlook, publication number
18 AIS79, September 2002. It's two pages. There is a - one
19 page has four figures on it, four graphs on it. It
20 documents average ownership and operating costs for a dairy
21 of less than 50 cows. Second documents average operating
22 and ownership costs for a dairy with 500 - 199 cows. A
23 large dairy in their terms, 200 to 499 cows. And then what
24 they term an industrial scale, 500 cows and over. Those
25 costs range from an average of \$15.81 on the smallest size

1 to \$10.46 for the largest size. And the variation in those
2 costs get smaller as the farm size gets larger.

3 THE COURT: Okay. Now --

4 MR. BESHORE: I'm sorry, the second page is the
5 supporting documentation for that - those graphics.

6 THE COURT: Now, are you prepared to proceed with
7 the exhibit 60, which is a prepared statement?

8 MR. BESHORE: I am. I would note for the record,
9 for everyone's information, Mr. Hollon may, and will
10 deviate from the pre-printed text of Exhibit 60, a couple
11 of points, at least, and he will point that out for the
12 record when he does.

13 THE COURT: Very well.

14 THE WITNESS: Testimony of Proponent Cooperatives
15 Southern Marketing Agency, Inc. --

16 THE COURT: What's your speed per minute again?

17 THE WITNESS: 1.5 pages per --

18 THE COURT: Go ahead.

19 MR. BESHORE: Go ahead, sir.

20 THE WITNESS: Milk Marketing Order Hearing Docket
21 No. AO-388-A15 and AO-366-A44; DA-03-11, Atlanta, Georgia,
22 February 23, 2004.

23 The issue of large unregulated producer handlers is very
24 serious. If not corrected it has the potential to
25 completely undermine the Federal Order system. Large

1 unregulated producer handles have a distinct competitive
2 advantage that they will naturally move to exploit unless
3 the provisions we offer are adopted. Regulated handlers
4 will not be able to maintain market share and will force
5 suppliers to reduce prices in order to maintain the
6 viability of their operations. The problems we will
7 outline are not an industry secret. The expansion of this
8 "loophole" is growing rapidly. In some cases retailers
9 have become sophisticated enough to understand the
10 advantage and seem to be recruiting producer handlers for
11 supply. Just as in the initial hearing in Phoenix, there
12 are likely some individuals in this room today who are here
13 to get "schooled" on how to exploit these provisions and to
14 learn whether or this loophole will be there in the future
15 for them to exploit. The issue has even led to --

16 MR. RICCIARDI: Your Honor, I don't want to
17 interrupt, but I assume you want to take out, just at the
18 initial hearing in Phoenix --

19 THE WITNESS: No, --

20 MR. RICCIARDI: -- in the testimony?

21 THE WITNESS: -- I did not.

22 MR. RICCIARDI: You want to leave that in?

23 THE WITNESS: I do.

24 MR. RICCIARDI: Your Honor, this is another
25 issue. Now we're - again we're in Order 131.

1 THE COURT: Well, he's giving general state- - go
2 ahead, sir.

3 MR. RICCIARDI: Okay.

4 THE COURT: Go ahead.

5 THE WITNESS: The issue has even led to
6 discussions in some portions of the US dairy marketplace to
7 lower regulated prices in order to provide some competitive
8 equity.

9 The drive to exploit this loophole is or will
10 create organized, disorderly marketing. There would be no
11 advantage to exploit without first an Order and then the
12 exemptions granted to producer handlers. In this case the
13 nature of the provisions are causing disorderly marketing.
14 Legal Authority to Regulate Producer Handlers
15 There has been an undercurrent of discussion and activity
16 attempting to establish the position that the Secretary has
17 no legal authority to regulate producer handlers. The
18 simple fact that we are at a Hearing announced by the
19 Secretary and supported by the Departments' Office of
20 General Counsel should be reason enough to dismiss this
21 thought. It is our understanding that the Department will
22 not go to a Hearing without a determination that the
23 Hearing proposals could legally be adopted.
24 This issue has been thoroughly reviewed and briefed in
25 prior hearings and decisions.

1 The next sentence, We - insert the word support - the
2 conclusions so reached that the Secretary has any and all
3 authority to regulate Producer Handlers in her effect -
4 efforts, I'm sorry, in her efforts to provide for orderly
5 marketing conditions.

6 Basic Position

7 Our reason for participating in this hearing can be summed
8 by the Secretary's comments in 1989.

9 The purpose of the Federal Milk Marketing Orders is to
10 establish orderly marketing conditions for producers
11 who are the regular suppliers of milk. In its
12 simplest terms, this is accomplished by establishing
13 minimum prices for milk in accordance with its uses
14 and providing for the pooling or equal sharing of the
15 proceeds from the sale of milk in all uses among all
16 dairy farmers supplying the market.

17 Any time that milk is sold within a Federal ordering
18 marketing area and such milk is not priced by the
19 order, the ability of the order to maintain orderly
20 and stable marketing conditions for milk may be
21 impaired. When milk of a producer-handler is sold in
22 a Federal order milk marketing area, such milk is not
23 priced by the order. In such case, the order does not
24 provide uniform regulated pricing among competing
25 handlers since fully regulated handlers must pay the

1 minimum order class I price for milk in fluid uses
2 while producer-handlers are not required to do so.
3 This raises the potential for competitive inequities
4 among handlers. Furthermore, there is not an equal
5 sharing among all dairy farmers in the market for the
6 returns from the sale of all milk in all uses since
7 producers whose milk is being priced under the order
8 do not share in the Class I sales of producer-
9 handlers.

10 The cite is 54 FR 27182 June 28, 1989

11 The key point here is there are circumstances
12 where the activity of producer-handlers can thwart the
13 operations and intent of Federal Orders. For Dairy Farmers
14 of America members Federal Order provisions are a key
15 component of their total marketing plans and when the
16 Orders' ability to function as intended is impaired we are
17 concerned.

18 We intend to demonstrate in support of our
19 proposals that the operation of large producer handlers in
20 both Orders 131 & 124 and many other federal orders.

21 MR. RICCIARDI: And, Your Honor, I'll object,
22 this part of the statement - it's clear that this is the
23 statement he used in 131 and 124, and that's what they're
24 using it for. Your Honor, are we going to let - whether we
25 call it re-litigate or have another Administrative Hearing

1 to go over this stuff again that we already did?

2 THE COURT: I'm going to allow it as background.
3 Go ahead.

4 MR. BESHORE: The point is made and it's on the
5 record. It's got an automatic exception, I think we ought
6 to go on with it.

7 MR. RICCIARDI: Well, Your Honor, we note our
8 objection, too, which this is beyond the scope for the
9 (inaudible) of this hearing. This hearing is not about
10 Orders 131 and 124.

11 THE COURT: Well, I know it's not, but it's about
12 this hearing and they're pointing out that - their point
13 is, whether it's a good point, that the Secretary is going
14 to say, well, this is what makes me decide one way or the
15 other, I don't know. But their point is and their argument
16 is that there's some problems in 131, in their opinion, and
17 that the Secretary ought to take those problems into
18 consideration when he has to deal with producer handlers
19 here as well. That's the point.

20 MR. RICCIARDI: Your Honor, we've had three weeks
21 on 131 and 124, the Secretary will that information in the
22 record.

23 THE COURT: Well, but it may be that they decide
24 this hearing before they decide the other one and they want
25 to make sure that if they - it's decided, they get -

1 they've got some evidence here for the Secretary to act on
2 a producer handler exemption.

3 That's what I think it is. I may be wrong, but I
4 - part of what I think it is.

5 MR. BESHORE: Well, it's all the same. You know,
6 we could have testimony that simply and blatantly
7 speculates about what could happen if a proposal is not
8 adopted. This is an attempt to be better than that, but to
9 show what actually happens when these regulations aren't in
10 (inaudible).

11 THE COURT: I think it's appropriate testimony
12 for an amendment hearing for Marketing --

13 MR. RICCIARDI: I think what we have is a
14 speculation and supposition hearing, that's all we're going
15 to have.

16 THE COURT: Very well, sir. All right, enough of
17 that. Let's go.

18 THE WITNESS: Does that count for my minute and a
19 half?

20 (Laughter)

21 THE COURT: No, you get a reprieve, go ahead.

22 THE WITNESS: I'll pick up --

23 We intend to demonstrate in support of our
24 proposals that the operation of large producer handlers in
25 both Orders 131 & 124 and in other federal order:

- 1 1) Can draw sizable dollars out of the order's blend pool -
2 blend price pool - that's not allowing for an equal sharing
3 of the Class I revenues generated by the operation of the
4 Order for all regular suppliers to the market;
- 5 2) Have serious competitive impacts on handler equity
6 causing a loss of sales to fully regulated handlers;
- 7 3) Have the ability to service multiple retain accounts thus
8 impacting competitive pricing in the market;
- 9 4) Have balancing costs that are a small percentage of the
10 advantage offered by avoiding class prices.
- 11 5) Are larger in some cases than many of the regulated
12 handlers in the Federal Order system;
- 13 6) Are statistical outliers in terms of size in the Federal
14 Order system and that our proposal will have no impact on
15 the current operational ability of nearly all of the
16 producer handler operations in the Federal Order system;
17 and
- 18 7) Have economies of scale on the fluid processing portion
19 of their business and in the area of costs of milk
20 production that have the potential to generate significant
21 revenue streams that can be used to capture market share
22 from other regulated handlers.

23 Impacts to the Producer Blend Pool from the Order 131

24 Experience

25 I wish at this point to add two sentences to my

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1 prepared statement that are not printed. And I say that
2 this information was introduced in the record in the
3 Phoenix Hearing of the Producer Handler Hearing, and have
4 been included in the data record for this Hearing. I call
5 attention to this information as a case study example of
6 what the potential for impact at a large producer handler
7 may have on a regulated market.

8 The producer handler Class I revenues are - I'm
9 back to page 4 in the prepared statement.

10 When producer handler Class I revenues are not
11 shared with the market wide pool, dollars are lost to the
12 remaining producers in the Order. Since exact producer
13 handler data is restricted from publication by Federal
14 Order 131 for confidentiality reasons, we can only make
15 inferences to their exact volumes. But in a published table by
16 the Order 131 Market Administrator titled *Class I In Area Routes*
17 *by Pool Plants, Producer Handlers and Other Plants Arizona Las*
18 *Vegas Order (FO 131) January 2000 through June 2003) --*

19 And that will now be Exhibit 61 I.
20 -- there is enough detail to make a reasoned estimate that
21 Producer Handlers account for 12.8 to 19.1 million pounds
22 of Class I In Area Route Sales. (that is the last number
23 published without producer handlers subtracted from the
24 high/low month with producer handlers) The difference
25 between the monthly totals for February and March of 2001

1 represents the volumes of producer handlers in the
2 marketplace and from other Order plants. Based on our
3 knowledge of market conditions and of producer handler
4 operations in the market we believe that large producer
5 handlers represent the majority of the volume difference.
6 The revenues from sales, to the extent they are from
7 producer handlers, are not shared with other producers in
8 the pool.

9 When these sales are priced on a component based
10 and adjusted for location they result in a reduction in
11 producer funds of \$0.05 to \$0.29 cents per hundredweight.
12 For the 43-month period measured the average reduction is
13 approximately 12.5 cents or based on an average monthly
14 pool of 254 million pounds - \$317,000.00 per month. We
15 consider that sum significant. It seems unreasonable that
16 the actions of primarily of a single entity could cost all
17 producers in the marketwide pool \$317,000.00 per month.

18 *(Exhibit 61, Table J - Federal Order Estimated 131 Blend*
19 *Price Calculation Possible Effect of an Additional*
20 *18,000,000 Pounds of Producer Milk in Class I at Market*
21 *Average Class I Butterfat at Test and \$2.10 Class I*
22 *Location Adjustment.*

23 Impact to the Competitive Relationships Between Processors
24 and Retailers

25 The starting point for the measure of impact is

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1 the comparison that the regulated handler pays class prices
2 for the mil used in his plant but the producer handler
3 accounts to their operation at the blend price. The table
4 *Comparison of Class I and Blend Price Federal Orders 1005*
5 *CY 2000 - 2003* (Exhibit 61-Table A1)(Table A2 shows similar
6 comparisons for Order 1007) detail this difference. The
7 annual averages, when expressed in cents per hundredweight
8 range from \$1.03 to \$1.24 or on a per gallon basis from
9 \$0.88 per gallon to \$.107.

10 THE COURT: 0.88 per gallon to what?

11 THE WITNESS: To 0.107, and those numbers are
12 taken from Table A1.

13 MR. BESHORE: Could you give the per
14 hundredweight?

15 THE WITNESS: \$1.03 to \$1.24.

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

17 (OFF THE RECORD)

18 THE WITNESS: I'm sorry, I misinterpreted my own
19 table, so let me try that again.

20 THE COURT: Okay.

21 THE WITNESS: Taken from Table A1 and A2.

22 The annual averages, when expressed in cents per
23 hundredweight range for Federal Order 5 \$0.68 to \$1.03 per
24 hundredweight. (For Federal Order 7, \$1.03 to \$1.24 cents
25 per hundredweight, or on a per gallon basis for Federal

1 Order 5 from \$0.59 per gallon to \$0.089 per gallon.) (For
2 Federal Order 7, \$.088 per gallon to \$1.07 per gallon.)
3 For a business that makes bids based on multiple decimal
4 points, this difference equates to a sizable and
5 significant competitive advantage. Testimony by various
6 processors here will further detail the competitive strains
7 caused by this sizable price difference.

8 At this point I would like to insert two
9 comments. One is that Mr. Herbein and Mr. Lee pointed out
10 that in their experience, both from the accounting with
11 various businesses; and Mr. Lee from his experience in his
12 day to day activities, that a range of less than a cent per
13 gallon was a significant number.

14 However, the point to remember is that Order
15 provisions that allow large-sized producer handlers to
16 avoid regulation but still compete with regulated handlers
17 in the marketplace cause disorderly marketing issues.
18 Processors face competitive challenges on several fronts.
19 Testimony from processors will further detail but I would
20 like to characterize several from my own experience in
21 marketing bulk milk to processors. Milk marketing and
22 pricing is a process of continual negotiation. Day to day
23 changes in market conditions always call for a new look at
24 prices. If my processing customer faces new competition
25 from their competitor they will always ask about the price

1 - and how they can get a lower one. Milk from producer
2 handlers can be and is used by retailers to "leverage"
3 their supplier for a lower price and stay competitive
4 themselves. Usually the "lowest price" puts pressure on
5 every other price. To get some idea of the pervasiveness
6 of the ability to put downward pressure on prices we have
7 developed two tables.

8 Exhibit 61-Table B *Ability to Service Retail*
9 *Accounts by Size of Processor* uses several calculations to
10 arrive at relating the volume of milk packaged by a handler
11 to the common unit of delivery - a trailer load. We show
12 this calculation for a variety of sizes from 30 million
13 pounds per month of processing capacity down to 100,000
14 pounds. The top end of our table would encompass the
15 largest processing plants in the US and the smaller end
16 would encompass the majority of producer handlers in
17 operation today.

18 The volume limitation measure we have proposed -
19 3,000,000 pounds per month is still sizable. It would
20 allow the producer handler to deliver 2.5 trailer loads of
21 gallon jugs of milk to a single or combination of retail
22 accounts per day. This volume would be enough to cause a
23 significant competitive reaction in the marketplace. A
24 retail chain of several stores in a nearby suburb market
25 with pricing driven by the gap in the producer handler

1 price versus the regulated handler price would get the
2 attention of the remaining handlers in the market. They
3 would be sophisticated enough to know whether the marketing
4 strategy of that store (or chain) was driven by "every day
5 low price" or a random promotion as a loss leader. If the
6 strategy were not a very temporary "loss leader", they
7 would press their milk supplier for a reduced milk price in
8 order to compete. Milk is a major category for retail
9 sales because it is a rapid turnover item. A retailer must
10 be competitive on milk prices in order to stay in business.

11 We attempted to quantify the number of stores that
12 might be serviced by the 3,000,000 pound per month producer
13 handler by contracting with Institutional Resources
14 Incorporated to provide us data on milk sales per store.
15 They have a store universe of 12,800 stores representing
16 approximately 80 - 90 percent of the universe of US grocery
17 stores. This population does not include super stores or
18 club stores, drug stores selling food or convenience
19 stores. From this population they provided data on 3,200
20 stores that represented the smallest 25% of their store
21 sample. (Stores are stratified based on total sales
22 receipts of all commodities.) The average store in this
23 subset (the smallest 25%) sold 1,070 gallons of white milk
24 per week. At the ration of 4,500 gallons per trailer the
25 3,000,000 pound per month producer handler could service 74

1 stores per week with gallons. That calculation is 4,500
2 divided by 1,070 times 2.5 times 7.

3 Using the remainder of the universe of stores, in
4 this case the largest 75% of the population, the average
5 store sold 4,425 gallons per week. The 3,000,000-pound per
6 week - I'm sorry, the 3,000,000-pound per month producer
7 handler could service 18 stores of this size per week. The
8 stores that make up this subset could easily be a
9 metropolitan retail grocery chain with a reasonable market
10 share. In both cases, a competitive problem is caused by
11 exploiting the price difference allowed by the lack of
12 regulation of the large producer handler. In our
13 experience when this occurs the bottling plants which we
14 sell raw mil to face tremendous "bottom line" pressure and
15 ask us for price reductions. This situation is quantified
16 in Mr. Herbein's exhibits.

17 One rationale given for not regulating producer
18 handlers is that they have costs that absorb any potential
19 gain from not paying regulated prices. This argument has
20 been offered extensively in previous hearings.

21 The cost arguments seem to be premised on two
22 points: - that operational costs and balancing costs of
23 producer handlers are greater than for regulated handlers,
24 and for this justifies ignoring what would otherwise be a
25 significant competitive advantage. There will be evidence

1 at this hearing that producer handlers over 3,000,000
2 pounds do not suffer significantly lower operational or
3 balancing costs than the regulated handlers of the same
4 size - same or larger size.

5 Mr. Herbein's exhibits detail the fallacy of
6 these arguments from the standpoint of operational costs.
7 In the Exhibit 57 - *Cost Structure of Fluid Milk Plants of*
8 *Various Sizes* he has detailed the cost for operating plants
9 of various sizes. For the size plant that most
10 approximates the majority of producer handlers - the 90,000
11 pound per month monthly volume the argument that costs
12 absorb the benefit seems to hold true. That plant size
13 details an "operating cost only" - and the numbers in his
14 handout were \$.932 for Federal Order 5 and \$.950 for
15 Federal Order 7 per gallon, or approximately \$0.37 more per
16 gallon than the cost for the plants within the range that
17 we propose ending the producer handler exemption. The
18 price per gallon advantage gained between the blend and
19 Class prices (as noted previously) is more than eliminated
20 by the cost differences between the normal sized producer
21 handler and the next closest, smallest sized larger
22 processor. As shown in the Herein data the cost "spread
23 between what Mr. Herbein identifies as the "C plant" (which
24 most closely approximates the average fluid milk processing
25 plant in the US) and the "D plant" (which approximates the

1 expected size of the Sarah Farms plant) are reasonably
2 close. No logical argument could be made that a producer
3 handler larger than the average sized Federal Order
4 processing plant needs an exemption so that he can compete.

5 Nor should a smaller sized producer handler (between our
6 proposed 3,000,000 pound per month limit and the average
7 sized Federal Order plant), as shown in the Exhibit, need
8 an exemption to compete with smaller regulated plants.

9 Furthermore, in keeping with marginal economic
10 principles, the cost curve flattens out as volume grows.
11 So, the larger plant can add volume at little additional
12 cost. A large producer handler who does not pay regulated
13 prices, would easily be able to gain market share at will.

14 This seems to describe the retail market scenario in Order
15 131, and is the concern in Order 7 and 5 as well. This
16 would be an example of disorderly marketing, as I will
17 discuss further in my testimony later.

18 Again, the next 1, 2, 3 paragraphs talk about the
19 situation that we found in Phoenix, and again, that they
20 are designed to provide a case study example of what we're
21 concerned could happen in this market.

22 Mr. Herbein's exhibits further develop the
23 principle that a regulated handler cannot service a segment
24 of the market, known to be regularly supplied by producer
25 handlers, - if must pay the full regulated prices. Exhibit

1 25-E titled *Comparative Analysis of Returns to Producer*
2 *Handlers and --*

3 MR. BESHORE: Could 25-E - you mean Herbein
4 Exhibit E?

5 THE WITNESS: Yes.

6 MR. BESHORE: Okay, of 57?

7 THE WITNESS: -- *Regulated Distributing Plants*
8 *Supplying a Warehouse Store* demonstrates that for the
9 superstore/club store category using industry derived data,
10 a handler paying regulated prices cannot service the store
11 with any return or with a with a return so minimal that he
12 could not remain in business. This Exhibit does not allow
13 for any "profit" for the processor and still does not show
14 a viable return. Equally concerning is that the return for
15 the producer handler is substantial and viable. Certainly
16 this data speaks to the issue of "inequity of handler
17 prices".

18 Additionally, this Exhibit contains no values for
19 premiums, a fact which a Southern Marketing Agency member
20 cooperatives have an interest in. With no premium value
21 the producer pays for all of the market service costs and
22 further depresses producer returns. If our customers can't
23 be profitable - then neither can SMA member cooperatives
24 and their member dairy farmers.

25 The remaining five exhibits (Exhibit 57G through

1 K) detail similar comparisons for the five size ranged
2 processors we reviewed earlier. All would lose money
3 paying regulated prices and servicing this type of account
4 at the prevailing prices in the retail market. In fact it
5 would take a producer handler bigger than "C" to perhaps
6 break even for this business. But if the large producer
7 handler can earn a return and grow his business - pressure
8 to terminate the Orders will be impossible to resist. The
9 processor will either demand a lower price (until he bumps
10 into the minimum price) or seek a similar producer handler
11 arrangement. Producers will see similar and smaller share
12 of the Class I sales in the pool and conclude that the
13 concept is no longer working and seek to terminate orders
14 to preserve some level of market share. Once the Order is
15 terminated the "advantage" to the producer handler is
16 eliminated, all market participants are at lower prices and
17 the benefits of the Order are gone.

18 The line of argument for defending the producer
19 handler exemption from the position of additional and
20 excessive balancing costs does not bear up either. Exhibit
21 61-Tables C1 - C2 titled */Estimated Impact of Balancing*
22 *Surplus Milk for a Producer Handler at Varying Utilization*
23 *Percentages Orders 1005 & 1007* depicts the alternative
24 returns from balancing the producer handler supply at a
25 plant utilization of 90% Class I.

1 This exhibit computes a "Producer Handler Blend"
2 (a full description of the table was given when the Exhibit
3 was introduced) taking into account the producer butterfat
4 test, the Class I butterfat test, pricing the producer
5 handler components sold to Class I at the Uniform Component
6 prices and the volume to be balanced at the lower of Class
7 III or IV and comparing the resulting value to the
8 announced Uniform price at test.

9 At a 90% Class I utilization the comparison of
10 the Producer Handler blend to Uniform blend resulted in a
11 lower return of 28 to 35 cents for Order 5, to 25 to 35
12 cents for Order 7 per hundredweight or about 2 3/4 cents
13 per gallon. The balancing cost still allows for the
14 producer handler to take advantage of the difference
15 between the blend price and the Class I price.

16 A regulated handler has premium charges
17 reflecting the cost of balancing. Additionally most
18 producer handlers have their processing plant very near or
19 at their farm supply so that they do not have the cost to
20 assemble and transport milk to the market.

21 Furthermore, a portion of the producer handler's
22 balancing costs can be shifted to the entire pool when they
23 sell surplus to regulated handlers and when the retail
24 outlets they serve order additional (or reduce orders of)
25 packaged products. The Order allocation provisions attempt

1 to reduce the effect of producer handler balancing on sales
2 to distributing plants by down allocating the receipt and
3 if a portion of the supply gets allocated to Class I a
4 compensatory payment is charged. However, there is no
5 compensation for lost premium dollars or reduced return
6 when regular suppliers' milk is pushed into manufacturing
7 plants that result in lower returns. Typically the
8 producer handler surplus follows the typical market
9 patterns and would surge milk into the pool at the lowest
10 return period for the market's balancing plants.

11 Additionally retailers will fluctuate their orders to keep
12 shelf space stable and add volumes from the non producer handler
13 processors so that they are supplied by the pooled producers.

14 To summarize this point - the producer handler
15 has balancing costs - they are a given in the milk
16 business. But from our example the difference between the
17 producer handler "uniform" price, which takes into account
18 his utilization, and the marketwide uniform price is
19 minimal when compared to the advantage gained from not
20 paying class prices. Secondly the costs he may have are
21 offset by the very tangible premiums paid by regulated
22 handlers and the real but difficult to estimate savings of
23 pushing surplus back the marketwide pools regular suppliers
24 by selling surplus to regulated handlers and balancing
25 supplied by retail customers. Also the producer handler

1 has operational costs but only from the very small - but
2 more typically sized producer handler has costs that are
3 above the range of the market. The large sized producer
4 handler has operational costs that are lower than the
5 average sized Federal Order regulated plant. No valid
6 argument can be made that an exemption from the regulated
7 price is warranted from either of these two arguments.

8 The Relative Size of Large Producer Handlers as Processors
9 and Farms

10 A common defense of the existing treatment for
11 producer handlers under the Order is that they are small
12 business that need the additional benefit that the current
13 provisions offer them and that they are small enough to not
14 be an impact in the market and that the cost of regulation
15 would be greater than the gain from regulation.

16 There are only a few producer handlers in the whole country
17 larger than the limit we propose for the change in the
18 regulation. Data from all Federal Orders strongly support
19 this conclusion. Exhibit 61 D - Data Relative to Producer
20 Handlers in Orders 5 & 7 shows our estimate of the volumes
21 of milk associated with the Producer Handlers in Orders 5 &
22 7. We derive these estimates from our own sources.

23 That is not true. We were not able to - when I
24 put in the exhibit we noted that we were not able to get
25 numbers for all of those. So, our numbers for those

1 sources were from the Market Administrator's designation of
2 producer handler or exempt plant.

3 Clearly any producer handler with milk production
4 in excess of 3,000,000 pounds of monthly production is well
5 beyond the "small" label. Our estimate here corroborates
6 those made by United Dairymen of Arizona in its' testimony.

7 MR. RICCIARDI: Your Honor, we have United
8 Dairymen of Arizona, a proponent in 131 and 134, not here,
9 not able to be cross examined, and we're trying to bring
10 into this statement again what happened in 131, what
11 happened in 124. That line needs to be stricken, as does
12 the entire statement.

13 THE COURT: I'll strike that particular line,
14 since they're not here. Let's strike the one about United
15 Dairymen.

16 THE WITNESS: Yes, sir.

17 THE COURT: Go on, sir.

18 THE WITNESS: Exhibit 61 E - *Recap of Producer*
19 *Handler and Exempt Plants Data For All - All Federal Orders*
20 *May 2003* summarizes information relative to Class I volume
21 at producer handlers and exempt plants from all Federal
22 Orders for the month of May 2003. (For the purposes of
23 discussing this exhibit all references will be to both
24 producer handlers and exempt plants.) Based on the
25 information we obtained there are at least 101 producer

1 handlers in the Federal Order system. A count of the names
2 published in other statistical summaries would add 17 more
3 to the total.

4 The average Class I volume for which we have data
5 is 587,721 pounds per month. From what we know from at
6 least two of the markets from restricted dated the Order 5
7 producer handlers are small and two of the three Order 131
8 plants are also small. DFA's competitive information about
9 six of the 13 Order 33 producer handler plants would also
10 be below this average, The median size of producer handlers
11 for which we have data is 96,807 pounds per month. While
12 only three Orders were able to provide this data they
13 represent the majority of the producer handler plants. The
14 information we have from other Orders not able to publish
15 data would substantiate this figure. The detail that is
16 available relative to size by grouping continues to support
17 the conclusion that large producer handlers are not the
18 norm in the Federal Order system. For those Orders that
19 reported size groupings the largest one third (or half in
20 the case of Order 126) was consistently very much larger
21 than the remainder. Giving credence to the thought that the
22 largest group was indeed very large. The same tendency is
23 displayed in the percentage of the market's Class I sales, where
24 the largest group dwarfs the smaller grouping's market share.
25 Exhibit 61 Tables G and H -Recap All 7(a) Plant Data All

1 Federal Orders May 2003 detail an identical table as above
2 for the Class I volume at 7(a) Federal Order distributing
3 plants. The 278 listed Federal Order regulated plants have
4 an average volume of 14,849,743 pounds. The median sized
5 plant volume is jus below 12,000,000 pounds. In the two
6 smaller size groupings the average plant volume is 3.7 and
7 11.4 million pounds per month respectively.

8 In the experience of Federal Order 131, the
9 largest producer handler in the US, Sarah Farms is larger
10 than the average sized plant in either of the two smaller
11 sized groupings, which would contain more than 2/3 of all
12 Federal Order distributing plants. From DFA's

13 investigation it is the largest producer handler in the US.

14 Quite likely it is at least double the size of every other
15 producer handler, except one and in several cases would be
16 larger than the collective production of all of the
17 producer handlers of some Orders.

18 It seems invalid to make the argument that a
19 plant of this size needs an exemption granted - needs the
20 exemption granted to producer handlers. There can be no
21 reasonable argument why 2/3 of all Federal Order plants
22 should pay regulated prices and plants of this size should
23 not.

24 Further more the regulated plants in the smaller 2/3
25 groping would face the same unfair and difficult

1 competitive situation when trying to compete with producer
2 handlers larger than the typical size but smaller than
3 Sarah Farms. All of the arguments we have offered would
4 support this conclusion. The size versus competition
5 factor helps us in selecting the 3,000,000-pound per month
6 limit for granting the exemption from paying regulated
7 prices. We also note that at the smallest 1/3 grouping for
8 all Federal Order. Its continued operation as a producer
9 handler would put it in a very favorable competitive
10 position with non producer handlers of that size - several
11 of which operate in the Order 5 & 7 area.

12 In addition to being a statistical outlier in terms of
13 plant operations the large size producer handler would also
14 be an outlier in terms of farm size. According to *Producer*
15 *Structure in Federal Milk Orders, May 2001 (Official*
16 *Notice)*, or rather, Exhibit 62, farms of over 2.5 million
17 pounds compose 0.6% of all farms pooled on Federal Orders.
18 Whether these operations are family farms, or some type of
19 corporate ownership it does not seem reasonable that they'd
20 be granted special exemption from the Order's pricing
21 provisions.

22 Finally, large farms have significant economies
23 of scale with regard to the cost of the cost of milk
24 production. The significance of this factor is that they
25 have resources available to them that they may be able to

1 use to affect the marketplace that smaller
2 producer/handlers would not have.

3 According to the *Agriculture Income and Finance*
4 *Outlook September 2002* (Exhibit 63 - ERS Report AIS-79)
5 page 39, Industrial - Large-scale dairy farms (500 cows or
6 more) have an average cost of operating and ownership of
7 \$10.46 per hundredweight versus \$15.81 for small (less than
8 50 cows) and medium sized \$13.47 for medium sized
9 operations. This difference \$3.01 per hundredweight to
10 \$5.35 per hundredweight or larger than even the cost of
11 avoiding minimum order prices, and could be used to gain
12 market share. This is another reason to limit the producer
13 handler pricing exemption to farms with less than 3,000,000
14 pounds of milk per month.

15 Order Language

16 Southern Marketing Agency supports the language
17 in Proposal 7 and offers the following comments about the
18 proposed language changes to the current order language.
19 Proposal 7 would first amend Section 1007.10 to add:

20 1007.10 Producer-handler.

21 (e) has route disposition and transfers in the form of
22 packaged fluid milk products to other distributing
23 plants during the month that does not exceed 3 million
24 pounds;

25 This is the language that's requested in the

1 Notice of Hearing.

2 From the outset our intention is that if a person
3 desires to be a producer handler and gain exemption from
4 the pricing provisions of the Order, the standards they
5 must meet, must be strict and clear. Having route
6 disposition in the marketing area gets a producer handler
7 regulated if he has route dispositions or transfers of
8 fluid milk products to other distributing plants anywhere
9 in excess of three million pounds. We do not want to see a
10 scenario where someone attempts to gain producer handler
11 status by splitting their sales into several markets to
12 avoid having some determining percentage in Order 5 and 7.

13 Or in the revised Federal Order 7

14 2. Proposal 7 also adds the following:

15 Amend 1007.10 to add the following:

16 (f) The producer-handler does not distribute fluid
17 milk products to a wholesale customer who is served by
18 a plant described in 1007.7(a),(b), or (3), or a
19 handler described in Section 1000.8(c) that supplied
20 the same product in the same-sized package with a
21 similar label to a wholesale customer during the
22 month.

23 This language is currently a part of Order 131
24 and has been proposed for Order 124, and we would propose
25 it for Orders 5 and 7 as well. It prevents a producer

1 handler from "striking a deal" with or through a retailer
2 to provide balancing by packaging product in the producer
3 handler's label in the same size container with the
4 producer handler is unable to do so. If this were to occur
5 the pool's regular suppliers would ultimately balance the
6 surplus of the producer handler. Note that we would expect
7 this comparison to be made for an entire chain of stores
8 and not an individual store in a chain.

9 Summary

10 The competitive situation that large unregulated
11 producer-handlers create is one of disorderly marketing
12 conditions. What started out as an "exemption" to
13 producers handlers because they were not a competitive
14 factor in the market, has evolved into a new competitive
15 situation that threatens to undermine the entire Federal Order
16 system. For those reasons SMA proponent cooperatives support a
17 limit to the producer handler exemption for producer handlers
18 who are larger than 3,000,000 pounds of Class I sales per month.
19 Producer handlers large than this size can draw
20 considerable sums of money out of the blend pool thus
21 creating inequity between them and the regular suppliers of
22 the pool. They have a cost advantage to exploit, the
23 difference between the blend price and the Class I price
24 and they may do so aggressively. The traditional arguments
25 supporting the exemptions have been shown to be faulty:

1 1) they do not suffer a disadvantage in the area
2 of
3 competitive operational costs;

4 2) they do not suffer a disadvantage of
5 significant
6 proportion in balancing their operation - and
7 have some abilities to push those costs over
8 to
9 the other producers in the pool;

10 3) they are of significant size and as such are
11 "statistical outliers" in the overall population
12 of producers and handlers in the federal order
13 system and have a sizable share of Class I sales
14 in both

15 THE WITNESS: Sorry, put a period after system
16 and strike the remainder of the sentence.

17 4) they cause market disruption to the extent
18 that

19 both processors and producers could ultimately
20 be forced to seek relief by the elimination of
21 the Order.

22 These factors surely are signs of disorderly marketing.

23 The language we propose will maintain the
24 producer handler option for over 99% of the producers in

25

1 the Federal Order system - far from a total elimination of
2 the exemption. It continues to "allow for a startup" if a
3 dairy farmer wishes to become a producer handler. It
4 allows for that avenue of enterprise to continue - up to
5 the point where the producer handler should face competition in
6 the marketplace on the same terms as other handlers.

7 It helps assure that all regulated handlers (both
8 large, medium sized and small) face the same minimum costs.

9 And it provides some language changes to make the
10 regulation of producer handlers more clear. It is not
11 possible to justify the continued exemption in its current
12 form. The producer handler exemption threshold should be
13 based not on how inefficient the producer handler operation
14 is - thus needing a price break - but rather how disruptive
15 they are in the marketplace and how much they contribute to
16 disorderly marketing.

17 The 3,000,000-pound limit we propose:

18 1) Is consistent with the limit set by Congress
19 when establishing the processor promotion payment program
20 when it decided that threshold was sufficient for a
21 processor to afford the cost and realize benefits from the
22 program;

23 2) Is a point on an operational cost curve
24 where the higher costs due to small scale become absorbed
25 by larger volumes and any competitive disadvantage of the

1 producer handler evaporates;

2 3) Is a point based on actual retail sales data
3 where a processor can service enough retail accounts to
4 have an impact on competitive factors in the marketplace;

5 4) Is a point where significant advantages in
6 the cost of producing milk can be achieved and used to
7 subsidize the gain of market share in the retail food
8 business; and

9 5) Is a point where economies of scale in fluid milk
10 processing are clearly evident. We request timely and
11 decisive actions by the Secretary in response to our
12 proposal.

13 MR. BESHORE: I have just another couple of
14 questions, perhaps, --

15 THE COURT: Of course.

16 MR. BESHORE: -- on direct for Mr. Hollon.

17 EXAMINATION

18 BY MR. BESHORE:

19 Q. Mr. Hollon, have you observed some testings
20 presented in the area, whether there have been new producer
21 handlers profiting from these Orders 5 and 7?

22 A. Federal Order 7, I have to admit I didn't look in
23 Federal Order 5, but in Federal Order 7 in the data 2000,
24 which is the green book, and the data for 2003, which is
25 the yellow book. In 2000 they are listed as what we had

1 identified in our look through the market from our own
2 sources, in 2000 Etawama Dairies, Inc. while they're listed
3 as an exempt plant they are producer handler. Humphrey's
4 Dairy and White Dairy, LLC, Alexandria, Alabama. In 2004 -
5 I'm sorry, 2003, in the same list, in addition to that
6 there is Hosanna Hills Dairy in Eureka Springs, Arkansas;
7 Mothese Dairy in Fulsom, Louisiana; Memory Lane Dairy in
8 Fordland, Missouri; Rock Springs Dairy in Rogersville,
9 Tennessee; Smith Creamery in Mt. Herman, Louisiana. And
10 those two are producer handlers.

11 Q. Now, you referred to the green book, you were
12 referring to the Order 7, 2000 Annual Statistics, which has
13 been admitted as Exhibit 38?

14 A. Correct.

15 Q. And the yellow book being 2003 Annual Statistics
16 from Order 7, Exhibit 41?

17 A. That is correct.

18 Q. Now, you've testified in previous testimony that
19 there are presently no producer handlers in New York
20 (inaudible) larger than the 3,000,000 pounds (inaudible)

21 A. Correct.

22 Q. But the intent of the regulation is to address
23 those possibilities, are prospective, a forward looking
24 basis, correct?

25 A. That is correct.

1 Q. Are there dairy farms of the size in excess of
2 3,000,000 pounds currently supplying these markets and
3 situated such that it would be feasible for them to become
4 producer handlers and supply these marketplaces?

5 MR. RICCIARDI: Objection, Your Honor. How in
6 the world can there be any basis for him to give that kind
7 of testimony other than speculation? How would he know
8 that these people would want to be producer handlers or
9 not? They're not producer handlers.

10 THE COURT: Well, he's asking if there's any that
11 had the capacity to convert.

12 MR. RICCIARDI: Oh, well --

13 THE COURT: I'll just overrule the objection and
14 allow the answer.

15 A. Yes, there are.

16 Q. Some of them were - they're referred in the
17 testimony or have been identified - not by name or
18 anything, but by location in terms of size - in previous
19 testimony in the Hearings?

20 A. In the Phoenix Hearing, on the record, Mr.
21 Ritchie indicated that he was of that size. That he had an
22 interest in being a producer handler.

23 MR. RICCIARDI: Here he goes - we could have
24 records coming from Phoenix in what he said or didn't say -

25 MR. BESHORE: Your Honor, --

1 MR. RICCIARDI: Let me finish my objection.

2 MR. BESHORE: Well, it's the same repetitive
3 objection.

4 THE COURT: Let him finish.

5 MR. RICCIARDI: You know what, I'll make the
6 objection on each question if there's an objection to be
7 made. And if you have a problem with it, then draw it to
8 the Judge's attention.

9 The problem here, Judge, is he's now testifying
10 about what a person may or may not have said during the
11 course of the Hearing.

12 THE COURT: All right, are we talking about
13 somebody in this market area?

14 THE WITNESS: Actually, they are.

15 THE COURT: Okay, and you understand --

16 THE WITNESS: Well, the county that their farm
17 was in, if it's not a county in Order 7, it's within 100
18 miles of Order 7.

19 THE COURT: And you know of this because you
20 heard of it at another Hearing?

21 THE WITNESS: I know this from several, I've had
22 discussions with Mr. Ritchie many years ago about his
23 interests.

24 MR. RICCIARDI: And, also, he's no longer a
25 farmer, Judge, so we're going to bring that in here now,

1 too?

2 THE COURT: I don't know, I don't know anything
3 about Mr. Ritchie. All I know is that this witness says
4 there is somebody like that. We'll allow that to stand,
5 the objection is overruled.

6 All right, go ahead.

7 BY MR. BESHORE:

8 Q. Mr. Hollon, are there provisions, other
9 provisions, of the Orders that a producer handler will one
10 day be proposing that in your experience as a marketing
11 professional addressed prospective marketing conditions?

12 A. Yes, that would be true. There have been at
13 least one that was discussed today. We started out the day
14 with Mr. Hitchel talking about lock-in provisions. He was
15 talking about the need in a particular situation for his
16 company. But lock-in provisions are a prospective and
17 there are Orders now with lock-in provisions that aren't
18 used, but they may be used in the event that the need, as
19 described in the Order language, would call for them.

20 Q. So, is it your understanding that those
21 provisions are designed to prevent disorder from occurring?

22 A. That is correct. Another example would be a
23 promulgation hearing, for which we in essence have a
24 proposal at this hearing. That just says, let's create a
25 new Order for these reasons. Would be pretty hard to say,

1 well, you know, this is all the things that have happened
2 in the past to create this new Order and we're going to say
3 these are some of the things that will happen in the future
4 as a result of it. So, it's a prospective proposal.

5 We have another proposal in this hearing that
6 hasn't been heard yet, that's being made by - Proposal 8 by
7 Mr. Summer, who is requesting some changes in the producer
8 handler provision. (inaudible), as I understand it, is not
9 a producer handler. So, that would be prospective in the
10 sense that he's seeking to change those regulations. And I
11 assume when he testifies he'll explain the reasons why.
12 But that's something that may happen out in the future.

13 Q. It's along the same line that Southern Marketing
14 Agency and others are proposing to change producer handler
15 definitions in these Orders, even though they do not
16 immediately impact on any particular operation?

17 A. That is correct. You could come up with some
18 other examples, but those are at least three that come to
19 mind.

20 Q. Thank you.

21 MR. BESHORE: I have no other questions on
22 Direct.

23 THE COURT: Let us now adjourn until 9:00
24 tomorrow morning.

25 THE WITNESS: Your Honor?

1 THE COURT: You have something?

2 THE WITNESS: Yes, I did. I spent a considerable
3 amount of time being ready today and I'm ready, so let's
4 finish up.

5 THE COURT: Oh, well, I don't think we're going
6 to finish today.

7 MR. RICCIARDI: And I'm not ready. I'd like,
8 Your Honor, to start at 9:30 instead of 9:00.

9 MR. BESHORE: Your Honor, I think 8:30 is more
10 appropriate to try to get - you know, push towards getting
11 done this week.

12 THE COURT: There's a compromise, 9:00 tomorrow
13 morning.

14 (Whereupon, the hearing adjourned at 6:05 p.m., to
15 reconvene at 9:00 a.m. the following morning in the same place.)

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