BEFORE THE UNITED STATES DEPARTMENT
OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

In the Matter of:	)	
	)	
	)	
MILK IN THE CENTRAL	)	Docket Nos.
	)	AO-313-A48
ORDER MARKETING AREA	)	DA-04-06

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing, pursuant to notice, at 8:30 a.m. on Wednesday, December 8, 2004, at the Hilton Kansas City Airport, 8801 NW 112th Street, Kansas City, Missouri, before the Honorable Marc R. Hillson, Chief Administrative Law Judge.

VOLUME III

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(Proceedings commenced at 8:31 a.m.)

JUDGE HILLSON: Good morning. It's December 8, 2004, the third day of our hearing.

Before I ask Mr. Vetne to call his next witness, are there any other dairymen who are coming in today who want to testify, do you know, Mr. Beshore?

MR. BESHORE: We have one farmer with us and that's all we anticipate.

JUDGE HILLSON: When do you want to call that witness?

MR. BESHORE: She's not here at the moment.

JUDGE HILLSON: We'll do it later on, then. You just let me know when you want to do that and we can fit her in between other witnesses.

MR. BESHORE: Thank you.

JUDGE HILLSON: At this point, Mr. Vetne, I'll ask you to call your witness.

MR. VETNE: John Weis.

JOSEPH W. WEIS,

a Witness, being first duly sworn, testified under oath as follows:

JUDGE HILLSON: Will you please state your name and then spell it for the record.

THE WITNESS: My name is Joseph W. Weis, W-E-I-S. You can call me Joe.

JUDGE HILLSON: He's your witness, Mr. Vetne.

MR. VETNE: Thank you.

DIRECT EXAMINATION

BY MR. VETNE:

Q. I'm John Vetne, as I was yesterday. And Mr. Weis, you've been sworn. You identify yourself and your affiliation in your statement; correct?

A. Yes, I do.

MR. VETNE: I've provided two documents for the record: One is testimony of Joe Weis, and the other is a two-page document captioned at the top of the page Proposal No. 3, Foremost, et al., which is two pages. I want the Foremost, et al., document to be marked the next exhibit.

JUDGE HILLSON: You don't want the statement marked --

MR. VETNE: I want that the

next exhibit.

JUDGE HILLSON: We'll mark the Proposal No. 30.

MR. VETNE: Which is the revision in the proposed language concerning which I e-mailed as many people as I could several weeks ago. And then 31 would be the testimony.

JUDGE HILLSON: I'll mark his testimony as Exhibit 31.

(Exhibits 30 and 31 were marked for identification.)

Q. (By Mr. Vetne) Would you proceed with your statement, Mr. Weis?

A. My name is Joseph W. Weis. I'm employed by Foremost Farms USA Cooperative (Foremost) as Vice President of Fluid Products Division. My business address is E10889A Penny Lane, P.O. Box 111, Baraboo, Wisconsin 53913.

Foremost Farms USA is a dairy farmer-owned Capper-Volstead cooperative representing 3,700 milk producers located in seven states. In 2003, Foremost's member-owners located in Wisconsin, Minnesota, Iowa, Illinois, Indiana, Ohio and Michigan marketed 4.9 billion pounds of milk through their cooperative. Foremost owns and operates manufacturing facilities in Wisconsin, Minnesota and Iowa, along with two distributing plants in Wisconsin.

In addition to supplying to our own facilities, we also supply distributing plants in Federal Orders 5, 30, 32 and 33. Foremost is currently serving two customers who operate Class I distributing plants in Federal Order 32. Foremost and its predecessor cooperatives have served one of these customers for over 30 years and the other for over 35 years.

This testimony is given on behalf of the proponents of Proposal No. 3. Proponents are: Associated Milk Producers, Inc., First District Association, Foremost Farms USA Cooperative, and Land O'Lakes, Inc.

Let me begin by stating that we have modified our original proposal submitted to USDA on August 12, 2004, requesting the addition of provisions for transportation credits and assembly credits for Class I milk delivered to distributing plants in the

Central marketing order.

Our modified proposal will not contain the proposed § 1032.20 defining a "milk reload station" and references to such "reload stations" have been removed from our proposed § 1032.55 "Transportation credits and assembly credits." Our revised proposal is submitted as Exhibit --

And I missed that John.

Q. 30.

A. If you'll refer to that document, Exhibit 30, I will review our proposed transportation and assembly credit language.

§ 1032.55 Transportation credits and assembly credits. (a) Each handler operating a pool supply plant decided in § 1032.7(c) or (f) that transfers bulk milk to a pool distributing plant described in § 1032.7(a), (b), or (e) shall receive a transportation credit for such milk computed as follows:

(1) Determine the hundredweight of milk eligible for the credit by completing the steps in paragraph (c) of this section;

(2) Multiply the hundredweight of milk eligible for the credit by .30 cents

times the number of miles between the transferor plant and the transferee plant (not to exceed 500 miles);

(3) Subtract the effective Class I price at the transferor plant from the effective Class I price at the transferee plant;

(4) Multiply any positive amount resulting from the subtraction in paragraph (a)(3) of this section by the hundredweight of milk eligible for the credit; and.

(5) Subtract the amount computed in (a)(4) of this section from the amount computed in paragraph (a)(2) of this section. If the amount computed in paragraph (a)(4) of this section exceeds the amount computed in paragraph (a)(2) of this section, the transportation credit shall be zero.

(b) Each handler operating a pool distributing plant described in § 1032.7(a), (b), or (e) that receives milk from dairy farmers, each handler that transfers or diverts bulk milk from a pool plant to a pool distributing plant, and each handler described in § 1000.9(c) that delivers milk to a pool distributing plant shall receive an assembly credit on the portion of such milk eligible for the credit pursuant to paragraph (c) of this section. The credit shall be computed by multiplying the hundredweight of milk eligible for the credit by $0.10.

(c) The following procedure shall be used to determine the amount of milk eligible for transportation and assembly credits pursuant to paragraphs (a) and (b) of this section:

(1) At each pool distributing plant, determine the aggregate quantity of Class I milk, excluding beginning of inventory of packaged fluid milk products;

(2) Subtract the quantity of packaged fluid milk products received at the pool distributing plant from other pool plants and from nonpool plants if such receipts are assigned to Class I;

(3) Subtract the quantity of bulk milk shipped from the pool distributing plant to other plants to the extent that such milk is classified as Class I milk;

(4) Subtract the quantity of bulk

milk received at the pool distributing plant from other order plants and unregulated supply plants that is assigned to Class I pursuant to §§ 1000.43(d) and 1000.44; and

(5) Assign the remaining quantity pro rata to physical receipts during the month from:

(i) Producers

(ii) Handlers described in § 1000.9(c); and

(iii) Other pool plants.

(d) For purposes of this section, the distances to be computed shall be determined by the Market Administrator using the shortest available state and/or Federal highway mileage. Mileage determinations are subject to redetermination at all times. In the event a handler requires a redetermination of the mileage pertaining to any plant, the Market Administrator shall notify the handler of such redetermination within 30 days after the receipt of such request. Any financial obligations resulting from a change in mileage shall not be retroactive for any periods prior to the redetermination my the Market

Administrator.

And then § 1032.60 Handler's value of milk. Add new paragraph (k). And (k) reads, Compute the amount of credits applicable pursuant to § 1032.55.

Q. Mr. Weis, before you continue, a little housekeeping. Page 2, subsection D, line 4, word 4, you, in reading your testimony, you inserted the word "requires." What's printed is the word "requests." Which word do you prefer?

A. The word "requests" is the word.

Q. Thank you.

A. Returning then to my testimony.

Foremost has done an analysis of the revenues of expenses on our shipments of Class I milk made to our Order 32 distributing plant customers during the month of August 2004. On milk sold to Prairie Farms Dairy, Inc. (Prairie Farms) at Carlinville and Peoria, Illinois, we incurred a loss of $.998 per hundredweight, while on milk sold to Anderson-Erickson Dairy, Des Moines, Iowa, we lost $.3148 per hundredweight.

The primary reason for the difference

in the above losses is the result of transportation cost differences. These calculations do not include any expenses associated with field service, producer component and quality testing, producer payroll processing and other administrative expenses, or supply plant operating expenses.

Foremost Farms USA's member-owner dairy producers incurred these losses on their milk shipments made to meet distributing plant Class I needs. I believe that similar losses are incurred by other proponents of our proposal when they're delivering milk from the same geography to these same customers.

These out-of-pocket costs are not borne uniformly by all producers who participate in the benefits of the marketwide pool. Just as revenue from fluid milk sales are shared by all producers in the marketwide pool, so should an equitable portion of the expenses associated with furnishing the supply of raw Class I milk.

I would first like to discuss our transportation credit proposal. When Foremost's predecessor cooperatives began supplying milk to our long-standing Class I customers in what is current Order 32, the transportation costs to ship the milk was approximately equal to the difference in blend prices between shipping locations in northeast Iowa and the receiving distributing plant locations.

For example, in 1968 the difference in zone prices at Carlinville, Illinois, and Waukon, Iowa, was 55 and a half cents per hundredweight, while the hauling cost was $0.55 per hundredweight. In August 2004 the zone difference was $0.25 per hundredweight, while our hauling cost was $1.6865 per hundredweight, a shortfall of $1.4365 per hundredweight. I'm using Foremost as an example, due to the confidentiality of the other proponent's data, but their situations would be similar.

You may ask why the proponents of Proposal No. 2 have continued to ship milk to Prairie Farms under these circumstances. Prairie Farms allocates patronage to us on the volumes of milk supplied them by us as member cooperatives. If Prairie Farms were not a cooperative, distributing earnings to us, it would have been impossible for them to continue to source a supply of milk from southeast Minnesota and northeast Iowa for these past 35 plus years.

In August 2004, our hauling cost to ship a 50,000 pound load of milk traveling 382 miles from Waukon, Iowa, to Carlinville, Illinois, was $0.425 per hundredweight per mile. A 470 mile haul to Olney, Illinois, would have cost $0.399, and a 259 mile haul to Peoria cost $0.488 per hundredweight per mile. These rates include a 9 percent diesel fuel surcharge in effect at that time.

Our proposed Class I transportation credit rate of $0.03 per hundredweight per mile for milk transferred from pool supply plants to distributing plants would recover approximately 75 percent of the average hauling cost to move this milk shipped from supply plants in southeast Minnesota and northeast Iowa to our long-time customers.

It is not our intention -- not our intent to propose a transportation credit that could cover all of these transportation costs, as this could lead to inefficient movement of milk. For the same reason, we have also proposed that the one-way mileage eligible for transportation credits be capped at 500 miles.

We are also proposing that an assembly credit of $0.10 per hundredweight be implemented on milk furnished by handlers for Class I use at Order 32 pool distributing plants. Assembly costs result from receiving milk at a pool supply plant, sampling and testing, cooling and storing, and then loading onto a truck for shipment to supply the needs of the Class I market. Storage tanks, pumps, pipelines, and facilities must be maintained, cleaned and sanitized as well. The costs incurred in performing these functions are not currently recognized in the order.

Foremost's pool supply plant at Waukon, Iowa, had a cost of $.2226 per hundredweight for the 12-month period ending July 31, 2004, for handling all of the milk through the Intake Department where these activities occur, not just the milk that moved to the Class I market. These costs do not include field service, laboratory producer milk testing, or any other administrative overhead costs that could also be considered assembly costs.

Waukon is like many pool supply plants in that shipments to distributing plants vary seasonally, in our case from less than 10 percent in some months to near 70 percent in others. Most of the milk serving the market from this geographic area moves through a supply plant or a reload station, and we assume it incurs a similar assembly cost.

In the interest of promoting efficiency, the proponents do not wish to reimburse handlers for the total costs of assembling milk. Direct-ship milk also incurs assembly costs in serving the market, and we are, therefore, proposing a $0.10 per hundredweight assembly credit on all Class I milk delivered in the Central marketing order.

These proposals are not new concepts to the Federal Milk Market Order System. Federal Order 30 has employed transportation credit and milk assembly credits for many years. Transportation credits on supplemental milk are also a part of Orders 5 and 7.

These proposed credits would serve to ensure that all the producers who share in the proceeds of serving the Class I market also share more equitably in the costs involved in the serving market. Thank you.

Q. Mr. Weis, do you have any last minute thoughts or comments you want to share before Mr. Beshore and Mr. English have questions for you?

A. Not at this time.

Q. Thank you.

MR. VETNE: The witness is available.

JUDGE HILLSON: Does anyone have questions for this witness? Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods. Good morning, Mr. Weis.

A. Good morning.

Q. Let me ask a few questions about the proposal first. Am I correct that when I look at the transportation versus the assembly, the assembly credit is available to all handlers operating pool distributing plants or supply plants, whereas transportation is only available to supply plants?

A. That is our proposal, yes.

Q. But you agree that assembly costs are incurred by all handlers; correct?

A. Correct.

Q. And transportation costs are incurred by all handlers; correct?

A. Correct.

Q. But you propose only reimbursing supply plants for transportation; correct?

A. Yes.

Q. For the purpose of reimbursement of transportation costs, should there be any mechanism to insure that a cost is actually incurred before the transportation credit is paid?

A. I would believe the Market Administrator should be entitled to do so if he wishes, yes.

Q. Should there be any assurance that the money paid for these transportation credits actually reimburses either haulers or producers who incur the cost?

A. It's the handler or the producer that incurs the cost.

Q. Correct. But in this market, unlike Order 30, dairy farmers subsidize the cost of the haul, do they not?

A. Yes. They do in Order 30 as well.

Q. Should there be any assurance that the money that is paid to handlers actually goes to the dairy farmers who have paid that cost? Should the handler, for instance, have to prove that the money that is received for the credit for the prior month was paid out of the dairy farmer's -- to reimburse them for that cost as opposed to the handlers pocketing the money?

A. I have not thought through all of the circumstances, but in the case of the proponents of this proposal, being dairy farmer-owned cooperatives, in effect the reimbursement for transportation costs incurred would be, in effect, reimbursed to the producers of supply plants.

Q. But there are supply plants that are operated by proprietary operators; correct?

A. There may be. I'm not aware of any.

Q. If there are, don't you agree that the transportation credit payment shouldn't end up being a windfall to a handler as opposed to a payment to the dairy farmer?

A. I don't see it as a windfall to the handler in the event -- because of the fact he has to pay his producers some kind of a price and his returns from the marketing of their milk and the revenues generated weigh into his ability to do that.

Q. So you think that as a result of receiving the transportation credit, a handler operating the supply plant will, as a response in the competitive marketplace, pay the money in any event?

A. Generally, yes.

Q. What happens to the handler who happens to receive the milk from direct-ship milk? How are they, then, going to compete in the marketplace with the handler who has received the credit because they have a supply plant?

A. I would -- the way I would answer your question is our proposal was designed to cope and deal with the issues that the proponents have dealt with in furnishing milk to the market, a long-time supply of supplemental milk. Current Order 32 is a wide ranging geography with logistical issues and problems in movements of milk that we're not familiar with, and we have no issue with the proposed modifications to our Proposal No. 3 pertaining to direct-ship milk.

Q.   Maybe I got about it the long way. You're basically saying you don't object to the modification?

A.   No, we do not.

Q.   For instance, Order 30, which has a transportation -- you're familiar with Order 30?

A.   Yes.

Q.   And you're familiar Order 30 has a transportation and assembly credit program?

A.   Yes.

Q.   And you're familiar that that transportation credit is available both to supply plants and to distributing plants who receives direct-ship milk?

A.   I don't believe the transportation credit is available on direct-ship milk to

Order 30 distributing plants.

Q. The reg says what the reg says. But again, you don't have any objection that that's how it ends up here in Order 32?

A. No, I do not.

Q. I want to explore a little bit with you from page 3 and on of your testimony, the losses incurred in selling milk in August of 2004. I suspect it is a similar analysis to what was done or provided yesterday by both Mr. Hollon and Mr. Lee.

Would I be correct that when you refer to a loss incurred, that is a Federal order loss that does not include any over order premiums that are charged?

A. We went about it a little differently. When we looked at the Foremost figures for August, it does involve the proceeds of the over order premium that is charged as a part of the price to the handler and offset by the -- we're taking into account all the proceeds from the sale, including over order premiums in settlement with the Producer Settlement Fund and with the Marketing Agency, uniform distribution, as well as the payment to the producer, including all the costs associated with the quality premiums and order premiums and hauling subsidies.

Q. So it's a net?

A. It's a net.

Q. Let me backtrack for a moment. Is this loss of $.998 per hundredweight relative to another use for the milk?

A. No. It's relative to the proceeds earned from the sale of the product, the delivery of the product to a customer versus the expenses incurred in paying the producer for the milk.

Q. But the $.998, .998 hundredweight for delivery from I guess it was to Carlinville --

A. Yes.

Q. -- and Peoria, that, if you exclude the order portion, so you just used Federal order, that number would have been higher, I take it?

A. Yes. The figures that have been presented in earlier testimonies.

Q. And had you, instead, delivered that milk into your distributing plants in Order 30, you would have, instead, gained the benefit of the Order 30 blend price which would have been higher relative to the blend price in Carlinville and Peoria? When you include the haul.

A. I would have to run through the calculations. I can't answer the question off the top of my head. We would receive a transportation credit and assembly credit on that milk. That would have been out of the area, so we would not receive it.

Q. But you could have received the milk, instead of your supply plant, you could have sent it to an operation in Order 30; correct?

A. We could have, yes.

Q. On the next page when you reference Prairie Farms allocates patronage to us on the volumes of milk supplied them by us as member cooperatives, could you, for the record, describe that a little more fully so the record, and me, will understand what that means?

A. A Capper-Volstead cooperative can elect to treat another Capper-Volstead cooperative supplying them with milk just as a member-owner of the -- of Prairie Farms is considered in terms of allocation of income of the cooperative based on the dollar value of the volume of milk that is marketed to them.

Q. A short form would say that to the extent Prairie Farms has profits, they share those profits with those of you supplying the milk?

A. Correct.

Q. That is to say they had to cut into their profits in order to get the milk supply delivered?

A. Correct.

Q. Now, you also deliver milk to Anderson-Erickson; correct?

A. Yes.

Q. Anderson-Erickson doesn't have that opportunity to share its profits with you in the same way that Prairie Farms does; correct?

A. Not in the same way, that's correct.

Q. They could pay a higher premium?

A. Yes.

Q. But there's no way for them to share their patronage, so to peak, because they're not a Capper-Volstead cooperative; correct?

A. Yes.

Q. Finally, I'm curious about your statement on page 6. "Most of the milk severing the market from this geographic area moves through a supply plant or a reload station, and we assume it incurs a similar assembly cost."

When you say this "geographic area," are you referring to that portion of Iowa from which you are supplying the milk?

A. Yes, northeast Iowa, southeastern Minnesota.

Q. So you're not referencing, for instance, a geographic area that would be Wisconsin serving the market?

A. Not necessary -- no, I'm not.

Q. Thank you, that's all I have.

JUDGE HILLSON: Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good morning, Mr. Weis.

A. Good morning.

JUDGE HILLSON: I know it's a new day, but go ahead and identify yourself.

MR. BESHORE: I'm sorry. Marvin Beshore for Dairy Farmers of America and Prairie Farms.

Q. (By Mr. Beshore) Are other witnesses going to speak to Proposals 1 and 2 on behalf of the organizations that you're testifying for today?

A. Yes.

Q. Now, with respect to the proposed modification, Proposal No. 3, we appreciate your testimony, is that on behalf of all four cooperatives, not just Foremost?

A. I can't speak to First District Association, but the remainder of the haulers, I speak on their behalf.

Q. AMPI, Associated Milk Producers, and Land O'Lakes?

A. Yes.

Q. The hauling expenses that you have alluded to or discussed in your testimony, can you tell us what current rate you're experiencing on the over-the-road hauling on a loaded mile basis and the way it's been -- there have been a number of different rates testified to by Gary Lee or Elvin Hollon.

A. I have invoices from August from Cliff Viesman, Inc., (ph) who does our transportation from Waukon to Prairie Farms in Carlinville, the rate was $1.49 per hundredweight. We'll have to convert that into the mileage using the mileage figures I gave in my testimony. And on top of that, then, was a 9 percent fuel surcharge.

Q. So 9 percent would be, what, about $0.13, $0.14 on top of that?

A. You take, for example, 50,000 -- he has a 50,000 pound minimum in his rate structure, and to move a load of milk, 50,000 pounds, the standard rate was $745, and 9 percent of that is another $67.05 for the fuel surcharge.

Q. And that was from Waukon to Carlinville?

A. Carlinville, yes. From Waukon to Peoria, Illinois, the 50,000 pound rate was $1.16 per hundredweight and a 9 percent surcharge, so $589, with 5 percent surcharge, $52.20.

Q. Do you have any similar information for other supply plant locations? Lancaster?

A. There was no milk moved from Lancaster during the month of August when I pulled the data together.

Q. Are the rates from Waukon that you've quoted, are they similar from other locations, the best of your knowledge?

A. They are similar, to the best of my knowledge.

Q. Now, let's -- if there were a cooperative or a handler collecting milk in Iowa who was able to assemble it on a 50,000 pound over-the-road tanker directly from a farm and deliver it to Carlinville or Peoria, would you anticipate that the hauling costs would be at least as great as the point-to-point tanker costs from the supply plant down to those locations?

A. Once the truck reached the end of the route and it was lowered, I am assume the cost would be similar, yes.

Q. Is it your testimony that with Foremost, you don't have any milk assembly deliveries to Prairie Farms in that manner direct from the farm?

A. We do have one large producer who delivers direct to the market, in this case to Anderson-Erickson.

Q. Anderson-Erickson, okay. In that case, the cost of the over-the-road hauling that that producer incurs or the -- or Foremost incurs on his behalf as marketing agent, would be similar to the tanker supply plant to Anderson-Erickson costs over-the-road?

A. Yes.

Q. Are you aware of whether Associated Milk Producers, Inc., First District or Land O'Lakes have producers in the Iowa, Minnesota, Wisconsin area, they're able to direct deliver from farms to Prairie Farms or Anderson-Erickson or other Order 32 plants?

A. There may be. I'm not aware.

Q. And certainly feasible for those types of deliveries to be done?

A. Yes, it is.

Q. And when they are done, when it's feasible and when those deliveries are made, some of the costs of handling the milk at the supply plant are able to be avoided, would you agree?

A. Yes.

Q. So that there's, in the overall

market picture, there's some gain in efficiency with the elimination of those costs when you're able to direct deliver the milk from the farm?

A. When the logistics allow it, yes.

Q. Let me see if I understood your testimony in response to Mr. English's questions. The losses that you have indicated in your statement, Exhibit 31, are cash losses calculated by taking the gross proceeds, all the proceeds received for those milk deliveries, over order payments included?

A. Yes.

Q. And then deducting from that all of Foremost's costs for assembling and delivering the milk?

A. There are no assembly costs involved in the computation, it's strictly the cost of -- on the expense side it's the payment for the milk to the producer and the transportation cost associated with that movement of that milk.

Q. And the payment would have included the blend price received at the Order 32 locations?

A. Yes.
Q. In your experience, you've been -- how long have you been in marketing milk of Order 32? Quite a few years?
A. Since 1990.
Q. Since 1990. Have those assembly and transportation credits worked well in helping to attract milk to Class I plants in Order 30, in your view?
A. The transportation credit hasn't been totally adequate. We operate distributing plants. In Order 30, distributing plants incurs the cost. So in addition to the Federal order transportation credits, we have transportation credits in CMPC.
Q. In the super pool?
A. The super pool that are designed to help offset some additional costs, although not all the costs.
Q. So the deficiency in the transportation credit under the order relates to the fact that it's set at a rate that is substantially less than the cost of hauling the milk?
A. That's correct.

Q. Is it the .3 the same rate that's proposed here, is that the current rate in Order 30?
A. It's .28 cents.
Q. Which was set back in 1987?
A. 1987, yes.
Q. Mr. Weis, the Market Administrator's exhibit identified, which is Exhibit 9, locations of nine supply plants in Order 32. Do you recall that?
A. Yes, I do.
Q. Do you have that exhibit available?
A. Exhibit 9?
Q. Yes, at page 91.
A. Yes.
Q. Directing your attention to the seven supply plant locations in Iowa, Wisconsin, and South Dakota, to your knowledge is milk assembly around those supply plants similar -- two of them are Foremost supply plants, of course -- is milk assembly at the other supply plant locations similar to that of Foremost, to your knowledge?
A. I believe it would be, yes. Farm bulk route pickup trucks.

Q. You saw also the information that the Market Administrator provided at Elvin Hollon's request about hauling charges in those areas. Do you recall that?
A. Yes.
Q. Did those numbers comport with your experience in terms of what producers around those supply plants are charged for hauling?
A. Yes, they do.
Q. Would you have any agreement or disagreement with Elvin's analysis that farmers in those areas tend to be charged for about 25 miles of the haul?
A. The statistics from those areas would support that, yes.
Q. And that's your experience, as well as Foremost's, roughly?
A. (Nods head.)
JUDGE HILLSON: You just gave a nonverbal answer.
A. Yes.
Q. (By Mr. Beshore) Now, in the areas around your supply plants and those of others in northeast Iowa, southwestern Wisconsin, there's milk, that's an overlapping supply

area between Order 30 and 32, is it not? There are producers in those areas that are on Order 30, pooled on Order 30 as well as some pooled in Order 32?

A. Yes.

Q. And to the extent that for Order 30 there are assembly credits and transportation credits available for moving Class I milk, you don't presently have that on Order 32, that tends to tilt that procurement equation towards Order 30, would you agree?

A. There are a number of factors that weigh into that procurement situation, including differences in blend prices as well as transportation costs and proceeds from even the super pools or Federal order system to offset those transportation costs. So it's a dynamic situation.

Q. I realize there are a lot of other factors involved, but presently for Order 30, if you've got a load of milk and you're looking at a Class I sale to Order 30 versus Order 32, in Order 30 you know you're going to get whatever the prevailing premium is plus a $0.10 assembly -- a $0.10 assembly credit and transportation credit?

A. I should know the answer to this, but I'm not certain that supply plants located outside of the geographic area of Order 30 would receive transportation credits and assembly credits. I'm not sure. Milk doesn't move, I haven't watched it.

Q. If we can -- we can all look at the regulations to determine whether they do or don't, but if you assume that those credits are available in addition to the over order premiums available, etc., on Order 30, it doesn't tilt the equation from presently that much towards the Order 30 sale?

A. Yes. To a certain extent, yes.

Q. To whatever extent they apply?

A. Yes, and to the extent they cover the actual cost.

Q. Thank you, Mr. Weis.

JUDGE HILLSON: Anyone else want to cross-examine Mr. Weis? Mr. English.

RECROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods. I have one follow-up question from Mr. Beshore.

In his questioning, he suggested perhaps the difference between Order 32 and 30 was that the rate of reimbursement -- I'm sorry, strike that. That the problem, the deficiency in Order 30 was the rate of reimbursement for transportation, that is to say that it was set in 1987 and may need some updating; correct?

A. Correct.

Q. Isn't another deficiency and the reason why CMPC has to intervene outside the order, that Order 30, as you corrected me, doesn't reimburse for transportation for direct shipment?

A. Correct.

Q. Thank you.

JUDGE HILLSON: Does USDA have any questions of this witness?

MR. ROWER: Yes, we do.

JUDGE HILLSON: Go ahead, Mr. Rower.

CROSS-EXAMINATION

BY MR. ROWER:

Q. Jack Rower, AMS Dairy Programs. Good morning, Mr. Weis.

A. Good morning.

Q. In developing Proposal 3, did you consider what resources the Market Administrator might need to take to implement the proposal, Proposal 3, if adopted?
A. Yes, we did, to the extent --
Q. Additional resources.
A. There would be an up-front effort to establish a database of mileages between supply plant locations and distributing plant locations that would be applied against those movements of milk and the computations that are involved that are currently being done in Order 30 to determine the volume of milk that's eligible to receive the credit.
Q. In that regard, would there be a need, in your view, for an increase in the order's administrative assessment to pay for those additional resources, any additional personnel, software?
A. I don't believe I'm qualified to answer that. I'm not that familiar with the staffing and workload and circumstances.
Q. It has not yet been considered in terms of the development of the proposal; is that correct?

A. Correct.

Q. Thank you. Just some follow-up question. In your opinion, does the need for adoption of the transportation and assembly credits, as you've developed in Proposal 3, rise to the level of an emergency condition?

A. We don't consider it an emergency condition.

Q. Thank you. We have questions that we would like to ask on small business.

MR. ROWER: Mr. Richmond?

CROSS-EXAMINATION

BY MR. RICHMOND:

Q. Bill Richmond, Dairy Programs. Good morning.

A. Good morning.

Q. With regard to small business areas, do you employ zero to 500?

A. No, we don't. We have 1,700 employees.

Q. Also with regards to the transportation costs in terms of a loss, would you consider the transportation costs to be a --

JUDGE HILLSON: You need to

speak up.

Q. With regards to a condition of a loss versus an operating expense, do you consider transportation costs to be more of a loss or simply the cost of business or operating expense?

A. We would consider what we're discussing here to be a loss. We're delivering milk, and the proceeds from the milk are not adequate to cover the cost of procuring it and delivering it to the market, to the customer.

Q. Thank you. And also, could you reflect on the difference, if you would, in terms of assembly costs or milk going from a farm directly to a distributing plant versus milk going from a supply plant to a distributing plant?

A. I think it was described very well yesterday by Mr. Hollon in his testimony, milk does not go through a supply plant. Also incurs assembly costs associated with field service, quality testing, and screening of the milk to determine that it meets the customers' specifications. In the case of Class I milk, we are doing additional antibiotic testing on that milk, we go beyond the minimum legally required beta-lactam testing.

JUDGE HILLSON: Could you spell that last thing you said?

A. Yes. It's B-E-T-A - L-A-C-T-A-M, family of antibiotics that are required by law to test for. We're testing for additional drug residues at the request of our customers. We're running additional bacteria tests and troubleshooting quality problems at the farm level. These are called preliminary incubation counts.

Producer communications, market information for them, education, and services we provide in the area of risk management tools associated with all milk regardless of whether it goes through a reload station or direct-ship farm.

Q. Thank you.

JUDGE HILLSON: Anything else?

MR. ROWER: No thank you.

THE COURT: Any other cross-examination of this witness?

Mr. Miltner, come on up.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner for Select Milk Producers and Continental Dairy Products. Good morning, Mr. Weis.

A. Good morning.

Q. We had some earlier questions, I don't remember if it was Mr. Beshore or Mr. English, about the deficiencies of direct farm shipments. And I wanted to ask you: In addition to the efficiencies of such shipments, are there also milk quality considerations? Any differences in milk quality and shipments direct from the farm rather than milk that comes from a supply plant or a reload station?

A. There are potentially -- there are more risks involved with handling milk at a reload station or supply plant as compared to direct-ship.

Q. What kind of risks might those be?

A. Additional pumping and exposure of the milk to pumps, pipelines, hoses, the surface of milk storage tanks, etc., would lead to the opportunity for contamination.

Q. And is it, in general, is it safe to say that the more raw milk is handled, the more it becomes degraded? And I say degraded in a general sense, not in a Grade A versus Grade B sense. The more it's handled, the quality of the milk deteriorates, the longer it's handled, the more times it's handled, is that an accurate statement?

A. I would frame it that there is an increased risk the more the milk is handled, not necessarily if it's handled properly results in a degradation of the quality, but the risk is definitely increased.

Q. And then my final question, maybe a series of questions, about your proposal as modified in the Proposal 3 modifications offered by DFA.

Is it accurate to say that the DFA proposal would achieve the same results that your proposal would achieve for your cooperatives?

A. For our cooperatives in general, yes.

Q. In that respect, you have no preference as to which is adopted?

A. We would have no preference.

Q. Thank you.

JUDGE HILLSON: Mr. English.

FURTHER RECROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods. I want to go back one more time, in more specificity, if possible, to page 6 in your statement, "Most of the milk serving the market from this geographic area moves through a supply plant or reload station."

Looking at Exhibit 9, the Market Administrator's data, Table 33, first when you say geographic area, I think you said Iowa, northeast Iowa and --

A. Southeast Minnesota.

Q. Southeast Minnesota. Do you know what counties in Iowa and Minnesota would be included in that?

A. No, I don't, right off the top of my head. Waukon is in Allamakee County.

Q. How is that spelled?

A. A-L-L-A-M-A-K-E-E.

Q. That's the third county listed on Table 33 for Iowa. How many -- what's the sort of circle that you would think about, how

large is -- how many counties, do you think, or what geographic bounds maybe by cities? Does it go as far up as Minneapolis?
A. The area we're talking would pertain to Caledonia, Minnesota; Waukon, Iowa; Lancaster, Wisconsin; Prairie du Chien, Wisconsin.
Q. Could you spell that?
A. Prairie, small d-u capital C-H-I-E-N.
Q. So that was going to be the northeast boundary or eastern boundary?
A. For the most part, yes.
Q. What would be the western boundary?
A. Stacyville, Iowa.
Q. What would be the southern boundary?
A. I believe -- I believe Waukon. I'm not --
Q. Again, roughly.
A. -- familiar with the geography there.
Q. And the northern boundary would be?
A. Caledonia, Minnesota.
Q. Thank you.
JUDGE HILLSON: Any other cross-examination of this witness? Do you have any redirect?

REDIRECT EXAMINATION

BY MR. VETNE:

Q. Mr. Weis, in response to questions, I think you testified that, in referring to invoices, that the freight costs to Carlinville was $1.49 hundredweight?

A. Yes.

Q. And to Peoria, $1.16 per hundredweight?

A. Yes.

Q. So that the record won't be confused with other references to cost, the rate that you gave is the cost of 100 pounds of milk from point of origin to point of destination?

A. Correct.

Q. It's not a per loaded mile cost for the truck?

A. Right.

Q. In response to some questions you were asked about alternative, possibly alternative marketing of the Waukon area milk supply to Foremost distributing plants in Order 30, and correct me if I'm wrong, but I think you said you hadn't looked at much moving milk in that direction because you didn't do it?

A. I haven't analyzed it, yes.

Q. The Foremost Farms members in the area that you just identified, those Foremost Farms members move through Order 32; is that correct?

A. Yes.

Q. Pooled in Order 32?

A. Yes.

Q. Somewhere in the geography between northeast Iowa and southern Minnesota, there are a number of plant opportunities before you get to the Foremost-operated distributing plants in Order 30?

A. Yes, there are.

Q. And if, indeed, you were to take milk from that area to the Foremost distributing plant in Order 30, you would be displacing more local milk supplies to those distributing plants; correct?

A. Yes, we would.

Q. That's all I have.

JUDGE HILLSON: Can I presume you want Exhibits 30 and 31 moved into evidence?

MR. VETNE: Your presumption is so good. Thank you.

JUDGE HILLSON: Any objection? Exhibits 30 and 31 are received in evidence. And the witness may step down.

And Mr. English, are you going to call a witness now?

MR. ENGLISH: Can we go off the record for a second?

JUDGE HILLSON: Sure.

(Off the record.)

JUDGE HILLSON: Let's go back on the record. Mr. Vetne, you indicated you want to call another witness?

MR. VETNE: I did. Your Honor, John Vetne. Yesterday morning I asked the Market Administrator, I noticed something I thought was there, it wasn't there, it was missing, I asked him if that could be readily made available by yesterday afternoon. It was available, and Mr. Stukenberg said he would present it when it was convenient.

JUDGE HILLSON: This seems to be a pretty convenient time.

MR. VETNE: When there's a

hole.

JUDGE HILLSON: So we're recalling Mr. Stukenberg.

Mr. Stukenberg, you're still under oath and I'll just let Mr. Vetne ask his questions. I just have handed another exhibit called John Vetne Supplemental, and I presume you want that marked as Exhibit No. 32? We'll so mark it Exhibit 32.

(Exhibit 32 was marked for identification.)

CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Stukenberg, yesterday morning I broached you and asked if the Market Administrator could provide data that shows not only pounds per county but number of dairy farmers pooled into the market by county for the months of November, December '03 and May of '04?

A. That's correct.

Q. And by the afternoon you assembled that and put it in exhibit form, John Vetne Supplemental; is that correct?

A. That's correct.

Q. And it's been sitting at the back table there since yesterday afternoon?

A. That's right.

Q. Other than the addition of the producer numbers, there's also data there on pounds, and those pounds would be identical to county data that's previously been introduced?

A. Only in the format that this is in the total, with the exception of December in the MA exhibit, we had the December totals listed, but for November and May, we have the totals listed here on this one.

Q. The totals for the --

A. Total marketings by county.

MR. VETNE: I have no other questions, but I ask the exhibit be received.

JUDGE HILLSON: We'll receive it in once anyone else wants to ask questions. We've marked it Exhibit 32.

MR. VETNE: I want to thank you. And thank the Market Administrator for all the works it's done.

JUDGE HILLSON: In the absence of any questions, I'm going to admit this document into evidence. If you think of questions later on, you've had a chance to review this document, we can always recall this witness one more time before the end of the hearing, if necessary.

You may step down.

Exhibit 32 is received into evidence.

Are you ready to continue, Mr. English?

Mr. Beshore, you're going to call a dairy farmer witness?

MR. BESHORE: Yes. Yes, we call Barbara Rinehart.

BARBARA RINEHART,

a Witness, being first duly sworn, testified under oath as follows:

JUDGE HILLSON: Would you please state your name and spell it for the record.

THE WITNESS: Barbara, B-A-R-B-A-R-A, Rinehart, R-I-N-E-H-A-R-T. And our residence is 17088 Highway M of Purdin, Missouri, P-U-R-D-I-N.

MR. BESHORE: Your Honor, I would like to ask that the two-page document be identified as the next consecutive exhibit number, which I think is --

JUDGE HILLSON: 33. I have marked the Barbara Rinehart statement as Exhibit 33.

(Exhibit 33 was marked for identification.)

JUDGE HILLSON: She's your witness.

DIRECT EXAMINATION

BY MR. BESHORE:

Q. Mrs. Rinehart, would you please proceed to present the statement you've prepared? And we may have a few questions after that.

A. Okay. I am Barbara Rinehart. I've been a dairymaid/dairy producer in north Central Missouri, in Linn County, for 42 years. I am a producer member of Dairy Farmers of America and I am in Federal Order 32. Under normal conditions on our farm we produce our own feed, raise our own heifer replacements, sell some heifer replacements, and we sell hay. And my son and daughter-in-law also have a heard of Angus and flock of sheep. So we're well diversified.

When my husband and I began farming it took a serious commitment to produce quality milk by hand milking cows and lifting 10-gallon cans into a water cooler. There were three processing plants in near proximity. And some people still ship cream in plastic bags and cardboard boxes and went by a train to Chicago every night on Kansas City Chief.

We sold mostly through Producers Creamery, which is in Brookfield and Chillicothe, Missouri. That was the background of Mid-Am. That was the first producer property of Mid-America Dairymen, which is now merged into DFA.

We try to stay in form. We try to promote milk to the best of our ability. I host not always formal dairy tours, but we do have often visitors to our farm. And we try to stay involved in the complicated world. Now, I'm not an expert in milk marketing, but only in producing milk and raising heifers and farming. I was Mid-America secretary for 18 years and I did enjoy that occupation.

When we thought several years back we

could see the handwriting on the wall, the Grade C milk in cans and even the small bulk tanks that are going out of business being committed, and it was a big commitment. We committed to all the rules and regulations, all new facilities, new equipment, and especially the debt that it took to produce quality Grade A milk. And we produced that milk every day, all day, all those years since.

In less than two years after that happened, my husband suffered a severe heart attack. He was only 44 years old. And I had three young teenagers and had a severely handicapped young child, and in order to keep everything going, I stayed with that commitment with the help of those kids and family and friends, and we're still producing milk.

There are -- there were approximately 40 dairy producer members in our county when we began farming. Now there are six of us who produce milk for DFA. There are an additional two that I didn't have written down: One is an organic farm that delivers milk personally to Columbia and Kansas City areas, and the other produces milk for I think Prairie Farms in the eastern edge of the county. These three -- these six dairy farmers are on one route. We have -- there's a typo here. We have a 55,000 gallon tanker, it's not gallon, it's a 55,000 pound tanker that backs into our farm, picks that milk up every other day.

He comes out of Iowa and he delivers directly to the Anderson-Erickson Class I plant in Des Moines, Iowa, and the other day he doesn't pick up for us, he picks up eight farmers in three adjoining counties, and he also delivers it to Anderson-Erickson. That is his only market, that is our only market.

Anderson-Erickson, as I'm sure most of you know, is well committed to their quality. They are noted for their flavor, shelf life, and the high quality of their products. And they are extremely strict with their producers. And those quality milk standards start with my cows every day.

Anderson-Erickson is committed to our milk supply. One producer lost a cooler, it went bad, and he was unable to meet the market for several days, and Anderson-Erickson management was very upset because that -- they had counted on that milk; they planned on it being there every day.

Cost of transporting that milk is not cheap. We all share that transportation cost every day, and not just once a month or once a quarter. We paid -- when our milk went to Chillicothe, we paid $0.665 per hundredweight. Now we pay the cost to St. Joseph, Missouri, which is approximately twice that distance, and our costs are $10 per stock weight and right around $1.00 per hundredweight in addition to that.

It was -- the milk can go to Kansas City, but when we had the -- Chillicothe had a plant that produced mozzarella cheese, and it -- a lot of our milk went there. It was always available to go to Omaha, to Kansas City, to St. Joe, wherever it was needed, but it saved money for all of us producers that the transportation costs were shared among the producers in Kansas City who were closer to this bottling plant, and we were closer to that mozzarella cheese plant. And we all shared in the pockets of that plant, but it is closed, so now we are forced to pay the higher cost. We pay to St. Joseph, Missouri, regardless of where the milk goes to.

And the only reason that we chose to remain dairy farmers in the fall of '02 and '03 was the hopes milk prices would get higher. We had a severe drought in our area that year. We did not raise one grain of corn, we had to buy water for all our livestock through the rural water association, and that ran as high as $1,200 a month. And that continued from the first of July until Easter of 2004.

But we did that on the premise that prices were going to get better. Dairy cow number were going down, milk supplies were tightening and it was going to get better. And it did, but we missed it. What happened was -- what almost -- the straw that almost broke the camel's back was I received a call from my brother-in-law. He's a professor of economics in West Plains, Missouri, Springfield/Southwest Missouri State, and he was just joyous as he could be. He was sincerely congratulating me on finally doing the right thing. I finally was going to make some money.

One of his -- one of the sons of a dairy producer had told him that his dad made more money last month than he did in 2002 and 2003 combined. Of course, those were kind of bad years, and that's not saying a lot, but it was saying a whole lot.

Our milk prices were almost $12, and this producer, who obviously depooled, made more money in one month than he had made in two years put together. He was hearing and seeing the prices soar in the store. He was seeing, you know, the jubilation of several of those producers, and we were sort of left holding the bag.

In Federal Order 32, from my milk check information, we had 6 million pounds; that's 68 percent utilization for Class I. When Class III prices were at their highest, PPDs were very negative, and when that situation turned around, it changed to 1.234 millions pounds at 26 percent Class I utilization and 1.272 million with a 27.08

percent utilization when things changed quickly. And so therefore, when all that depooled milk came into play, our prices dropped before they ever reached anything like the peaks.

And that peak actually -- it isn't in this testimony -- but actually, we feel like it did almost more harm than it did good, because we lost -- the last figures I saw, we lost 2 percent of our Class A bottling milk market, we lost a lot of goodwill, and even with all the advertisements we put in milk, we're still around 2 percent.

And the most serious thing, from my point, is the lack of incentive for producers in our area. Like I say, there are so few of us. And if -- there are no young producers. I think the only young people at all are in a family situation. And I think, as far as I know, that the youngest one in a family situation is my own son, who is 43.

I asked my children if there's anything they would like to say if they would be down here today, and my daughter-in-law said, yes, you tell them if it keeps up this way, they're not going to have any milk.

And it is that serious, because there's -- the opportunity -- they just don't feel the opportunities are there. They feel like they got kicked in the teeth when this all happened and that we'll suffer the down effects for a long time.

Our internal lack of services is already critical because there are so few of us. It cost me $238 to get a repairman or serviceman to the door of the barn. And that's without doing anything, that's just arriving at the barn. And there are a few qualified, even at a distance, they've gone out of business for the dairy farmers.

And if even one of those six producers in my county drops out or even cuts back, that's going to leave that hauler in ruin because he can't afford to pull that tanker around, he can't afford to make all those miles, and he doesn't have a new producer to take his place. And I seen that insight we're going to be in an even more worse spot than we are now.

It's a problem for our area and it is

a problem for our entire Midwest.

Q. Just a couple of additional questions for you, Mrs. Rinehart. Thank you for coming.

Tell us just a little bit more about your farm operation. How many cows are you milking?

A. We did milk 120 cows or more, and then due to some health reasons, we sold half our herd five years ago and we have it built back to about 80, 85 head. Like I say, we do raise our own replacements.

Q. How much milk -- is your milk picked up daily or every other day?

A. Every other day.

Q. And approximately how much -- what volume are you shipping every other day?

A. 7,000, 7,500. We go year-round, so it runs 7,000, 8,000 pounds per day per pick up.

Q. I think I understood you to testify your hauling expense involves a $10 stop charge at every pick up?

A. Yes, it does.

Q. And in addition, the cost to deliver up to Des Moines, to the Anderson-Erickson

plant, it's about $1.00 hundredweight?
A. Yes.
Q. So we can do these -- we can do this math, but the $10 per stop would be an additional rate?
A. Yes.
Q. On top of the $1.00 per hundredweight?
A. Regardless of how much milk you produce, it's still $10 for the truck to back in.
Q. Now, I know you were here a little bit yesterday afternoon, and I don't know whether -- did you hear any of the other dairy farmers testify?
A. No, I didn't.
Q. One of the things that the Department of Agriculture is interested in knowing is how proposed regulations, changes in regulations here, and the existing regulations affect small businesses. And a small business for a dairy farmer is defined as an enterprise with less than $750,000 gross a year. Does your dairy qualify as a small business?
A. Yes.

Q. There was some testimony earlier this morning about one of -- by Mr. Weis from Foremost Farms, who is also a supplier to the Anderson-Erickson plant in Des Moines, and one of the proposals that's on the table here would provide reimbursement for hauling expenses to Anderson-Erickson for tanker loads of milk that come from a supply plant and points in other parts of the milkshed, okay, but it wouldn't provide reimbursement for cost of delivering to Anderson-Erickson when it's directly from the farm as in your case.

A. Yes.

Q. Do you have any thoughts about that?

A. Well, I guess that $10 stop charge is our pooling charge, because all six producers go directly in that tank and then it's loaded and goes on. We used to have a load-over facility in the Trenton, Missouri, area, but that is no longer available. There are no -- I don't know of any, you know, collection facilities in our area at all.

Q. But I guess if you -- if there's reimbursement for milk from collection facilities but not direct from the farm, you

might have to put one up to see if --
A. Yeah.
Q. -- to see if you could --
A. Yeah, because -- I don't think I'm misquoting him when he said that most of those producers are within a 25 mile area. So the producers that pool into that load-over facility, or collection facility, their transportation costs are a whole lot less than $1.00, I'm sure. I don't know what they are, but I'm sure they're less than $1.00.
Q. Actually, the Market Administrator has provided some statistics that are in some of the documents we have, and you're correct.
You made -- in your typed statement, I think there was an inadvertent error in one of the statistical numbers you had. You talked about at one point Federal order pool after depooling had 6 million pounds at 68 percent utilization. The statistics that we have show that it was just a little over 600 million pounds.
A. Okay.
Q. Does that sound about right?
A. Yes, that's what it should read.

Q. And then as you correctly pointed out, when the milk came back on the pool, the volume doubled to 1,200 and some million pounds as you indicated and, of course, the utilization went down as you correctly reported.

A. Way down.

Q. Right. Now, tell me a little bit about your -- the responsibilities you had as Mid-Am district secretary. Was that an elected office?

A. Yes, it's an elected office for the district meetings that were annual.

Q. And what district did that encompass?

A. It was -- first it was Brookfield district, and producers dropped out, and then it was Chillicothe, and now it's Cameron and District 18. I don't remember the exact numbers of those areas, but Cameron is 70 miles.

Q. And those district proceedings were meetings at which the members of the cooperative came together to vote on issues that might come before them?

A. Yes. Vote on a representative for

redistricting for district chairman who meets before the corporate board to elect those officers and to review the year's business to bring producers and management up to date on things that are happening.

Q. Give your managers some input?

A. Yes. And they give us a lot and we give the managers back.

Q. That's the way a coop works.

A. That's right.

Q. Thank you.

JUDGE HILLSON: Does anyone else have questions for Mrs. Rinehart?

Mr. Stevens.

CROSS-EXAMINATION

BY MR. STEVENS:

Q. Garrett Stevens, Office of General Counsel, U.S. Department of Agriculture. Thank you for coming today and testifying.

As Mr. Beshore said, the Secretary is interested in your views as a small business on the effect of these regulations. I know you had some views already expressed. I just want to make sure you feel you've had an opportunity and if there's something else you would like to educate the Secretary with, I think the record would -- it would help on the record if you could do so.

A. Well, I think what -- we are committed every day to that supply. And I think if the persons or coops or whatever are going to draw the premiums, they should be committed to sharing the burdens of producing and transporting. It shouldn't be in and out to leave the Grade A producers hanging.

Q. You're referring to depooling?

A. Depooling, yes.

Q. Thank you very much.

JUDGE HILLSON: Anything else? I'm going to receive Exhibit No. 33 into evidence.

MR. BESHORE: Thank you.

JUDGE HILLSON: Thank you very much for testifying, you may step down.

It's almost exactly 10:00, why don't we take our morning break, 15 minute break. Come back in 15 minutes.

(Recess.)

JUDGE HILLSON: Mr. English, want to call your next witness, please.

MR. ENGLISH: Thank you, your Honor. I'm Charles English representing Dean Foods. At this time I call to the witness stand Mr. Evan Kinser.

EVAN KINSER,

a Witness, being first duly sworn, testified under oath as follows:

JUDGE HILLSON: You need to try to speak up.

THE WITNESS: Okay.

JUDGE HILLSON: And please state your name and spell it for the record.

THE WITNESS: Evan, E-V-A-N, Kinser, K-I-N-S-E-R.

MR. ENGLISH: Your Honor, I've handed both you and the court reporter and have also handed out, to the extent we have copies, two documents, I would ask them to be premarked. The first is Testimony of Dean Foods Company by Evan Kinser, which is a 26 page statement.

JUDGE HILLSON: And I have marked that as Exhibit No. 34.

(Exhibit 34 was marked for identification.)

MR. ENGLISH: And I apologize, there were -- some of them I handed out to those cooperative agencies or parties and I've provided four copies to the court reporter.

The second copy, there are more copies on the back table, and that is entitled Exhibits of Dean Foods Company by Evan Kinser and in larger print Exhibits A through E.

JUDGE HILLSON: I've marked that as Exhibit No. 35.

(Exhibit 35 was marked for identification.)

MR. ENGLISH: And again, I've provided four copies to the court reporter.

JUDGE HILLSON: He's your witness.

MR. ENGLISH: Thank you.

DIRECT EXAMINATION

BY MR. ENGLISH:

Q. Mr. Kinser, could you read your first paragraph of introduction and I'll interrupt for one second and ask a few questions.

A. Hello, my name is Evan Kinser. I'm employed by Dean Foods Company as Manager of Dairy Risk Management and Commodity

Procurement. My business address is 2515 McKinney Avenue, Suite 1200, Dallas, Texas 75201.

Q. Mr. Kinser, how long have you been employed by Dean Foods?

A. Five months.

Q. Have you testified at a prior proceeding on behalf of Dean Foods?

A. I have.

Q. Is that the Order 30 proceeding that's been referenced several times in this proceeding?

A. Yes.

Q. And prior to being employed by Dean Foods, have you been employed in the dairy industry?

A. Yes. By Foremost Farms for five years.

Q. What was your position?

A. Director of Fluid Milk Marketing.

Q. And prior to your employment at Prairie Farms, what involvement have you had in the dairy industry?

JUDGE HILLSON: Prairie Farms, you meant Foremost?

MR. ENGLISH: Apologize. Thank you.

Q. (By Mr. English) Foremost Farms, I'm sorry.

A. Prior to Foremost Farms I received a master's in agri business from the University of Wisconsin and a Bachelor of Science in agriculture economics and animal science from the University of Missouri.

Q. And prior to that education, you worked on a dairy farm?

A. I grew up on a dairy farm in southern Missouri.

Q. So it's fair to say you're familiar with this marketing area?

A. That is correct.

Q. Would you then proceed with your statement?

A. Dean Foods owns and operates nine distributing plants regulated by Central Milk Marketing Federal Order. I am appearing today to support and explain the philosophy of Dean Foods in arriving at Proposal No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12 and No. 13. I will further explain our position on the remaining proposals. Mr. Paul Christ will explain the detailed mechanics of the proposals.

Definition of the Problem. There are two problems: 1) The provisions of adequate incentives to attract an adequate and reliable supply of milk to the pool, and 2) the provisions of adequate incentives to attract pooled milk to pool distributing plants.

The current order provisions fall short in solving either of these problems. These inequities arise from depooling and do not allow for equal treatment of all milk with respect to the distribution of the pool value. The ability to depool and repool at will amplifies the challenge of getting milk to the market. As testified to yesterday, there are great challenges to getting milk to St. Louis, Missouri, the largest metropolitan area in the marketing area.

Purpose of the Federal Order System. Understanding the correct purpose of the Federal order system is key to this hearing being successful. Distractions from the intent in the past have led to tweaks or small patches, when more concise and meaningful action was needed. The focus always needs to be on the original intent and what changes should be made today to ensure the original intent is carried out. Today, we can and should take different actions than in the past. These actions must address a now greater array of market conditions and resulting opportunistic behaviors.

The Agricultural Marketing Agreement Act (AMAA) of 1937 states as a declaration of policy the following:

"(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in Section 8c(2) [which includes milk] of this title as will provide, in the interest of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing seasons to avoid unreasonable fluctuations in supplies and prices."

The Federal order system strives to provide a stable supply of milk, which has routinely been construed to mean packaged fluid milk only, with minimal fluctuation recognizing there is some degree of seasonality that is unavoidable.

The current provisions are miserably failing to accomplish the purpose of supply stability. There are multiple examples in the exhibits that have been presented at this hearing that illustrate volatile swings in milk pounds pooled on the order.

The best exhibit to illustrate the swing in pounds in the order is seen in Exhibit 9. On several pages (14, 17, 19, and 21) there is a graph titled "Utilization of Producer Milk By Class." This graph clearly illustrates there is a problem. It shows radical swings in the percent of the producer milk that is utilized by each class of milk.

To understand this more clearly, page 22 (Table 12) shows the producer milk utilization by class. Connected to this are the actual pounds contained in Table 13 (page 23). In looking first at Table 13, studying the rightmost column, Total Producer Receipts, it becomes clear that something is going on.

Notice the significant decrease in pounds in the pool in July 2003 through October 2003 and then again in March through May of 2004. Closer inspection will show this significant drop in producer milk is almost entirely associated with Class III pounds, seen two columns to the left.

Table 12 shows how this affects the make up of the pool when the Class III pounds leave the pool; the other class pounds remain the same and the utilizations swing dramatically.

Central Order Provisions. The purpose of the Federal order has been confused and misapplied in developing regulations that govern the Federal orders. Some would lead the Secretary to believe the Federal order's purpose is to ensure all plants have a sufficient supply of milk. The AMAA and the action by the Secretary simply does not support this; it is clear that the concern of an adequate and stable milk supply applies to distributing plants.

The track record and structure of this order makes this clear. There are many key sections from the order language to substantiate the only milk supply of concern to the order is that available to distributing plants. By absence and extension, the milk supply of other plants is a residual concern of the order, and only to the extent it is necessary to ensure that reserve producers, those standing ready to serve the fluid market, have outlets for their milk.

The importance of distributing plants' milk supply is clearly illustrated in § 1032.7(g). This provision gives the Market Administrator the authority to change shipping percentages of pool plants to distributing plants. There is no statement about the need for milk in a supply plant, or a supply plant system. The purpose of these plants being part of the order is to meet the needs of the distributing plants. In the event current requirements are ineffective, the Market Administrator can make a change.

A dissection of § 1032.7, the definition of a pool plant, clearly illustrates the only plants mandated to be regulated by the order are distributing plants. All other plants are allowed to participate based on defined service to a distributing plant. Rather than spend the time to explain each subsection, I would offer the following as a quick summary of § 1032.7.

In Paragraph 1, the plant referenced is distributing and its regulation is mandated. Paragraph 2 references UHT-distributing; its regulation is mandated. Paragraph C references supply plant; regulation is voluntary.

Paragraph E, distributing system; voluntary to be formed, mandatory pooling -- or mandatory regulation once formed. Paragraph G, the call provision is voluntary. Paragraph H, plant exemptions is special circumstances.

These key sections of the order language demonstrate the order's main concern must be with distributing plants' milk supply. However, the order also provides a mechanism for all the orders' milk. The pricing system is built around price discrimination based on the milk's use. This serves as an attraction for the milk to be in the pool.

The largest contributor to the pool is the Class I price. This is clear from studying the pricing formulas found in § 1000.50 that Class I is structured to be the highest price in the pool.

Summary of Federal Order Logic. The system is designed for classified pricing while maintaining certain relationships between the prices. It was thought the supply plants and producers shipping to them would want access to the dollars generated by the distributing plants. Therefore, this system regulates those plants (distributing plants), requiring them to contribute to the pool, and relies on economic incentives to drive regulation for the balance (supply plants).

This is based on the assumption that the revenues generated by the distributing plants would always provide sufficient incentives to attract a milk supply to the pool. In the absence of forced regulation, the contributing plants would have left the order rather than contribute. Without their contribution to the pool, the incentive would be lost to draw other milk to the pool.

Having locked in the contributing plants to regulation, it was thought would-be unregulated handlers (supply plants) would voluntarily submit to regulation in order to capture the benefits of the higher Class I price.

Change in Grade A Volume. However, it hasn't quite worked out that way. One possible cause for these glaring shortcomings could be the result of not adjusting to changes in the underlying structure of the dairy industry. There are several significant changes that have occurred in the dairy industry since the implementation of the AMAA in 1937.

I could spend hours discussing such changes as cow genetics, production methods, cooling and processing technology, transportation systems, etc. One dynamic that seems to have been overlooked, and a key principle in operation of the Federal order, is the issue of availability of Grade A milk. The industry has changed from having significant manufacturing grade supplies to all but exclusively Grade A milk production

(See Exhibit 35, A and B).

One could get the impression from how the orders currently are written and behave, that there continues to be a need for more Grade A milk. If these exhibits were the only facts, likely the reverse conclusion would be drawn. There is more than ample supply of milk available to the Grade A market. The regulations have not recognized that the incentives, once needed to switch from manufacturing to Grade A, are no longer necessary.

Inequity. The fact remains this system requires proper economic incentive and properly defined regulation. Missing these two key ingredients allows handlers to associate milk with the order and draw money out of the order, while not providing any service to distributing plants. However, the problem is not limited to these handlers merely being free riders, drawing from the pool for no service.

It extends beyond that, when there are costs incurred by those servicing the market these costs are not shared, instead they are left with the handlers who have continued to do the right thing and serve the market. When the free riders leave, the costs do not go away; these costs are forced upon smaller pool of handlers. More correctly said, they are forced upon a smaller contingent of dairy farmers. It is like going out with a group of friends and sharing a great meal, eating as much as you can, but when the server comes with the check, you simply get up from the table and leave the bill to be divided among those who didn't do the same.

Among Handlers. Current regulations allow handlers who may or may not choose to be pooled to enjoy the benefits of the pool, so long as they meet the requirements of the order for that month. Furthermore, when there is a cost to serve the market, they are allowed to excuse themselves from the table, until the next meal is being served.

This idea of excusing themselves has been termed depooling. A more technical definition of depooling was provided in the prior testimony. The result of this structure is when there is no economic incentive (reward) to stay pooled, and no economic disincentive (cost) for leaving the pool, this milk withdraws from the pool. Handlers operating nonpool Class III, hard cheese, operations are in prime position for exercising this option.

Nothing demonstrates this exact situation any more clearly than recent history. A quick glance back, a little over a year, clearly demonstrates that in today's marketplace this system is broken. Undeniably, there is insufficient economic incentive and poorly defined regulation, resulting in failure of the order to achieve its intent. Furthermore, it is producing disorderly marketing, a result it was intended to prevent.

Producer Prices. Like my illustration of leaving before the bill is covered at dinner, there are costs currently not equitably shared among producers. Let's look at an example of two different dairy cooperatives. We will compare two similar cooperatives with the only exception being the percentage of their milk that they sell to a distributing plant.

Distributing plants are the only plants that are forced into regulation under the Federal order. All other plants can choose to be pooled or not to be pooled. The degree you service a distributing plant, by definition, lessens your ability to depool milk. The ability to depool milk lessens your competitiveness in the marketplace where others can.

Let's suppose there's a cooperative shipping 50 percent of its milk to a distributing plant, we'll call this Coop A. 50 percent of Coop A's milk supply must be pooled by definition; there is no choice. The balance of the milk could be depooled.

Now, let's contrast that with Coop B, which is shipping 20 percent. That is enough milk so that if they wanted to fully pool, they could pool all their milk receipts regardless of the month (this could drop to 15 percent for the months of March through July), but it does not force them to pool any more than 20 percent.

Now, focusing on the worst case scenario, we will look at April 2004. Here, Coop A had to pool 50 percent of their milk with a negative $4.02 PPD (Table 5, Exhibit 9). This means that Coop A's blended PPD is a negative $2.01.

Suppose Coop B pooled 20 percent at the same PPD and has a blended PPD of a negative $0.804. The Class III price was announced at $19.66 with a negative $4.02 PPD resulting in a blend of $15.64. If we assume that the remaining milk of each went to cheese production, both coops are able to overpay the blend, because neither had the negative PPD on all their milk.

But they are not both able to pay the same price. Coop A would be able to pay $17.65, the $19.66 less their $2.01 blended PPD. Coop B would be able to pay $18.856, the $19.66 less their blended negative PPD of $0.804.

Let's say that Coop B wants to be profit maximizing, yet competitive. They would pay at the Coop A's price level allowing them to make $1.206 per hundredweight in profit. In reality, Coop B might see a chance to expand their procurement, so they decide to say $18.00. If Coop A believes that Coop B is going to overpay the blend and pay more money to Coop A, Coop A will have to lose money to match Coop B. If Coop A guessed that they needed to pay $17.95 to be more competitive, it would mean that Coop A paid $0.30 more than their ability to pay.

In this example, I make no provisions for the operational efficiencies or inefficiencies of Coop A versus Coop B, they are assumed to have the same cost structure. This is merely an illustration of how different shipping percentages to a distributing plant affects a handler's ability to pay for milk.

Hidden Costs. A cost that often gets overlooked by the marketplace, but is not overlooked by the Market Administrator, is the cost of operating the order. In the current system, which allows for depooling, the administrative assessment is imposed only on those pooling. It is a tax on those who remain in the pool, even though everybody, including those who he depooled, obtains the benefits of having announced minimum prices.

Summary of Inequities. I hope at this point it is clear to the Secretary that there are three fatal flaws in the system. First, it forces regulation on distributing plants, but allows all others voluntary participation.

Secondly, these plants choose to participate when they can siphon funds out of the system for their betterment, but when the reverse is true, they bail with no cost to them.

Third, the reality is that when milk leaves the pool, the costs of administration must be borne by a smaller few. This creates a heavier burden for those remaining in the pool that is not rewarded when the market improves, because the free riders will return.

Exposure to Order Failure-Call Provision. I would like to point out that beyond economic effects of the flawed system, such provisions position the order to completely fail its purpose. I earlier referenced 1032.7(g) to illustrate that the purpose of the Federal order was to ensure a supply to distributing plants. This provision provides for the Market Administrator to increase or decrease for all or part of the marketing area the shipping percentage to encourage needed shipments or to prevent uneconomic shipment to distributing plants.

The current provisions only require 20 percent of pooled milk to be shipped to a distributing plant during August through February and 15 percent in all other months. No more than the reciprocal percent can be diverted to a nonpool plant. With the current provisions relying on economic incentives to keep milk in the pool and subject to the call provision, the change in shipping percentage would need to be significant.

I turn to April 2004 to illustrate how significant the call percentage needed to be. I'll begin with the assumption that all distributing plants pooled in the Central marketing order were 100 percent Class I, which we know to be an overstatement based on Exhibit 14, page 7 of 53, Pool Distributing Plant Utilization.

Exhibit 9, page 22, shows us the Class I percentage of producer milk. For example, in April 2004 the Class I percentage was 60.62 percent. This would say that 39.38 percent of the milk was used in other classes. If conditions had warranted for the Market Administrator to adjust the shipping percentages, the shipping percentages would have needed to be in excess of 60.62 percent.

If more milk was needed than the approximately 371 million pounds of milk utilized in Class I and there was only about 612 million pounds of milk in the pool (Exhibit 9, Tables 12 and 13), it would have required something greater than the 60.62 percent.

The milk that is pooled is all the Market Administrator can call on. So, to force milk to move from Class II, III or IV into Class I, or face being depooled, the shipping percentage would need to be higher than 60.62 percent. However, if a call had been issued, it is possible that some of the Class III milk would not have met the requirement.

Many handlers could benefit from being disqualified and forced out of the pool. This would have forced the shipping requirement even higher on handlers with Class II and IV uses, since those handlers were the only ones who would have wanted to be in the pool. If these handlers wanted to be in the pool, they would likely have done whatever was necessary to remain pooled.

The shipping percentage would only be even higher if you used the real Class I utilization of the distributing plants. Such a scenario would have required the shipping requirement to be set higher than 80 percent (recognizing the average Class I utilization in pool distributing plants is 80 percent as opposed to 100 percent).

The response to this line of thinking could be that milk will be readily available when the shipping percentage is increased and can be easily purchased. Actually, the opposite is the case, especially as it relates to the most recent examples for milk supply in the north. Cheese plants are most interested in keeping all their milk when the price is high so they can make cheese and not short any customers.

Now, put yourself in the place of a Class III handler, like Coop B. During recent examples of negative PPDs, Coop B was looking at above average, and in the case of 2004, record high cheese prices. If Coop B wanted to pool milk, they would have to give up at least 15 to 20 percent of its milk, depending on the month of what they wanted to pool [defined by § 1032.7(c)].

This would mean less milk to the vat and they would receive the negative PPD on that milk and any additional milk they pooled. I've already explained the implications of pooling on their ability to pay for milk. Given that information and my testimony about voluntary participation, the other alternative provided Coop B by the current order regulation is to keep all their milk, make cheese, and pool nothing.

This would be a win-win situation for Coop B. They are able to make as much cheese as possible for customers and they don't have a negative PPD. Thus, the Market

Administrator has no ability to call on Coop B to ship additional milk when and if he decided there are insufficient supplies available for distributing plants. The handlers shipping milk to the distributing plants will have a negative PPD, but will have to compete with Coop B when they go to pay for the milk.

The point of this illustration is that the current provisions allow milk to leave the pool. This renders the order virtually useless in ensuring an adequate and reliable milk supply to distributing plants and maintaining uniform prices paid by handlers to producers.

Just the opposite occurs. The power of the Market Administrator to make milk available to the distributing plants is severely hampered by the opportunity to depool. To the degree that shipping percentages would have been increased, what milk remained in the pool could have opted out of the pool, or depool. Those handlers would not respond to the increased shipping percentages.

Philosophy of Our Proposed Solutions.

Something must be done to change the order to rectify the shortcomings I have discussed above. We appreciate the Secretary's recognition of the need to change in requesting proposals and subsequently having this hearing. We further appreciate that the Secretary recognized ten proposals submitted by Dean Foods.

Our proposals are aimed at the current pooling abuses. The first most glaring and important pooling abuse is depooling. To the degree the Secretary does not solve this obvious error, the balance of our proposals are hardly band-aids. If the Secretary does correct the problem of depooling, these other proposals offer various levels of correction to achieve a pool that was designed to exist with Order Reform.

In an ideal world, from Dean Foods' perspective, the Federal order would operate in such a way to allow a distributing plant or distributing plant unit to have an individual handler pool. This system would put the pressure on the distributing plant to manage the pool in such a way as to resolve the purposes of the Federal order. If this would be allowed, it would force distributing plant handlers to think about how to insure their future supply of milk. They would need to keep economic incentives in place that would insure that even when it is temporarily undesirable to ship milk (as has been the case), the long run loss for opting out of the pool would be too great to forgo the long-term reward. However, the Secretary has rejected individual handler pools.

Thus, I will introduce the proposals with modifications. Our proposals can be divided into two major categories. First, depooling, which is the most important concern and serves to amplify our second concern, pooling abuses. We have proposed multiple solutions for pooling abuses, each having a different degree of efficacy.

We understand that many of our proposals are at odds with others. We did not mean for all of our proposals to be adopted but to provide the industry and the Secretary options to correct the shortcomings of the current order provisions. I will not comment much on their mechanics or function, Mr. Paul Christ will be providing this information and detail in his testimony. I am going to introduce these proposals in order of preference.

Proposal No. 6. In Proposal No. 6 we propose establishing a dairy farmer for other markets provision, much like the same titled provision included in the Northeast Milk Marketing Order, § 1001.12(b)(5) and (6). We would like to modify the language that was submitted for the hearing and published in the official hearing notice to ensure that it reflects our intent. Our proposal would read as follows:

Rather than read it, the changes that were made is following § 1000.9(c) stated "if the pool plant," we are striking "the" and replacing that with "any."

Q. That's the second line of (b)(5)?

A. That is correct.

Continuing on to read, "pool plant operator or the cooperative association" was the original language, we are striking "the" and replacing that with "any cooperative association."

Q. That's the third line of (b)(5)?

A. That is correct.

A conforming change needs to be made by the Secretary under Proposal 15 to clarify potential implications created by Proposal 6. This change would occur in § 1032.13 (d)(1), which contains the following:

...if a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval), the dairy farmer's milk shall not be eligible for diversion until the milk of the dairy farmer has been physically received as producer milk at a pool plant.

To make our proposal highly effective and consistent, it should ber43 changed to read as follows:

...if a dairy farmer loses producer status under the order in this part (except as a result of a loss of Grade A approval not to exceed 21 days in a calendar year, unless it is determined by the Market Administrator to be unavoidable circumstances beyond the control of the dairy farmer such as a natural disaster (ice storm, windstorm, flood or fire) in which case the Market Administrator may determine the time extension granted to the effect -- that should be "effected." I'm amending the written statement to include "effected farm or farms") the dairy farmer's milk shall not be eligible for diversion until milk of the dairy farmer has been physically received as producer milk at a pool plant.

This change is not meant to harm dairy farmers who have had a disaster occur. This is meant to close a loophole that might otherwise allow for depooling, while avoiding the ramifications intended in this (and other) proposals. It is focused to give the Market Administrator clear definition, as well as the latitude to intervene when there is reason.

Effect of Northeast Order. Similar language exists in the Northeast order. A major difference is milk can get into the pool "free" in July. If milk leaves in the spring, it is out until July. This year, this provision played well into the hands of several handlers in the Northeast.

To illustrate this, I have Exhibit

35, C1 through C6. This is the Pool Price Announcements for the Northeast order for February through July. Notice that the Class III pounds dropped by 223 million pounds from March into April (the PPD also went from $1.07 to a negative $2.38 at the same time).

The pool lost another 37 million pounds of Class III milk in May, likely because of negative PPD. Then the provision worked. The milk could not "repool" on the Northeast order in June.

The system shortcoming was that the Mideast Milk Marketing Order does not contain the same or similar language. Some savvy handlers moved milk to qualify for pooling on the Mideast order for June. These handlers repooled their milk back on the Northeast order in July, as is allowed. Exhibit 35, C1 through C6 illustrates this point. Notice that in from June to July the Class III pounds increase 176 million pounds, close to the level in March.

To illustrate this point I will turn to Exhibit 17, submitted by Paul Huber with the Mideast order. I would also like to remind the Secretary of Mr. Huber's testimony with regard to how one might interpret the numbers, more importantly where this additional milk came from and where it returned. It would seem almost obvious that this isn't milk that suddenly appeared. It is milk that was most likely was left homeless because of as earlier month's pooling decision.

I requested Exhibit 17 - Pounds of Milk By State, February 2003 and 2004, Pounds of Milk By State, June 2003 and 2004, Pounds of Milk By State, July 2003 and 2004, and Pounds of Milk By State, August 2003 and 2004, to help illustrate how Northeast handlers took advantage of the pooling provisions of the Mideast order in June.

I included February, because all milk would have desired to be in the pool that month. This helps to single out other things that changed in the Mideast order from 2003 to 2004. I will not bore the Secretary, nor the hearing attendees, with every line of the three tables, instead I would like to focus the attention to two states, New York and

Vermont, and the footnote includes New Jersey.

Why would milk in New York, Vermont and New Jersey suddenly become pooled on the Mideast order for a single month and then disappear? The answer is the product of this proposal at work in the Northeast order.

The New York, Vermont and New Jersey milk could not pool in its "home" order. Having lost its home, it needed another market, and the best option was the Mideast order. Here we find what appears to be, in simple terms, an additional 67.422 plus million pounds of milk on the Mideast order because it was unable to pool on the Northeast order because of pooling decisions made the prior two months.

Think ahead for a moment and consider if a correction were implemented in all orders. Milk would either stay pooled or ship to a distributing plant to return to the pool. In practice, this can't happen overnight. Such a change would require additional hearings. So, if this were to begin, which order would be the right place to start? It should be the order with the most generous pooling provisions, the Upper Midwest order.

A hearing has been held in that order in which we have asked for this same provision. We believe that this is the right order for the Secretary to initiate a new policy and begin righting the existing wrongs. Then the Central order becomes the next vulnerable point, so we are here today asking the Secretary to take immediate action to fix this glaring error in the order.

The Mideast order, the next most critical order, has a request for proposals out, and we will submit this same language and urge the Secretary to have a hearing in that order. This would complete the core part of the order system that desperately needs this order language change.

Proposal No. 7. Again, only noting the changes, in Paragraph (5), starting with the third line, "1000.9(c), if the pool plant operator," original language, we are striking "the" and replacing that with "any." And continuing on, "pool plant operator or the cooperative association," we are striking "the" and replacing that with "any." So it would now read, "1000.9(c), if any pool plant operator or any cooperative association."

In Paragraph (6), second line, "received at the pool plant," again, striking "the" and replacing that with "any." Continuing on, "pool plant or by the cooperative association," striking "the" and replacing it with "any." So that line would now read, "received at any pool plant or by any cooperative association handler."

Like in Proposal 6, we would look for the same changes this § 1032.13(d)(1).

Q. 1032.13?

A. 1032.13(d)(1).

Illustration of Dairy Farmer For Other Markets Effectiveness. As pointed out earlier in my testimony, this type of provision exists in the northeast order. In fact, it is just like Proposal 7 with different months. Earlier I illustrated how the absence of this provision had a negative effect on the Mideast order. Before offering another depooling solution, which is much less effective, thus less desirable, I would like to contrast the pool consistency of the

Northeast with other markets with significant cheese manufacturing (i.e., the Upper Midwest, Central, Pacific Northwest, Western (when it existed) and Mideast). I believe from this illustration it will be clear that the provision is effective and accomplishes the intent of pool stability.

I summarized Exhibit 13, Federal Order Statistical Overview (all orders) January 2000 to current, in creating in Exhibit 35D. Page 1 of Exhibit 35D is a summary of the following four pages. This exhibit illustrates the volatility of the Class III percentage of the Northeast, Upper Midwest, Central, Mideast and Pacific Northwest.

For example, examine August 2003, each market had a negative PPD at the base zone(meaning it would be a larger negative PPD any place there is a negative location adjustment) of the order. Notice that in all the orders but the Northeast, the percentage Class III utilization is noticeably less than what would be deemed "normal." If you only saw the Class III utilization for the

Northeast order in 2003, you would be hard pressed to pick which months handlers would have desired to depool, given different rules.

To examine the situation on a more macro level, look at the first page of Exhibit 35 -- and E there should actually be D. This just looks at the variance in the Class III utilization by month and annually. Notice the variation on the Northeast order is less than one-quarter of 1 percent. The variation in each of the other orders is greater than 1 percent, with the Upper Midwest topping 5 percent. The Central order is close to 3 percent.

What is it that makes the Northeast unique? It is the "dairy farmer for other markets" provision. When this provision exists, handlers have to evaluate more than the current month's economic impact. This requirement causes them to behave differently than handlers pooling milk on this order, who only have to consider the immediate implications. They do not have to consider any possible future missed opportunities. Such consideration is currently required by the Northeast order's "dairy farmer for other markets" provision.

Dean Foods prefers Proposal 6 to Proposal 7 because the ramifications are longer and thus more significant. As I illustrated earlier, the Northeast order is not perfect. If it and the Mideast order were worded like Proposal No. 6, it would not have caused the implications on the Mideast order this year that occurred.

However, when you create a limitation on a handler reentry due to voluntary depooling, a reentry point must be provided. The Northeast allows that point to be July. Instead of a set month, both of our proposals allow handlers to serve the fluid market to return to the pool.

This provides the handlers greater flexibility than in the Northeast order, but also helps to reinforce the purpose of the Federal order system. In Proposal 7, the standards are more lenient and they can return via the calendar, like the Northeast order, but handlers still have the option of serving the market to return earlier.

We believe the Exhibit 13 Federal Order Statistical Overview (all orders) January 2000 to current provided by the Market Administrator and the summary of it in Exhibit 35 -- and again, E should be D. Page 1 through 5 clearly illustrated the effectiveness of the dairy farmers for other markets provisions.

We urge the Secretary to adopt this provision, with the most effective version provided in Proposal No. 6. However, if the Secretary feels handlers still need a greater degree of latitude to play games in the marketplace, we feel the weaker standards offered in Proposal 7 represents a significant improvement over the current standards and any other proposals offered at this hearing.

Proposal No. 8. In Proposal No. 8 it is as printed with the exception of § 1032.13, Paragraph (3) subsection (i), we would like to strike "subject to the provisions of § 1032.13(f)(3)." So (i) would read only, "For a new handler on the order" comma.

Before turning to the remaining proposals offered by Dean Foods, I want to make it clear that the most important action that could be taken by the Secretary at this hearing is implementing a solution for depooling. Any of the other proposals that Dean Foods or other participants in this hearing could present pales in importance to the health and viability of the order system than to eliminating depooling from our Federal order vocabulary.

This was made clear in testimony by Mr. Hollon and his Exhibit 18, Table 8A through I and Table 9I. This Exhibit shows how allowing depooling and making changes to the pooling provisions will be of minimal impact to the problems plaguing this order by illustrating a farm in Idaho. This also applies to other milk supplies. To change this, the Secretary would need to implement something more drastic than has been proposed at this hearing thus far.

With it clearly understood that depooling must be addressed by the Secretary, we offer a few other things for her consideration. These proposals, when added to the pooling change, can go a long way toward moving the Central order to a level of Class I utilization that was expected as a result of the Order Reform process.

Exhibit 35E contains a copy of Table 1 from the Final Decision released March of 1999. This table shows the Class I utilization of each of the 11 marketing area. In examining this table, you will see that the Central order was expected to have a Class I utilization of 50.1 percent. If you look at the numbers provided from Exhibit 9, Table 12, it is clear that is not the case.

The only time it is the case is when the Class III milk depools. Based on this low Class I utilization and the challenges that discourage the movement of milk to certain areas of the marketplace, Dean Foods has proposed the following changes to the pooling provisions to be considered along with, but secondary to, the correction of depooling.

There are no changes to Proposal 4, so we support what was published in the Federal Register.

There are no changes to Proposal 5, so we support what was noticed in the Federal

Register --

Q. Excuse me.

A. Excuse me.

Q. Paragraph (1) of Proposal 5, but (2) there are some changes; correct?

A. That's correct. There are no changes in (1), there are changes to (2).

(2) § 1032.13, Producer Milk, Paragraph (d)(1) stated, Milk of a dairy farmer shall not be eligible for diversion unless milk, we're striking "unless" and replacing that with "until."

Q. That's in the first line of (d)(1) and also the sixth line of (d)(1)?

A. This is backwards.

Q. That's what I was wondering.

A. What is struck through is what we are amending it to. So the original language read, Milk of a dairy farmer shall not be eligible for diversion until, we are actually striking "until" --

Q. And inserting "unless"?

A. That is correct. So the printed copy that is in circulation that's been presented and admitted is reversed.

Q. And that same reversal occurs in the sixth line of (d)(1)?
A. Yes.
Q. You intend the word "unless" rather than "until"?
A. That is correct.
Q. So Paragraph (d)(2) you have a change?
A. Correct. Paragraph (d)(2) ended with November, we are adding "and January," which is correctly stated in the exhibit.
Paragraph (3), in order to recognize that, the word December has been struck and replaced with February. Continuing on in the last line in the exhibit, in between --
Q. On page 22.
A. On 22, in between "through" and "January," "November and" is being inserted. So the last line reads, "in each of the prior months of July through November and January are."
Q. And the same change is made two lines later at the top of page 23, inserting the words "November and"; correct?
A. That is correct. So the last line of

(3), the second line on page 23 reads, "milk during each of the prior months of July through November and January."

We offer Proposals 4 and 5 as alternatives. We believe there are many pooling abuses that allow significant amounts of milk to ride the pool and not serve the market. The exhibits prepared by the market administrators contain numerous illustrations. Clear examples can be found by looking at Exhibit 9, Table 30, Exhibit 12, page 3 of 53, contrasted against the total producer milk found in Exhibit 9, Table 13, and Exhibit 12, pages 14 through 53 of 53.

We would prefer Proposal No. 4, which would eliminate supply plants. Mr. Hollon in his testimony stated that they are an inefficient way to serve the market. Exhibit 10, page 17 of 42, illustrates that the supply plants are not doing their job of serving the Class I market.

In Proposal 5 we offer an alternative to eliminating supply plants. Here we propose some change to the supply plant definition that will make milk available to the Class I market. Offering this as an alternative is a way of acknowledging that the industry may not be ready to eliminate the supply plants, but to not take action to correct their failure would be irresponsible.

Beyond just increasing the shipping percentages, we believe other actions should be taken by the Secretary to increase the effectiveness of supply plants. We believe the provisions allowing split plants are abused. In Proposal 9 we offer eliminating split plants altogether.

Proposal No. 10 would require a 12-month decision if a handler opted to create a nonpool plant.

Q. And you have no changes for Proposals 9 and 10?

A. That is correct.

The final area that we believe needs action as it relates to the pool supply plants is the use of systems. This is typically a convenience to handlers to allow additional in this case on orders without making shipments to the market. We offer in Proposal Nos. 11, 12 and 13 potential changes to lessen this abuse to the pool supply plants.

In Proposal 11 we propose completely eliminating the supply plant system. Proposal 12 would only allow a single handler to have a system, and Proposal 13 would require that every plant in a system participate with some of the shipment, but only at 40 percent of what they would be required to ship if they were a stand-alone and not allow plants to qualify with direct-ship milk.

We are modifying Proposal No. 11 to remove the requirement for shipments to qualify a supply plant. So in Proposal 11, we are striking the comma "and revising Paragraph (c)(2) to read as follows," and we are striking the proposed language change to § 1032.7(c)(2) from that proposal.

12 is unchanged, from what was known as 13 is unchanged from what was noticed.

Proposal No. 2. We have concerns about certain aspects of this proposal. First, we feel that 125 percent is too loose. It allows guessing to be less of a factor making the cost of making an error less. Handlers are allowed a greater degree of slop for miscalculations in their estimates.

I hate to continue to say the same thing in a different way, but the facts are what they are. The pool should be about ongoing equity, not about being in when it's good and leaving when it costs. We are urge the Secretary to adopt Proposal No. 6 over this proposal, or if she agrees with the philosophy to adopt Proposal 8. If the Secretary cannot find her way to do that, we would propose a compromise half way between 125 and 115.

Q. That concludes your prepared statement?

A. Yes.

Q. Let's review first Exhibit 35 for a moment. What is the source of Exhibits A and B for Exhibit 35?

A. A and B are taken from the Upper Midwest Dairy News published by the Federal Order 30 office.

Q. This is the kind of data you normally rely on?

A. It is.

Q. And what was the point of Exhibits A

and B referenced on page 6 of your testimony?

A. In looking at Exhibit A, the seventh column shows the percentage of producer milk used in Class I, illustrating that over time a lesser amount of producer milk is actually utilized in Class I.

B illustrates that over time, less and less of the milk is not Grade A milk, that over time a larger percent of the milk is Grade A.

Q. And the two tie together?

A. That is correct.

Q. And the source of C1 through C6, I think you already described in your testimony as being the Federal Milk Order No. 1 price announcements?

A. That is correct.

Q. And those are issued to the entire industry sometime in the middle of the month; correct?

A. Sometime in the middle of the month following.

Q. Yes, month following.

A. Correct.

Q. Now, Exhibit 35D with pages 1 through

5, that is the one document you prepared yourself; correct?
A. That is correct.
Q. And D1 is a summary sheet of D2 through D5?
A. That is correct. Only in looking at it, I realize that Western and Pacific Northwest -- excuse me -- that Western is dropped off, that there are -- there's six Federal orders compared in detail, but only five on the summary. Evidently when I printed it, it chopped a column off.
Q. It wasn't intentional, you weren't trying to --
A. It wasn't intentional.
Q. And you can locate the data from that in some of the other sheets?
A. That is correct. The aggregate data exists, it's just summarized data that's not on this table, which is page 1.
Q. And again, you got this material from the requested material that was submitted in the supplemental of Kinser Exhibit 13?
A. That is correct.
Q. Why don't you, just for the record,

state what you did for -- I assume it was done the same way for each order?

A. That is correct.

Q. So why don't you just describe briefly what you did for the Northeast order since that's the first one that appears.

A. In the detail pages 2 through 5, the three orders are set up such that for each order, the producer price differential for the representative month is there, the total producers' receipts in the pool are there, and the Class III percentage utilization is there.

And at the bottom of that, the variance is calculated for each month. So the variance of January is calculated at the bottom of the northeast showing a .04 percent variance.

Q. And variance is a term of statistics that you learned and have used and applied through your education at the University of Missouri and University of Wisconsin?

A. That is correct.

Q. Could you briefly describe for the record what the variance for January, how that would be calculated?

A. This is calculated using Excel's formula that calculates it. It has to do with looking at the changes over the population. So this uses all of January, the time period we're looking at.

Q. And similarly, you've done that for all other months on an annualized basis?

A. That's correct. Where it states all, I've just used the entire market time frame. So all the months as opposed to coming back and computing each of the individual month's variations. It looks at the variation -- it does not -- using the individual months factors in seasonality, because you're looking at the same time period when I used all not accounting for any seasonality.

Q. And Exhibit 35E, again, is taken from Federal Order Reform, the final rule?

A. That is correct.

Q. It is a one-page chart that you've reproduced for that purpose?

A. That is correct.

Q. Let me just go over a number of pages of your testimony, Exhibit 34, maybe a word here or there or something. You mentioned throughout the testimony the issue of equity or inequity, but I think if I heard correctly you may have left out a sentence on page 1, the fourth line under Definition of the Problem. You certainly intended to read that sentence. Would you like to -- do you want to provide that for the record? The fourth line under Definition of the Problem.

A. The current provisions of the Central order promote inequity among handlers and dairy farmers?

Q. Yes. Thank you.

A. If I missed that, it was an oversight on my part.

MR. STEVENS: What was that again?

MR. ENGLISH: On page 1, an oversight, I believe, it was a sentence, "The current provisions of the Central order promote inequity among handlers and dairy farmers."

Q. (By Mr. English) On page 4 where you have the chart, I believe you called Paragraph A Paragraph 1 and Paragraph B Paragraph 2. Did you mean to call it Paragraph A and B

instead of 1 and 2?
A. I meant to call it A and B.
Q. And in between E and G you left out F, would you like to provide F for the record?
A. Paragraph F relates to a supply plant system whose regulation is voluntary.
Q. Turn to page 7. The fourth line from the bottom, under the Producer Prices paragraph, did you mean -- why don't you just read the sentence that starts after the word "milk" in the fourth line at the bottom?
A. The inability to depool milk lessens your competitiveness in the marketplace when others can.
Q. And that's what you intended to say?
A. That is correct.
Q. And on page 16, the fourth line that starts, "needed another market," and I believe you said the best option. Did you mean to say the "next best option"?
A. The next best option.
Q. And that's what your testimony intends to be?
A. That is correct.
Q. Now let me turn to a couple of issues

that may be explanatory or just look at things that may be different. Turn to page 22 for a moment.

In the discussion under 1032.13(d)(1), in the fifth line, "a loss of Grade A approval not to exceed ten days," that is what appears there and that is what I believe you said. Do you recall in a different place whether we have used a different number of days than ten days?

A. That's correct.

Q. And so what is the correct number of days that you intend for 1032.13(d)(1)?

A. We intend for that to be consistent with what is included on page 14 of my statement. That would be -- well -- I'll attempt to insert it here. "Grade A approval not to exceed 21 days in a calendar year, unless it's determined by the Market Administrator to be unavoidable circumstances beyond the control of the dairy farmer such as a natural disaster (ice storm, windstorm, flood or fire) in which case the Market Administrator may determine the time of extension granted to the effected farm, farms, the dairy farmer's milk shall not be eligible for diversion, and in this case we're saying unless milk of the dairy farmer has been physically received as producer milk at the pool plant.

Q. A pool plant?

A. Excuse me, a pool plant.

Q. And that's what you intend for that?

A. That is correct.

Q. Now, yesterday I asked some questions of Mr. Hollon regarding sort of a preamble that appears in front of the proposals, and similarly Proposal No. 3, but for all your proposals, did Dean Foods provide what is in essence the preamble before the paragraph numbers for the amendments in the words that are used by the Secretary in the notice?

A. We did not.

Q. And to the extent in Proposal No. 3, an interpretation could be permitting 215 percent. What is your intention for Proposal No. 3?

A. Our intention is that it would -- I believe when you say Proposal No. 3, do you mean --

Q. I'm sorry, I apologize.

A. Proposal No. 8?

Q. Thank you. Proposal No. 8.

A. We mean for that to be 115 percent of the prior pooled pounds.

Q. And speaking of 115 percent, I think there's Market Administrator data that suggests because of the difference in days between February and March, 115 percent could be just a natural problem of association; correct?

A. That is correct.

Q. Do you have a proposed solution for still having 115 percent that addresses what is the nature of the problem of February to March?

A. We would be fine with it being adjusted for days.

Q. On a daily basis?

A. That's correct.

Q. With respect to Proposal No. 8 and the identical language in Proposal 8, for an exception for an existing handler would significantly change milk supply conditions due to unusual circumstances, do you recall I

asked a couple of questions of Mr. Hollon
about how one might define that?
    A.   Yes.
    Q.   And do you agree that an appropriate
definition could be found, for instance, for
the Secretary, in § 1030.7(i) having to do
with the definition of circumstances beyond
the control of a handler?
    A.   Yes.
    Q.   Now, sort of maybe getting ahead of
Mr. Vetne, maybe not, in Exhibit 14 -- did you
bring Exhibit 14 up with you, which is the
market administrative data in response to
questions by Mr. Vetne?
    A.   I have it.
    Q.   Turning to page 3 of 53 at the top,
Central milk Order Pool Distributing Plants
Receipts by Size, do you see that?
    A.   I do.
    Q.   Can you tell me how many plants Dean
Foods has on the Central order that would
appear in the first category, that is the size
range equal to or more than 25 million that
has two plants listed?
    A.   None.

Q. Can you tell me whether Dean Foods has the plant that is listed as the last plant category plant, category 4, less than 5 million pounds for one plant?
A. That is not us.
Q. As to the plants in the Central order, what are you authorized to tell us about categories 2 and 3?
A. There are a total of nine plants in category 2 and 3, and the majority is in category 3.
Q. That is the total number of plants that Dean Foods has on this market is nine?
A. That is correct.
Q. But a majority of them would be in the 5 to 15 million pound range?
A. That is correct.
Q. Now, you've discussed at some length the fact that these proposals are in some ways alternatives and in some ways dealing with different issues, but the most important issues you've discussed is depooling; correct?
A. That is right.
Q. For the benefit of the Secretary and the parties, can you list in order of

preference for your number 1 priority of depooling proposals?

A. The preference relates to depooling, which is our most urgent concern, we would prefer Proposal 6, then Proposal 7, then Proposal 8, and then Proposal 2.

Q. In essence, those are all alternatives to each other, so the Secretary isn't going to, in your view, adopt all four of those or even more than one of those?

A. That's correct. Adopt one from the group.

Q. Now, after -- assuming the Secretary does and you're urging the Secretary to adopt one of those four as its number one priority -- after that what is your next category of proposals?

A. Our next category is beginning to address pooling abuses, and we propose Proposal No. 4 or Proposal No. 5 as an alternative to those that touch base and shipping percentages, Proposal No. 1.

Q. So in essence, you're saying put 4 and 5 ahead of No. 1 as to those issues?

A. That's correct, with 4 ahead of 5.

Q. Beyond 4 and 5 as being alternatives to 1, you also have some additional proposals, 9 through 13. Can you tell me and, again, the Secretary and the record, where you are on your priorities with respect to those proposals?

A. If the Secretary were to adopt Proposal No. 4, the balance of the proposals would not be in play. If the Secretary would adopt Proposal No. 5, then there's two sets left from our standpoint: 9 and 10 as a pair and 11, 12 and 13 as a set.

Q. Would it be fair to say, then, if the Secretary adopts No. 4, she doesn't have to worry about 9 through 13?

A. That is correct.

Q. But if instead she adopts No. 5 or No. 1, or not even No. 5 or No. 1, then you're looking at these other proposals?

A. That is correct.

Q. And 9 is preferred to 10?

A. That is correct.

Q. And 11 is preferred to 12?

A. That's correct.

Q. And 12 is preferred to 13?

A. That is correct.
Q. Just a few more questions, sir. On page 7 of your testimony, in the first paragraph you're discussing depooling. You have a statement that says, "Handlers operating nonpool Class III, hard cheese, operations are in prime position for exercising this option." That is to say the option of withdrawing from the pool.
Now, if a handler is operating a nonpool plant, they, nonetheless, can have pool milk shipped to that plant; correct?
A. That is correct.
Q. But all it takes, then, for whoever is reporting that milk, is to simply not list it on the pool report; correct?
A. That is also correct.
Q. That's as much as it takes?
A. Correct.
Q. It's the lack of a stroke of a pen for that month?
A. That is correct.
Q. And then for the following month, it is the stroke of the pen?
A. It's the stroke of the pen to repool

the milk.

Q. Repool the milk.

A. Yes.

Q. As long as it's reported on the 9(c) for one day?

A. That is correct.

Q. On page 8 you discuss toward near the end of the paragraph about Coop A and Coop B, you reference that if Coop A believes that Coop B is going to overpay the blend price and pay more than Coop A, Coop A will have to lose money to match Coop B. Do you see that? When you reference Coop A will have to lose money to match Coop B?

A. Yes, I see that.

Q. Or another way of putting it, you heard testimony today that in order to receive milk, Prairie Farms has had to share its profits with those supplying the milk in order to be able to avoid those losses; correct?

A. Correct.

Q. A quick definition, since you've used the term a couple of times, on page 12 and then, of course, we reference 35E, you mentioned Order Reform. Could you, just for this record, state what you mean by the term "Order Reform"?

A. Order Reform was the consolidation of the Federal orders because of the -- because of the 1996 farm building was implemented in January 1 of 2000.

MR. ENGLISH: Your Honor, I move the admission of Exhibits 34 and 35, and the witness is available for cross-examination.

JUDGE HILLSON: Any objection admitting Exhibits 34 and 35 at this time?

Hearing none, Exhibits 34 and 35 will be received in evidence.

And I would ask who would like to be the first to cross-examine this witness? If no one wants to -- everyone is looking around but no one is volunteering. Do you have any questions?

MR. ROWER: Yes.

CROSS-EXAMINATION

BY MR. ROWER:

Q. Jack Rower, AMS Dairy Programs.

Mr. Kinser, in your opinion, is the adoption of Proposal 6, does it rather rise to the level of emergency?

A. Yes. We believe that what is going on in the marketplace needs emergency action on the part of the Secretary.

Q. Does Proposal 7 -- we have this order of preference that you've given us through your testimony, I'm just trying to find out which --

A. The issue of depooling absolutely is an emergency action on the part of the Secretary. If that is not going to be addressed, action needs to be taken on the pooling provisions, but our preference, urgency to the Secretary is to amend depooling.

Q. So Proposal 6, then?

A. Proposal 6, 7, 8, and 2 if you're going to lump them altogether.

Q. Thank you.

MR. ROWER: That's all the questions.

JUDGE HILLSON: Any other cross-examination of this witness?

Mr. Vetne, are you ready to go?

CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Kinser.

A. Good morning, John.

Q. Is it still morning?

A. My stomach tells me it's afternoon.

Q. Could you --

JUDGE HILLSON: Why don't you introduce yourself.

MR. VETNE: John Vetne.

Q. (By Mr. Vetne) Could you identify the nine plants, the name of the nine plants that are Dean plants?

A. If you turn to Exhibit No. 9, Table 35, Borden; Dean Foods, North Central; Dillon; Meadow Gold Dairies, four times; Pat O'Fallen.

Q. Excuse me, what page are you on?

A. I'm in Exhibit 9, Table 35.

Q. There are page numbers --

A. Page 86.

Q. 86, thank you.

A. And Robinson. That is all.

MR. STEVENS: Could you go over them one more time?

THE WITNESS: Sorry.

JUDGE HILLSON: That was Mr. Stevens saying that for the record.

A. Beginning again, Borden Dairy; Dean Foods, North Central, Inc.; Dillon Dairy Company; the Meadow Gold Dairy, Inc., four times; Pat O'Fallon, LLC; Robinson Dairy. I believe that's nine.

Q. In addition to the listed plants, the plants that you've just listed, Dean operates plants in one or more of the states adjoining Federal Order 32; correct?

A. More than one plant in the collection of states bordering 32?

Q. Operates plants, plural, in the adjoining states, plural.

A. That would be correct.

Q. Do you have Indiana, Dean operates plants in Indiana?

A. That's correct.

Q. Identify the name of the plant in Indiana, the plants.

A. To be honest, I can't -- no, I can't.

Q. Do you know the number of plants?

A. Greater than one.

Q. In Kentucky, Dean operates plants in

Kentucky?

A. I am confident there is a plant. There could be more in Kentucky.

Q. Does Dean own a plant in Murray, Kentucky?

A. Yes.

Q. Do you know of others?

A. Not confidently.

Q. And Tennessee, Dean operate plants in Tennessee?

A. Plants in Tennessee, correct.

Q. And Arkansas?

A. I'm not aware that there are plants.

Q. In Texas, multiple plants?

A. Multiple plants in Texas.

Q. New Mexico?

A. Yes, there is a plant in New Mexico.

Q. Utah?

A. Yes.

Q. Idaho?

A. Yes.

Q. Dean recently closed some operations in Idaho; is that correct?

A. Could be. That would be public record, probably.

Q. You don't recall that or know that of your own personal knowledge?
A. I cannot distinctively say that.
Q. Montana?
A. Yes.
Q. Wyoming?
A. I don't know about Wyoming, John.
Q. Do you know whether any of the plants in the surrounding area received milk diverted off the Order 32 pool?
A. I do not know that.
Q. Do you know whether any plants within the Order 32 area received milk diverted off neighboring pools?
A. Producer milk?
Q. Diverted off, meaning it comes from a farmer cooperative, not transferred.
MR. BESHORE: Could I --
Q. Cream or condensed.
MR. BESHORE: At the risk of being hypertechnical, my objection to the question is that the diverted milk -- or if milk is delivered direct from a farm to these other orders so it's not going to be diverted from this order, I do not think there is any

such thing.

JUDGE HILLSON: The question is out there, I'm going to allow it. And if there's a problem, you need him to clarify it, you can answer it to the best of your ability.

Q. (By Mr. Vetne) Let me ask you this, because you seem to be familiar with how some of the provisions work.

Are you aware that milk can be diverted off of one pool to a distributing plant regulated under another pool for requested uses other than Class I?

A. I believe that can happen, yes.

Q. You don't know whether that's happened, going either way, in or out of Order 32 for the Dean plants?

A. That is correct.

Q. In terms of crisis or impending crisis for depooling and potential depooling as you described it as a problem, are you aware that there is under construction to come on-line next year about this time a 7 million pound a day cheese plant in New Mexico?

A. I'm aware that there is a cheese plant being built in New Mexico. I'm not sure of the size, but yes, I am aware of that.

Q. Assume with me that it's 7 million pounds per day.

A. Okay.

Q. Would you not anticipate, if that were a correct description of its size, that the problems and what you describe as jeopardy of Dean supply would be just as great in Texas, in the southwest, as it is in some of the other states?

A. With the presence of a plant with the capacity you've described and the ability to depool would absolutely be of concern.

Q. So in your list of the core markets, which you have described that need to be considered in some order, Upper Midwest, Central, Mideast, with that consideration, the Secretary should consider that the southwest?

A. The Southwest problem, as I've looked at the numbers, does not go to the magnitude as it does in 30, 32 and 33. The plant that you've proposed on that planking up to speed in the markets we've seen could pose just as much of a problem in that marketplace.

Q. Dean proposes in a manner similar to

the DFA/Prairie Farms proposal to limit the quantity of milk a handler can pool to a percentage, in your case 115 percent?

A. The amount the pool report can grow.

Q. Exempted from the calculations on such growth, in your proposal is milk that has been continuously pooled in another order for six months as opposed to the DFA/Dean three months?

A. The DFA/Prairie Farms.

Q. The DFA/Prairie Farms. But you do not exempt milk that has continuously been pooled within Order 32 for prior six months, why is that?

A. If the milk has been continuously pooled for the prior six months, it would already be a part of the baseline calculation.

Q. Not necessarily of the handler whose milk is pooling it. If a handler is growing and requires milk within the order, your proposal would depool any growth beyond 15 percent in excess of the prior month?

A. There allows the Market Administrator the chance to look at circumstances, but to your point, 15 percent growth is quite a significant growth of a producer milk supply that's procurement base, meaning that it came from one handler to another without a merger or acquisition.

Q. Have there not been occasions when the acquisition of a new customer has caused a Dean plant to grow somewhere by 15 percent from one month to another?

A. And that milk would be required of a distributing plant and it would be allowed because it's serving the market under the purpose of the Federal order.

Q. I understand. I'm looking, in this question, for the likelihood of a growth factor. Is it true, first of all, that there have been occasions when the acquisition of a new customer caused the Dean plants milk supply to grow by 15 percent?

A. I could not say that that did or did not happen.

Q. What about the plant out in Greeley when it got the Wendy's accounts?

A. I don't think that happened since I've joined Dean Foods. Just to clarify, keeping in mind my first day on the job was

June 1st.

Q. Are you familiar with the plant out in Greeley County?

A. I know we have a plant there.

Q. And do you know that that plant acquired an account for Wendy's?

A. I did not know that.

Q. Did you know that -- then you wouldn't know that the plant sells bottled milk as far out as northwest as Oregon and as far west as California?

A. I'm unaware of that.

Q. For the nine plants, nine Dean plants in the Central market, is DFA the responsible supplier for those plants?

A. There are four suppliers to the plants that I am aware of.

Q. My question was really not whose milk comes there, but who's responsible for getting it there?

A. Again, it's my understanding of being four suppliers, and each of those four suppliers would be responsible for their respective responsibilities.

Q. Dean has separate contracts, supply

contracts with four suppliers?
    A.   I know -- I know of four suppliers. Whether they are all under contract or how the arrangement is, I don't know that.
    Q.   You don't know whether the other three suppliers are under contract with DFA, for example?
    A.   I do not.
    Q.   Are the Dean plants in the Order 32 area plants which are subject to the Dean/DFA contract mentioned in SEC reports that require Dean to buy milk from DFA and exact day submit the pounds?
    A.   I don't know that. I do know that we recently -- as recently as Saturday started procuring milk from a new supply that is one of your clients that you represent today.
    Q.   Do you know whether in order to do that, Dean -- and this would be at the O'Fallon plant?
    A.   That is correct.
    Q.   Do you know whether in order to do that, Dean had to ask DFA's permission so that it would not be considered in breach of contract to accept that new supply?

A. I don't know that. I do know that we do not have to make any report to the industry. And I think if we are going to make the move, the note that you referenced from a -- an unlikely chance to a likely chance of that happening, that would be something that would need to be publicly disclosed.

Q. Well, there wouldn't be a breach if the two parties of the contract were in agreement?

A. That is possible.

Q. Possible? I'm aware of a case in which that is simply possible.

A. True.

Q. Mr. Yates know the answer to that question whether you had to ask permission?

A. What was your question?

Q. My question was would Mr. Yates who was here know the answer to the question on if permission was sought for and given for acquiring that supply?

A. I would guess he would know the answer to that.

Q. Can you ask him if you get a chance to step down before we finish here?

MR. ENGLISH: We make no commitments. I'm not going to commit that right now.

MR. VETNE: Not going to commit to pose the question or present the answer or both?

JUDGE HILLSON: Note for the record that was Mr. English that objected.

Q. (By Mr. Vetne) On pages 12 to 14 of your statement, you refer to the Northeast order and the pooling of milk from the northeast into the Mideast for a few months and then bringing it back. And you refer on both pages 14 and 15 to handlers, plural, one case several handlers and another case, on page 15, savvy handlers.

Do you have any knowledge that, in fact, there was more than one handler that engaged in this practice?

A. I don't. I've assumed that multiple handlers did that.

Q. You're guessing?

A. That is correct.

Q. Your testimony earlier in the hearing that DMS, in fact, did that?

A. I don't know.
Q. Mr. Hollon testified to that effect?
A. If he did, he did. I don't recall directly that he did. The record will clearly state.
Q. And DMS is a handler organization -- it's a cooperative federation of multiple cooperatives. Do you know if anybody other than DMS engaged in that activity?
A. I do not.
Q. You refer on page 12 to your -- well, the absolute preference -- there's a lot of preferences given by Dean to its various proposals, but it seems that your absolute preference would be to scrap macro by pooling and go to individual handler pooling?
A. That is correct, we would like to do that. The Secretary did not notice that for this hearing.
Q. That was my next question. Did -- has Dean made a proposal to that effect?
A. We have.
Q. For Order 32?
A. Not that I'm aware of.
Q. For Order 30?

A. Yes.

Q. For any other market?

A. Not that I'm aware of.

Q. Page 21 you refer to the desirability of moving towards a 50 percent Class I as predicted in the Federal Order Reform decision. Am I correct, in my belief and my assumption, is that the way Dean hopes that would be achieved would be to put some more milk off the pool?

A. Dean's first concern is there's a consistent pool of milk and that the pool of milk serves the market. So to the degree that milk is -- consistently a part of the milk is not serving the market at the level provided by the regulation, then it would not be pooled.

Q. My question was, if the objective on page 21 of your testimony is to be achieved, that is of moving towards or getting to 50 percent Class I utilization, what is the mechanics? What are the mechanics by which that would be achieved?

A. We've offered two sets of proposals. Our first set had to do with that there would be a consistent pool of milk available to serve the marketplace, and the second set would change the performance standards of that pool of milk.

Q. Let me ask it this way: There are -- Class I utilization is a function of Class I to all milk; correct?

A. Keeping in mind that Class I milk cannot depool, so it's always regulated.

Q. Not part of my question. Please answer. Class I utilization is a function of Class I pounds to all milk pounds pooled; correct or incorrect?

A. Can you restate the question?

Q. Class I utilization in a market, in the context to which you use it on page 21, 50 percent Class I, Class I utilization is a function of Class I milk is a percentage of all milk pooled?

A. When it's stated by the Market Administrator, you are correct.

Q. And would you also agree with me that there are two ways -- maybe you can think of more, but I can think of two -- two ways in which Class I utilization would change, and that is if you increase Class I use, consumers go out and buy more bottles of milk, or you decrease the volume in the pool while Class I volume remains the same, are there any other ways to do it?

A. I would say that those two or a combination of the two could have the effect of changing Class I utilization.

Q. It would have the effect?

A. Would have -- well --

Q. This is not a quibble.

A. I'm sorry. It could have changes in such a way it would not.

Q. Now, going back to my question. In your use of moves towards 50 percent, is it not the case, that you envision, as a result of your proposals, that milk with access to the Order 32 pool, so that the pooled volume remaining be roughly double that of Class I use?

A. We envision that the pool becomes stable and there would not be the volatility that we've seen in the past, and we're envisioning that the milk that remains in the pool would perform serving the market to a greater degree than it does today.

Q. I understand the philosophy you espouse, but I'm trying to understand the arithmetic by which you arrive at the 50 percent because the milk moves, exits the pool. I understand you have a reason for your proposals, but is it because of those proposals, milk exits the pool and the remaining pooled volume is twice that of Class I, or is there some other factor in play?

A. It is not my belief that our proposals will carry the market all the way to the level that was expected in Federal Order Reform, it's a movement towards that to provide, first of all, stability of the pool --

Q. I understand.

A. -- and to the marketplace.

Q. I understand all of your reasons for whatever you propose. It would move in that direction, towards 50 percent, is that what you're saying?

A. It will not worsen.

Q. Pardon?

A. It would not get worse.

Q. And you're hoping it will move in that direction?
A. We hope it will move in that direction.
Q. And move in that direction because under your proposal, milk would exit the pool?
A. That is a possible outcome if the milk does not service at the level that we're requesting.
Q. As a possible outcome, if the possibility -- if it's only a possible outcome, then probability is that volume in the pool stays the same and it would be no movement toward 50 percent. Am I correct?
A. It is not my belief that the market is tapped out at the level that it is currently.
Q. Pardon?
A. It's not my belief that the market is tapped out as it is currently.
Q. I don't understand what "tapped out" means.
A. Meaning that there is ability for more milk to be pooled on this order today, given the Class I marketings than is pooled.

Q. Arithmetically?
A. Correct.
Q. And there are some handlers, some cooperatives, that have the ability to pool more milk than they are pooling and others who are, in fact, tapped out. Would you agree with me?
A. I don't know that I can say that it's cooperatives, but I could say that there is more -- if you look at the Class I sales in regulation, more milk could be pooled on the order.
Q. What do you know about the supply at the Greeley plant, by the way? We talked about four supply organizations. Are those supply organizations supplying all of the nine plants or are the other three organizations primarily supplying one portion of the market in which DFA supplies?
A. I do know that all four that I stated are not supplying all plants.
Q. And the Greeley plant is exclusively supplied by DFA, isn't it?
A. I could not say that.
Q. Dean Foods, in Order 32 and in other

markets, pays Class I premiums; correct?
A. That is correct.
Q. Pays an extra order amount for Class I milk?
A. Our cost of milk is -- yes.
Q. And we call that Class I premiums?
A. Fair enough.
Q. Isn't that the case that those premiums, the level of those premiums varies from market to market?
A. That is correct.
Q. In some cases even varies from plant to plant within a market as large as Order 32?
A. That is also correct.
Q. Is it not also the case that those premiums vary from month to month or time period to time period?
A. It could vary month to month and could vary time period to time period.
Q. In fact, it's not your experience with Dean and your predecessor employers that Class I premiums have been constant throughout your career, is it?
A. I would agree that Class I premiums do change.

Q. They do change. Not just could change, they do change?

A. They do change.

Q. And Class I premiums are extra order revenue to those that supply Class I plants?

A. You're asking are they on top of Federal order minimum prices, yes.

Q. They're outside the order?

A. Yes.

Q. And they vary from place to place, time to time. Tell me how extra order revenue for supplying Class I, which goes to those who supply Class I, is conceptually different from extra order revenue for those that sell milk into cheese?

A. Best example of that is in recent times where those extra dollars were needed to be competitive with the extra dollars that were being generated by milk not participating in the pool.

Q. And that happened in a few months. And in many other months the greater revenue, the premium for Class I, is not to compete with Class III but simply goes to those that supply Class I. It is revenue that the Class

III producers in that case don't share in and also extra order. How is it different?
    A. When milk is moved to manufacturing, it is not owned -- it is not cooperatively owned, that is the final dollar that the dairy farmers receive for that milk. When milk is moved to manufacturing plants owned by dairy farmers, they receive the manufacturing returns on that milk. So it is -- it is, in fact, coming back to be competitive.
    Q. When Class I premiums are paid, it goes back to the producers that supply Class I, and that may cause competitive problems for those Class III handlers in the pool who don't have the Class I premium revenue?
    A. And when Class III handlers depool from the market, they have money to pay that those in the market don't have, and Class III handlers have returns, typically most of those we're talking about here today are cooperative plants.
    Q. So in some months Class III handlers, when they depool, have an advantage; some months Class I producers who receive premiums have an advantage. Why doesn't it balance

out? In fact, why isn't the balance in favor of Class I since the Class I -- since the negative PPDs are less frequent than positive PPDs?

A. What is your question?

Q. We've discussed in some months Class III has an advantage because they have this extra order revenue that Class I doesn't have. Other months Class I producers shipping to Class I may have extra order revenue that Class III doesn't have. And in fact, the months in which there's a positive PPD and a Class I price higher than Class III are more frequent than the opposite.

Why doesn't one month's situation balance off of another, and if you're going to pool the extra order revenue in Class III, why not have a hearing to pool the extra order revenue in Class I?

A. I think we've had multiple witnesses testify some of the extra order revenue that you're referring to is necessary for milk to be able to even move the market. In absence of it, milk would not move to market.

Q. Some milk. Some milk needs to be

attracted. Are you familiar with Prairie Farms' practice of sharing its profits with its regular suppliers and supplemental suppliers?

A. Depending on your definition of familiar. I know that that happens.

Q. Did that not happen when you worked for Foremost?

A. It did.

Q. And Foremost was treated essentially like a Prairie Farms member?

A. That is correct.

Q. I think your counsel referred to, in the question, referred to that as a loss to Prairie Farms. Have you ever heard of Prairie Farms refer to that as a loss prior to your counsel's question?

A. I've not heard Prairie Farms refer to that as a loss.

JUDGE HILLSON: Perhaps this would be a good time to break for lunch. Are you all done, Mr. Vetne?

MR. VETNE: I'm not.

JUDGE HILLSON: I suggest, it's getting to be a quarter after the hour of 12, that we do what we did yesterday and come back at 1:30, we'll resume with Mr. Kinser's cross-examination. And Mr. Christ is after that; is that correct?

MR. ENGLISH: Mr. Christ is up next.

JUDGE HILLSON: We'll just come back at 1:30.

(Lunch recess.)

JUDGE HILLSON: We're going to continue, we're going to pick up the continuation of Mr. Vetne's cross-examination of Mr. Kinser. So when you're ready, Mr. Vetne.

MR. VETNE: Before I continue, I would like to ask this be marked. A document, it already has an exhibit number on it, ignore that; that was for the Upper Midwest hearing. A new number would be fine.

JUDGE HILLSON: The new number is going to be 36.

(Exhibit 36 was marked for identification.)

MR. VETNE: The witness, the judge, the reporter, the document entitled

Reach for Dean, which has an Exhibit No. 33 from the hearing up in Minneapolis and has now been marked 36. Is that correct?

JUDGE HILLSON: Yes.

Q. (By Mr. Vetne) Evan, you recognize this from the last hearing we had?

A. Looks familiar.

Q. It's an excerpt from the Dean annual report; correct?

A. That is correct.

Q. Which is a public document submitted to the SEC and published on the Internet both by Dean and SEC?

A. That is correct.

Q. And that document refers to a milk supply agreement. It's referred to in a couple places, but the next to last page on the bottom it's referred to a contingent obligation of milk supply arrangement, in which Dean agrees to purchase milk from DFA, and if it breaches that purchase agreement, there's a liquidated damages consequence of $40 million or more if the amount is growing.

MR. VETNE: Actually, before I continue with that premise for my question, before I ask that, your Honor, the document has been authenticated as an excerpt from Dean, I would like it received.

JUDGE HILLSON: Any objection?

MR. ENGLISH: No objection.

JUDGE HILLSON: Exhibit 36 is received in evidence.

Q. (By Mr. Vetne) First of all, since you and I last had colloquy about this exhibit in Minneapolis in August, have you gained any more personal information about its application to Dean operations?

A. I have not.

Q. Do you know of any information concerning the application of the milk supply agreement to which the annual report makes reference and the supply to the nine Dean plants in Order 32?

A. It is my understanding that the Note is filed in compliance with the SEC standards that all public companies are required to make notices to stockholders and other interested parties.

Q. True, true. That wasn't my question. Do you have any knowledge, yes or no, you do or you don't, concerning the relationship between the Dean/DFA supply agreements and the Dean plants in the Order 32 area?

A. No.

Q. And sometime during the break did you get an answer to my prior question on whether Dean had to touch base with DFA?

MR. ENGLISH: Your Honor, I was perhaps somewhat incoherent when I objected earlier. I should have said, what I intended to say, which was that that question calls for proprietary information.

He certainly is welcome to ask the question of whether or not this witness found an answer, but the answer itself will be proprietary as pertaining to Dean Foods.

JUDGE HILLSON: I can't order someone to give out proprietary information. You can give the answer as to whether you have the knowledge.

Q. (By Mr. Vetne) Did you gain the knowledge during the break?

A. No.

Q. You didn't pose the question?

A. I did not.

Q. And nobody posed it on your behalf?
A. They did not.
Q. Is Dean Foods the reporting handler on any producer milk at the Dean Foods plants in the Central market area?
A. I don't know.
Q. So you don't know to what extent the column on deliveries to distributing plants in the Market Administrator's Exhibit 14 might be Dean Foods? Let me -- let me start again.
Here are the sources of supply, I'll give you three types -- if you think of others you let me know -- to a distributing plant: 9(c) milk by cooperative association, supply plant milk, or dairy farmers who are patrons in which the distributing plant reports?
JUDGE HILLSON: Mr. Vetne, you have a tendency to lower your voice sometimes at the end of the question. I'm not sure the reporter can pick everything up.
MR. VETNE: Thank you.
Q. (By Mr. Vetne) Did you catch those three? Do you know whether Dean Foods plants, of those three types, receives any milk other than 9(c) milk?

A. I believe we do.
Q. Do you know whether Dean Foods plants receives any milk other than 9(c) milk and supply plant milk?
A. I believe we do.
Q. Your testimony, then, is that Dean Foods is the reporting handler?
A. That is correct.
Q. As a patron, do you know what plant Dean Foods is the reporting handler for with patron milk?
A. I do know.
Q. You do know. Could you identify the region in which that plant operates, the regions used by the Market Administrator, the four regions? It's either Colorado, Kansas City, St. Louis or Oklahoma.
A. It's in the Colorado region.
Q. You know if a portion of the milk supplied to that Colorado region is patron milk?
A. I do not.
Q. Do you know what plant that patron milk is supplied to?
MR. ENGLISH: That is

proprietary.

MR. VETNE: His knowledge of it is not proprietary, the name of the plant might be.

A. Can you repeat the question?

Q. (By Mr. Vetne) Do you know if the plant which receives milk on a patron basis is in the Colorado region?

A. I thought we asked earlier and I think my answer was yes. It is yes.

Q. And if I ask you the name of the plant that receives patron milk?

JUDGE HILLSON: We already have an objection.

MR. ENGLISH: Charles English with Dean Foods, that is proprietary.

JUDGE HILLSON: So you don't have to answer that question.

Q. (By Mr. Vetne) On page 11, going into mostly on page 12, you present a -- I think it's a hypothetical scenario about what handlers will do under certain situations. Can you confirm to me that what you describe there is hypothetical?

A. To which part of my testimony are you inquiring?

Q. Primarily on page 12, leading up to in the context of your thought that the handlers would not respond to.

A. If you're asking has the Market Administrator increased the shipping percentages and not had action, that is correct. So it is an example.

Q. You give a lot of -- I'm sorry. You've indicated, leading up to that, that handlers will not respond. Is it not true that handlers respond to the power of persuasion by the Market Administrator?

A. I would say that handlers make economic decisions.

Q. Dean Foods as well as supply -- we're talking about suppliers here, aren't we?

A. This provision we relate to the suppliers.

Q. Talking about suppliers. Isn't it true that suppliers respond to powers of persuasion?

A. I would say that handlers respond to economic -- handlers make economic decisions.

Q. And economic decisions very rarely

are made for immediate gratification, they're made for long-term reasons. Isn't that the case?

A. If that is the case, then I don't understand why we would have any hearing to discuss depooling.

Q. Let me ask you: Now you are participating in making decisions for Dean Foods, or in your former job at Foremost, did you not, of economic necessity, weigh the long-term consequences and benefits of every decision you made?

A. I think in all decisions, both long- and short-term consequences, must be considered.

Q. Isn't that true that handlers respond to, in addition to power of persuasion, power of contract, there's a contract to supply milk, there are economic incentives and disincentives in not conforming to that contract, handlers respond to that, don't they, suppliers do?

A. That would be a piece of information that's a part of economic incentives.

Q. All of your testimony concerning this relates to the order provision in performance requirements; correct?

A. In this section of my testimony that you're referring to, unless you've changed, I didn't follow --

Q. I'm still looking at page 12.

A. You're still in the section where I'm illustrating, as I've titled it exposure to order failure, and I'm highlighting that from the call provision perspective.

Q. I understand. But that's what you're doing, you're attributing -- are you equating failure of the call provision with failure of the marketplace because the regulations are one thing, maybe they're not in your mind, but I see the regulations as one thing and handler behavior as something perhaps effected by, but different. In your mind, are they identical?

A. Are the provisions in economic incentives equal, is that your question?

Q. No. Is the behavior of handlers in a competitive, albeit regulated marketplace, dependent entirely upon what the regulations are?

A. No.

Q. What is your experience with Dean Foods in connection with the call provisions that you refer to, if any?

A. The only experience I have is, and I believe I used this in testimony, in Order 30 is that there was a point in time where there was concern about milk supply. We approached this before I was with Dean Foods, but Dean Foods approached Market Administrator, Paul Kyburz, asking a change to be made to the provision.

That request was denied because Dean Foods, in that marketplace, had other plants that were receiving milk, and we had not diverted all of our milk to Class I needs, so the Market Administrator's viewpoint, the market was not short.

Q. Do you know whether this Market Administrator applies adjustment, performance adjustment provisions using the same factors, policies and philosophy as the Upper Midwest?

A. I would believe that.

Q. You believe he does?

A. Yes.

Q. Do you believe that the Upper Midwest and the Mideast market -- the Upper Midwest and Central Market Administrators have identical ability or inability to persuade their regulated constituents about what to do?

A. I believe they have equal ability to assess the marketplace and equal ability to change the regulation that they're responsible for administering.

Q. And in the Central market, does DFA have an equal handicap because it operates stand-alone Class II operations?

A. I do not know about DFA's operations.

Q. I'm sorry, Dean Foods. Thank you. Is there a similar handicap for Dean Foods in this market?

A. I don't think that we have any stand-alone Class II plants in this market that receives producer milk.

Q. And in the time you've worked for Dean Foods or in the time you're aware of prior to your working for Dean Foods, has Dean Foods had a supply shortfall from its contract suppliers that would cause you to call the Market Administrator and say, "Get us some"?

A. I'm not aware.

Q. Are you aware of anybody else that has been in that position in the Central market?

A. No.

Q. So the failure you describe is a hypothetical scenario for the Central market?

A. Hypothetical in the sense that the Market Administrator has not ever increased the shipping percentages, and to the best of what I've just testified to, I don't know that he's ever received a call to that effect.

Q. Thank you.

JUDGE HILLSON: Are there other folks who want to cross-examine this witness? Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Kinser.

A. Good afternoon, Mr. Beshore.

Q. First of all, I would like to ask you about one of the proposals, I think the only proposal to which you did not direct any comments in your prepared testimony, which is Proposal 3, unless I missed it.

Do you have -- does Dean Foods have a

position with respect to Proposal 3?
A. Dean Foods would support Proposal 3 as presented by proponents that would prefer to support Proposal 3 as modified and presented by DFA.
Q. So you would support the proposed transportation credits of direct-ship milk as put forth and presented by Mr. Hollon?
A. We would prefer that over the one presented this morning by Mr. Weis.
Q. So in terms of setting up your preferred options, that would be your first option for the Proposal 3?
A. That the DFA.
Q. DFA proposal?
A. That is correct.
Q. In your view, would that be -- is the support because you think that would be helpful and useful and equitable in terms of the Class I supplied in Order 32?
A. It is all that and it is consistent with our position that the dollars generated by the Class I market should go to those who serve that market.
Q. Thank you. Now, let's talk about

non-order revenues of that, and I'm referring to the questions and colloquy you had with Mr. Vetne with respect to non-order revenues.

Before we get to that, the order is involved strictly with pooling minimum class price revenues for all uses in the order. Would you agree with that?

A. I would.

Q. And while there are over order -- and, in fact, there are, in the marketplace, over order revenues for all classes of milk in most orders in most times, are there not?

A. Yes.

Q. But they're not pooled, they're retained, those over order revenues for all classes are retained by the individual market participants involved; correct?

A. That is correct.

Q. And with respect to Class III, is it not the case, Mr. Kinser, that there are quite substantial over order revenues associated with supplying milk for Class III by anyone?

A. That is true.

Q. In fact, you've had, when you worked with Foremost, considerable experience in marketing milk for the cheese plants in Foremost's region of operations, did you not?

A. Predominantly the milk that I handled there went to our own -- Foremost's own plants.

Q. Were you familiar with sales to cheese plants in the Upper Midwest?

A. I was.

Q. And it's the case, is it not, that those sales, month in and month out, year after year, tend to bring the highest over order revenues of any class of sales in the marketplace?

A. Agree.

Q. In fact, in the over order world in the Midwest, particularly the Upper Midwest, Class I, the Class I sales are always trying to keep up on an over order basis or compete or be close to Class III sales?

A. That is true.

Q. So when you were asked isn't it just fair, in so many words, that Mr. Vetne's clients have the right to depool their Class III milk whenever they want to and keep the over order revenues, isn't that just fair because the Class I premiums aren't pooled, they get to keep those over order revenues all the time; isn't that correct?

A. That is true.

Q. And in fact, when they're depooling, they're not just keeping the over order revenues, they're keeping the minimum Class I revenues for themselves too; correct?

A. Correct.

Q. And the Class I producers that supply Class I, in fact, never have the opportunity of keeping their minimum class price revenues all to themselves; correct?

A. That is correct.

Q. And that's the fundamental problem with the depooling disorder that we're trying to confront in this hearing, is it not?

A. Correct.

Q. Could you turn just for a minute to Exhibit 35, Table D or part D, which is your summary of the utilization variances. Maybe I got lost when you explained this. Is the variance that's depicted here basically the deviation from the average utilization, average monthly utilization for the various classes in the respective orders of Class III, I guess?

A. It's the variation -- it's a by month depiction of variation of the percent Class III for each respective month.

Q. A variation from what?

A. I think, as you said, probably average.

Q. For the month or for the year?

A. The individual months are for the months. So, for example, January is the variation of January from the average of January versus when you move down to the annual, that's looking at the whole time period of January of 2000 through I believe the data was October of 2004, taken as an average again, that would not acknowledge seasonality.

Q. But in any event, with setting seasonality aside, they're order-to-order comparisons are on the same -- made on the same basis?

A. Correct. The same philosophy that was used in Northwest was used the same in each of the representative orders.

Q. In one or more of your -- in your proposals with respect to pooling provisions, and they're probably numbers, what, 5 -- talk about 5 in particular, which is on page 22 and 23 of your statement, which is Exhibit 34. You've -- you corrected the typed statement so that you continue to use the word "unless" rather than "until" in the touch base or association provisions there; correct?

A. Yes. We amended the notice proposal from "until" to "unless."

Q. Do I understand that to be -- you may have testified to this -- to have been done because you've got the four days' requirement in your Proposal No. 5?

A. That is correct.

Q. And if the markets -- if the order stayed at one day, or establishes a one-day association requirement and touch base requirement, would you agree that "until" is the appropriate word to have in that provision?

A. I would agree in the absence of the four days it should be "until."

Q. Now, when you describe the marketing

problems that we're attempting to address here and the priority ranking of proposals and solution to this problem in Dean's view, I want to see if we understand, if I understand, it's clear on the record, what -- how you're grouping your proposals with respect to the pooling abuse issue.

As far as pooling abuse is concerned, you say your first option is No. 4.

A. That is correct.

Q. Standing alone. If you get 4, that's all you need, is that your position?

A. After the Secretary has dealt with depooling and move on to pooling abuses, then our first and preferred stand-along preference would be No. 4.

Q. Now, but your second tier option, if I understood you right, takes three sets of proposals together, the three proposals?

A. In the absence of pool -- in the absence of accepting 4, there would still be pool supply plants, and 5 through 13 all address pool supply plants. So if 4 is accepted, the rest could be deleted. If that is not the case, then they're still in play.

Q. If 4 is not accepted, do I understand you to say you want 5 plus either 9 or 10, plus either 11 or 12 or 13?

A. That is correct.

Q. Your third option is 1, plus either 9 or 10, plus either 11 or 12 and 13?

A. And when I referenced 1, I wanted to reference the touch base and shipping percentage and really not the regulation relating to nonpooled in defined states.

Q. Okay. So why do you need 9 and 10 or 11, 12 and 13 if you have 1 there, in your view?

A. With 1 you still have -- with 1 we're only supporting the touch base and shipping percentages, and we feel there's still potential abuses available and we still ask the Secretary to look at 9 -- 9 and 10 --

JUDGE HILLSON: Let's go off the record for a minute.

(Off the record.)

JUDGE HILLSON: Back on the record.

A. So 1 you still have plants that could be used for the continued pool abuses, so it would still ask the Secretary to look at 9 and 10 in addition to that, and 11 and 12 and 13 as additions to the combinations there. But again, our first and most urgent concern is depooling to be addressed. Does that make it clearer?

Q. I think I'm a little clearer anyway.

JUDGE HILLSON: Any other questions for cross-examination of this witness? Are you still up?

MR. BESHORE: Let me just ask one more question on Proposal No. 11.

Q. (By Mr. Beshore) Just so we understand what your proposal is there and what you're doing, in the text on page 25 of your statement, Exhibit 34, you've got strike out language. Is that to -- does that mean you're proposing to eliminate that language from the order?

A. That is an incorrect representation. Our intent there was to withdraw our proposed change and leave what exists in the order there. So we are withdrawing a recommended -- there's two pieces to that proposal. One removes split plants and one dealt with how plants would qualify.

We, in Proposal 11, are leaving the existing language as it relates to plants qualifying. So we are only asking for split plants to be deleted from the language. So that is an incorrect representation in my testimony.

Q. So you want to remove Paragraph (f) from 1032.7 and redesignate (g) and (h) as (f) and (g) and leave all the rest of the text as it's now in the order?

A. That's correct. So if the proposal was stated what you just read would be the only one that would be in Proposal No. 11, and that's what we're supporting in my testimony.

Q. Thank you.

MR. BESHORE: I have no other questions at this time, your Honor.

JUDGE HILLSON: Does anyone else have cross-examination of this witness?

Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner for Select Milk Producers and Continental Dairy Products.

Good afternoon, Mr. Kinser.
A. Good afternoon, Mr. Miltner.
Q. I have questions about the use of specific words in these proposals. Would that be better directed to you or someone else?
A. Let's take a run at it and if I don't have the answer, then you can ask him.
Q. My questions deal with Proposal No. 4 and in particular 1032.9(c), the first sentence. And I believe it reads, the current order provision, "Any cooperative association with respect to milk that it receives for its account," and so forth.
Your proposed change reads, "Any organization with respect to milk that it receives for its account." Can you elaborate on why the words cooperative association has been replaced by organization and what your...
A. When we proposed eliminating pool supply plants, that means that the only way that you could pool milk would be through shipments or have access to 9(c). So --
JUDGE HILLSON: Excuse me. It's hard to hear the witness.
MR. ENGLISH: Okay. I'm sorry.

A. So for example, if a proprietary plant would not be able to pool their plant because there would not be a plant. And so what we have done is proposed modifying the handler language such that a proprietary plant could pool their milk because their plant -- while it physically would exist an operation, it would not be recognized from the standpoint of the order. So it allows all handlers to be able to pool in the absence of pool plants.

Q. So it was meant to address the situation of a proprietary plant that was receiving milk from independent producers; is that correct?

A. That is correct.

Q. And that's the --

A. Excuse me. A proprietary non-distributing plant.

Q. And that's the only intent behind that change?

A. That is correct.

Q. Thank you.

JUDGE HILLSON: Any further cross-examination?

Mr. English, do you have any

redirect?

REDIRECT EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods.

Mr. Vetne asked you some questions about Exhibit 36, which is the 2003 annual report. And because he made some arguments from that exhibit in the Order 30 proceeding, I would like to clarify a few things, if I may.

First, in your experience, to your knowledge do annual reports provide all the details of all the proprietary contracts that a company may have?

A. No.

Q. And in fact, in your experience and for investigating by Dean Foods, is the case that a lot of the details that we have called proprietary today are not revealed within the annual report; correct?

A. That is correct. There's guidelines set forth by the SEC of what -- and within that financial accounting standard for what things are to be disclosed.

Q. And those may not be the complete

story about an arrangement; correct?
A. That is my understanding.
Q. And in fact, did you, after the Order 30 hearing and after having been presented with this exhibit, did you go back and look at other filings for Dean Foods with respect to this agreement?
A. I did. I requested all the filings that we've ever made since the formation of Dean Foods that would contain some note to milk supply.
Q. And Mr. Vetne made an argument in the Order 30 proceeding on behalf of his clients there, effectively that if no one would risk the $40 million payment, assuming that all the details are here, and we've just discussed that they are not, with respect to this arrangement, do you recall that argument that he made?
A. I do.
Q. And did you discover anything that relates to that argument in your investigation of public documents, nonproprietary information?
A. Yes. I found that it's been

disclosed that there was a point where we modified the contract, changing the terms of that, and there was a 28 some million dollar payment made in return for being able to make that modification to the agreement.

Q. So to the contrary, Mr. Vetne's argument, Dean Foods has already made a payment somewhere in excess of 60 percent of what is alleged to be due on liquidated damages clause that's disclosed; correct?

A. That's correct.

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

JUDGE HILLSON: You may step down.

Mr. English, you may call your next witness.

MR. ENGLISH: Call Mr. Paul Christ. And I believe I've provided the court reporter and I need to hand out official copies. But I do call Mr. Paul Christ to the stand.

JUDGE HILLSON: You do want the document marked?

MR. ENGLISH: I would like the document marked.

JUDGE HILLSON: I'll mark it Exhibit 37.

(Exhibit 37 was marked for identification.)

MR. ENGLISH: There's testimony -- no additional exhibits, I believe in addition to his testimony, internalized in the testimony itself is a chart.

PAUL G. CHRIST,

a Witness, being first duly sworn, testified under oath as follows:

JUDGE HILLSON: Please state your name and spell it for the record.

THE WITNESS: My name is Paul G. Christ. Last name spelled C-H-R-I-S-T.

JUDGE HILLSON: He's your witness, Mr. English.

MR. ENGLISH: I'm sorry, your Honor, what is the exhibit number?

JUDGE HILLSON: 37.

DIRECT EXAMINATION

BY MR. ENGLISH:

Q. Evening Mr. Christ. Would you go ahead and give your statement? I believe your background is, if not succinctly, very shortly stated at the beginning that you've given a lot of brevity and there's probably a lot more there, but why don't you go ahead and give your statement.

A. My name is Paul G. Christ. I reside at 245 Indian Trail, South, Afton, Minnesota 55001. I have a long background in working with Federal milk orders. From 1961 to early 1974 I worked for the Dairy Division of the Agricultural Marketing Service of USDA, both in the Washington office and in Market Administrators' offices in the field.

Between 1974 and 2000 I worked for Land O'Lakes, Incorporated, and was responsible for marketing Land O'Lakes member milk under several Federal milk marketing orders, and when necessary, for proposing changes to those orders. Thus, I have experience both inside and outside the government in the operation and effects of individual milk orders and of the entire Federal milk order system.

I appear here as an advocate for Dean Foods Company in support of Proposal Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13. I will attempt to explain how each proposal would work and how it would improve the supply of milk available for fluid use and the well-being of producers whose milk is continuously pooled.

As was stated by Evan Kinser in his earlier testimony, Dean Foods Company is interested in improving two aspects of the Central milk order. The first is to improve the ability of the order to attract an adequate and reliable milk supply to the Federal Order 32 pool, and the second is to improve the availability of milk for Class I use.

I will address each proposal in its order of priority for Dean Foods Company. And this order is the same order that was expressed by Mr. Evan Kinser. I will start with Proposal No. 6.

Proposal No. 6 is the most important of all the proposals offered by Dean Foods Company. It would establish a "dairy farmer for other markets" provision that would require a greater commitment by handlers to either pool or not to pool milk on the order.

I will attempt to explain how Proposal No. 6 would work. It would add a new subparagraph (b)(5) to the producer definition, which is § 1032.12. It reads as follows:

I will not read the proposed order language because that's already been covered by Mr. Kinser, and the language that we offer is the language presented by Mr. Kinser. If there are any difference between my language and his language, it's Mr. Kinser's language that will prevail.

The new subparagraph that we propose would exclude from the pool the milk of any dairy farmer whose milk was not continuously pooled under one or another Federal milk order during the last 12 months. The sole exception from this exclusion would be the case where the dairy farmer temporarily lost Grade A status and whose production facility was reinstated as Grade A within 21 days.

This exception can be achieved by adopting a conforming change under Proposal No. 15 to the producer milk definition as follows:

Well, this language also was

presented by Mr. Kinser.

The idea behind requiring ten days' delivery of milk to a distributing plant is to provide a benefit to the pool while discouraging milk that was depooled for economic reasons from easily becoming repooled when it is economically favorable to do so. The benefit to the pool would be more milk being made readily available to the Class I market.

Dairy farmers for whom their milk is pooled when benefits exist, and is not pooled when costs exist, create a burden on producers whose milk is continuously pooled. When the blend price is higher than a particular class price, there is an incentive to pool all milk used in that class. This has the effect of averaging down the producer price differential and the blend price, reducing returns to continuously pooled producers.

On the other hand, when the blend price is lower than a particular class price, there is an incentive to depool all the milk used in that class. This also has the effect of averaging down the producer price differential and the blend price, resulting, again, in reduced returns to continuously pooled producers. The losers in this process are the producers whose milk is kept in the pool and continues to be available to serve the needs of the fluid market.

Under Proposal No. 6, milk that was depooled within the last 12 months could again become repooled, if the responsible handler demonstrates that it is, in fact, available for fluid use. This is accomplished by delivering ten days' production from that dairy farmer's facility to a pool distributing plant.

This demonstration would insure that pool participation would be open to any dairy farmer for whom it is technically and economically feasible to supply milk for fluid use. In effect, the proposal would not prevent depooling; however, it would make it more difficult to return such a dairy farmer's milk to the pool after it is once depooled.

This demonstration of competence to supply milk for fluid use would continue for 12 months before such formerly depooled milk could be pooled under the more flexible provisions of the order that apply to continuously pooled milk.

This proposed change would not be economically burdensome if the milk were favorably located relative to a distributing plant. However, it would it more expensive for a distant or unfavorably located dairy farmer to again become a producer and participate in the pool. It would also insure the milk for which it is not technically or economically feasible to serve the fluid market would not reenter the pool.

Dairy farmers whose milk is pooled continuously under the Central milk order would not be affected by this proposal. Those dairy farmers shared in both the costs and the benefits of pool participation on a continuous basis.

Also, dairy farmers whose milk is pooled continuously under any other Federal milk order(s) during the preceding year would not be affected by this proposal. They could enter the Federal Order 32 pool under the same flexible provisions as apply to Federal Order

32 producers who were not depooled within the last year. In effect, these "other order" producers were continuous participants in one or another Federal order pool, sharing both the costs and the benefits of such participation on a continuous basis.

So, Proposal No. 6 would have three desirable effects:

1) Some milk in Class II, III or IV would stay in the pool when the blend price was lower than the class price, in order to avoid the extra cost of returning to the pool. This would increase the producer price differential (making it less negative) and the blend price for all producers, especially those whose milk is delivered to distributing plants.

2) Some Class III milk that is depooled would never return to the pool because it is no longer technically or economically feasible to do so. This would have the effect of increasing the producer price differential whenever it is positive. Those producers whose milk is delivered to distributing plants would benefit.

3) Some Class II, III or IV milk that is depooled would return to the pool, but only through regular, significant deliveries to distributing plants. This would demonstrate that for the milk being repooled it is technically and economically feasible to serve the fluid market. It would also increase the supply of milk ready and willing to serve the needs of the fluid market.

For the above reasons, Dean Foods urges the Secretary to adopt Proposal No. 6. And as related by Mr. Kinser, this is the highest priority proposal in the list.

Proposal No. 7. Dean Foods Company also offers Proposal No. 7 for consideration by the Secretary. It is offered as a weaker, less desirable alternative to Proposal No. 6, in the event that Proposal No. 6 is rejected. Proposal No. 7 reads as follows:

Again, the language was presented by Mr. Kinser and that is the language we support.

The difference between Proposal No. 6 and Proposal No. 7 is that, in the event that a dairy farmer's milk is depooled, the number of months for which ten days' milk production would have to be delivered to a pool distributing plant would be fewer.

In the first case, under subparagraph (5), if milk is depooled during the period of February through June, only four months of such deliveries would be required, compared to 12 months under Proposal No. 6.

In the second case, also under subparagraph (5), if milk is depooled in any month of July through January, then such deliveries would be required in each month of February through June. Dean Foods is more interested in discouraging depooling in the short season than during the rest of the year.

In the third case, under subparagraph (6), if milk is depooled during the period of July through January, only two months of such deliveries would be required, compared to 12 months under Proposal No. 6.

The same conforming language to the producer milk definition, which provides for the exception in the case if producer loses Grade A status, needs to be made for this proposal as was offered for Proposal No. 6.

Proposal No. 7 would have the same general effects and benefits as Proposal No. 6, except that the benefits of depooling would be greater and the costs of repooling would be smaller. Thus, the beneficial effects on continuously pooled producers would be smaller and there would be a less abundant and reliable supply of milk available for fluid use.

Therefore, we, again, recommend the adoption of Proposal No. 6. But if, for whatever reason, the Secretary chooses not to adopt Proposal No. 6, then we recommend the adoption of Proposal No. 7.

Now I'll discuss Proposal No. 8. Proposal No. 8 is offered by Dean Foods Company as a less desirable alternative to both Proposal Nos. 6 and 7. It offers a different type of mechanism for limiting the amount of depooled milk that can be repooled in any given month. It is similar to Proposal No. 2, but puts a tighter limit on how much milk can be pooled from month to month under the order.

And Proposal No. 8 has the language

presented by Mr. Kinser in his testimony.

The mechanism for discouraging the depooling of milk under Proposal No. 8 is to restrict the amount of additional milk that can be pooled by a handler from one month to the next. That means that the volume of milk that is continuously pooled under Federal Order 32, or any other Federal order, can be pooled without hindrance or restriction. However, milk that has been depooled under this or any other order can only be gradually repooled. This means that most of the milk for which the cost of pooling is avoided during periods of negative producer price differentials cannot immediately enjoy the benefits of pooling when the producer price differential is positive.

This reduces the benefits of depooling and increases the costs of repooling. This effect is a modest discouragement of depooling.

If depooling is discouraged to any degree, producers whose milk stays in the pool will enjoy a higher, and usually a less negative, producer price differential during months when it is negative. However, Proposal No. 8 provides for instant repooling of any milk that is delivered directly to a pool distributing plant. This has the desirable effect of increasing the supply of milk that is readily available to the fluid market, following a period of depooling.

Proposal No. 8 increases the cost of depooling with a greater percentage of a handler's milk that is depooled. The following Table 1 illustrates the time it takes to repool all the milk of a handler if he depools between 10 and 90 percent of the milk under his control.

The table is headed Table 1. The effect of the percentage of milk depooled on the time it takes to repool all the milk of a handler at a rate of 115 percent per month under Proposal No. 8. The first column has the heading of "Month," and the range of months goes from zero, the month in which milk is depooled, through 17. There is a super heading over the remaining nine columns, that says "Percentage of Milk Pooled."

The first of these columns represents

the case when 10 percent of the milk is pooled, meaning that 90 percent of the milk is depooled. And if we go down the list and number of months, it gives the amount of percentage of milk under the control of that handler that can be pooled.

So if only 10 percent is pooled in the depooled month, in the first month they can pool 11.5 percent; the second month, 13.2; in the third month, 15.2; in the fourth month, 17.5 percent; in the fifth month, 20.1 percent; in the sixth month, 23.1 percent; in the seventh month, 26.6 percent; in the eighth month, 30.6 percent; in the ninth month, 35.2 percent; in the tenth month, 40.5 percent; in the 11th month, 46.5 percent; in the 12th month, 53.5 percent; 13th month, 61.5 percent; 14th month, 70.8 percent; the 15th month, 81.4 percent; 16th month, 93.6 percent; and the 17th month, 100 percent.

This says if a handler chooses to depool 90 percent of the milk under his control, it will take 17 months for him to repool all of the milk if he chooses not to make deliveries to distributing plants.

However, if he chooses to make deliveries to distributing plants, he can immediately repool all of the milk.

Similar numbers are found under each of the other column headings ranging from 20 percent to 90 percent in 10 percent increments. I don't think it's necessary to read numbers, because this table will read in the record as an exhibit.

But clearly, the smaller amount of milk that is depooled and the greater amount that remains in the pool, the shorter the period of time that it takes for all of the milk to be repooled through the 115 percent allowance. But again, all of the milk can be pooled under any of these circumstances at any time if it is delivered to a distributing plant.

The point of Table 1 is that the greater the proportion of milk depooled, the longer the time needed to requalify the depooled milk. This is a desirable feature of Proposal No. 8. Those handlers (and producers) who capture the greatest benefit from depooling, also incur the greatest loss of benefit from attempting to regain pool status.

But again, remember, they can regain pool status immediately in any month by delivering to distributing plants.

Okay, now we'll get into the other group of proposals dealing with so-called pooling abuses or performance in services distributing plants. We'll start with Proposal No. 4.

Proposal No. 4 would eliminate the supply plant and supply plant system provisions from the order. This proposal would also expand the definition of a 9(c) handler to include "any organization," not just cooperative associations. It would amendment § 1032.7 (pool plant) provisions by removing Paragraphs (c), (d) and (f) and revise § 1032.9 to read as follows:

And again, this language has already been presented by Mr. Kinser.

Elimination of the supply plant and supply plant system provisions would eliminate the use of supply plants solely for the purpose of pooling milk. Without these provisions, all deliveries to pool plants to qualify a producer's milk would have to be made to pool distributing plants. This would enhance the role of the order in assuring the willingness and ability of pooled milk supplies to serve the needs of the fluid market.

Supply plants already play a minor role in supplying milk to the fluid market in the Central order. Statistics entered into this record by the Market Administrator show that less than 5 percent of deliveries to distributing plants originate at pool supply plants. This means that a primary function of supply plants is to facilitate the pooling of milk and not to facilitate the delivery of milk for fluid use.

Also, supply plants represent a relatively inefficient form of supply service to distributing plants. Milk assembled from farms must be received at the supply plant, cooled and/or stored there, and then loaded out again for event delivery to a distributing plant. This extra pumping in and pumping out provides a measure of abuse to the milk that may lower its quality. In addition, there is additional time expended between the time the milk is picked up at the farm and its eventual delivery to a distributing plant, providing further risk to the quality of the milk.

And Mr. Joe Weis testified to the risk to quality associated with supply plant handling.

The extra handling and cooling of milk at a supply plant also incurs extra costs, both in operation and in operations and in shrinkage.

Therefore, the order should not encourage a system of supply that is used very little to serve the fluid market and increases the cost of such service.

With the rise of larger farms, larger farm bulk pickup trucks, and better cooling and quality performance on the farm, the industry has come to accept the efficiency of direct farm to distributing plant delivery of milk.

By allowing any organization to become a 9(c) handler, Proposal No. 4 preserves the flexibility of such an organization to pool milk. It allows the handler to take title to the milk of producers, to divert it to nonpool plants, and to qualify it for pooling by making the necessary deliveries to distributing plants.

Dean Foods Company recommends the adoption of Proposal No. 4 in addition to Proposal No. 6.

I'll next discuss Proposal No. 5. Proposal No. 5 is offer by Dean Foods as an alternative to Proposal No. 4. It would increase the shipping percentage of supply plants and would require the four days' production of a producer to "touch base" at a pool plant during the month. It reads as follows:

And again, this language was presented by Mr. Evan Kinser.

By increasing the shipping percentage for supply plants and supply plant systems, Proposal No. 5 promotes a more effective mechanism for assuring that an adequate and reliable supply of milk is available to distributing plants under the Central order. Higher shipping requirements will make it more difficult to pool as much milk on the order as in the past, but they will make a greater share of the pooled milk available to the fluid market.

We have already seen from the testimony of Mr. Elvin Hollon and Mr. Gary Lee that economic incentives under the order by themselves are not adequate to attract milk to distributing plants under the Central order, especially in the Southern Illinois and St. Louis portions of the marketing area. Higher shipping requirements will help to overcome these impediments by reducing the size of the pool and increasing the level of the blend price relative to surrounding markets.

The second part of Proposal No. 5 does nothing more than insure that more producer milk is actively engaged in the process of serving the fluid market. This process starts with the production of Grade A milk and then continues the next step of being received in a Grade A pool plant facility.

If producer milk is diverted to a nonpool plant, then it is out of the Grade A marketing stream and is no longer available to the fluid market. Increasing the "touch base" requirement insures that more milk stays in that Grade A marketing stream one more step than otherwise would be the case. The effect is to make more milk physically available for the fluid market.

Proposal No. 5 would also insure that pool plant operators keep their Grade A facilities operating at a higher level of output than would be the case if more milk were diverted. In effect, more Grade A milk would be available for fluid use at all times and pool plant operators would routinely engage in Grade A operations, therefore maintaining greater standby capacity for supplying the fluid market.

Proposal No. 9. Proposal No. 9 would delete the split plant provision contained in § 1032.7(h)(7). The effect would be that a dairy facility at a location could either be a pool plant or a nonpool plant, but not both. The effect of the existing split plant provision has been to facilitate pooling, but not to facilitate the delivery of milk to distributing plants.

An ideal pool supply plant is one that receives producer milk and transships it to pool distributing plants when it is needed for fluid use and to a manufacturing facility when it is not needed for fluid use.

The present split plant provision encourages the establishment of a separate Grade A tank at a manufacturing facility to receive the minimum amount of milk needed to qualify producers for pooling. The rest of the available milk is diverted directly to the manufacturing facility and is never available for fluid use.

Even the portion of the local milk supply that is received in the Grade A tank is not usually shipped to a distributing plant. It is typically transferred via pipeline to the manufacturing facility, never again to be available for fluid use.

So, in our opinion, the split plant provision serves more to insulate pooled milk from the fluid market than to enhance its availability for fluid use.

Proposal No. 9 would not cure the

problem. However, by separating a pool plant from a non-Grade A manufacturing facility, it may keep more pooled milk in the Grade A system, thereby incrementally increasing its availability for fluid use.

Proposal No. 10. Proposal No. 10 is another way of tinkering with the split plant provision. It would require the nonpool portion of a split plant to remain a nonpool facility for 12 months. The proper language of this proposal was given by Mr. Kinser.

This proposal would simply provide more stability as to which portion of a facility is a pool plant and which is not. If a pool plant operator wants to take advantage of the greater pooling flexibility associated with a split plant, he can do so, but he must be committed to whatever decision he makes for 12 months or more. If he changes his mind, he can requalify the nonpool portion of his facility as a pool plant by making shipments directly from the facility to the distributing plants.

Proposal 10 would also prohibit the use of milk delivered directly from farms to a distributing plant from being used during the first month to requalify a plant. Requiring shipments from the plant itself insures that the facility is, indeed, capable of providing Grade A milk to the fluid market. We think this should be a minimum condition for a supply plant to participate in the pool.

Proposal No. 11. Proposal No. 11 eliminates system pooling of supply plants by deleting § 1032.7(f). This means that each and every handler would pool his producers and each of his plants on the basis of actual physical deliveries to distributing plants. This would insure that every pool participant is ready, willing and able to serve the fluid market.

This proposal does not discourage pooling, but it does insure that any milk that is pooled is, in fact, part of the Grade A system and available for Class I use.

Proposal No. 12. This proposal would reduce the flexibility of supply plant systems by limiting their use to a single handler. And the language was presented by Mr. Kinser.

This proposal represents an

intermediate position between the current supply plant system pooling provisions and no supply plant system pooling provisions, as suggested in Proposal No. 11. In this case a single handler could form a system and qualify pool supply plants through that system. It would insure that each handler, but not necessarily each plant, maintains the competence to service the fluid market. It would reduce amount of pooled milk that is not practically available to the fluid market, but would not eliminate it.

Proposal No. 13. This is the final proposal offered by Dean Foods Company. It incorporates Proposal No. 11 by prohibiting the use of direct-shipped milk to qualify a supply plant system. It also would require that every pool supply plant in a supply plant system ship some milk to the fluid market in order to maintain qualification. And the language was presented by Mr. Kinser.

The first part of Proposal No. 13 would prohibit the use of milk delivered directly from farms to a distributing plant from being used to qualify as a supply plant.

It would not prohibit the use of direct-shipped milk to a distributing plant, but it would prevent the use of that milk to qualify the supply plant. The direct-shipped milk could itself be qualified by delivery to a distributing plant.

This proposed change would have two desirable effects. The first would be to discourage the practice of diverting nearby milk to distributing plants in order to qualify distant milk for pooling. The distant milk, whether inside or outside the marketing area, may not be practically available for fluid use, but nevertheless gets pooled because the nearby diversions to a distributing plant.

We prefer to insure that all milk in the pool participate to a greater degree in the Grade A marketing system. By prohibiting the use of diversions to make qualifying shipments, some of the milk that other would be qualified for pooling with virtually no performance, will now have to be qualified by physical shipments from a pool supply plant.

This improvement would also insure

that more activity will take place in the Grade A facilities of pool supply plants, thereby increasing the competence of operators of such plants to serve the fluid market. This would enhance the availability of milk for fluid use in the Central order.

The second part of Proposal No. 13 does not eliminate any of the authority to form supply plant pooling systems. What it does do is insure that each plant in the system actually performs in serving the fluid market. Each plant would be required to ship 40 percent of the shipping requirement for a particular month in order to remain qualified and part of that supply plant system.

For example, if the shipping requirement for the month is 35 percent, as we proposed above, then each individual plant would have to ship at least 14 percent. And that's calculated by multiplying 35 percent sometimes .40, 40 percent equals 14 percent. If the shipping requirement is 25 percent, then each individual plant would have to ship at least 10 percent of its milk supply.

This concludes my testimony.

Q. Thank you, Mr. Christ. Back at the beginning you stated some of your background.

Charles English for Dean Foods.

Back at the beginning of your statement you referenced 1974 to 2000 working for Land O'Lakes. While I would correct there to say that you certainly haven't been part of the dairy industry entirely since 2000; correct?

A. I've not departed the industry, but my activities has been reduced. This last year I've appeared at several hearings.

Q. But you've kept up with market order issues?

A. Yes, I have. I feel that I am somewhat rusty, but I am following the developments as they occur.

Q. And in addition to everything else, do you teach some classes?

A. Yes. I teach -- right now I'm teaching in the MBA program at the -- at St. Mary's University at Minnesota. I have been teaching at the University of St. Thomas in their business, MBA program as well.

Q. And you referenced, of course, what

you've done in the dairy industry, but you have educational background in ag economics?

A. Yes. I was trained to be an agricultural teacher in high school as an undergraduate, and then I got my master's in agricultural economics and came close to completing a Ph.D. in agricultural economics.

MR. ENGLISH: I would offer Mr. Christ as a expert in ag economics.

JUDGE HILLSON: Any objection?

Q. (By Mr. English) Sir, just a couple of questions in addition to your testimony, your written testimony. As to Proposal No. 3, the transportation credits, you have not commented in your written testimony, but if these proposals are to be adopted, how, or if it does, the Market Administrator know that a handler is actually incurring the cost with respect to these kinds of proposals?

A. With respect to transportation credits --

Q. Yes.

A. -- proposals? I believe that the handler receiving the transportation credits should either show a payment of at least that amount of money to a milk hauler or a payment directly to producers as a separate line item. This would just validate that the money is not being kept by the handler and flows back to either someone providing hauling services or to someone who's actually paying for hauling services.

Q. In other words, it shouldn't become a windfall to the handler?

A. That's -- it should not be retained by the handler whether he considers it a windfall or not. It should go for the service of transporting milk.

Q. And Mr. Vetne had a discussion with Mr. Kinser regarding comparing in some way the value of depooled milk and the value of Class I over order premiums. Do you have any comment on the fairness of that comparison?

A. Well, I don't think it's a fair comparison. There's extraordinary money generated within Federal orders through classified pricing, it's a price discrimination system, and that extra money accrues to everybody in the pool. Whether they also enjoy additional benefits from manufacturing premiums or over order premiums, I think they're separate issues.

Q. Thank you.

MR. ENGLISH: The witness is available for cross-examination.

JUDGE HILLSON: Do you want to --

MR. ENGLISH: Before cross-examination, this is -- I think I came to the idea that Mr. Beshore, if I can hand the witness another copy with numbered pages, and I'm going to go ahead and number the pages in the exhibit for the court reporter during the next witness or something. And that concluded my examination. I also want to include --

JUDGE HILLSON: I will receive Exhibit 37 in evidence with the idea that the pages will be numbered as we move along.

Does anyone want to cross-examine Mr. Christ? Mr. Beshore, do you have any questions of this witness?

MR. BESHORE: May I inquire of Mr. English just a minute?

(Off the record.)

JUDGE HILLSON: Let's go back on the record. Does anyone have any questions of Mr. Christ? Mr. Rower.

MR. ROWER: Thank you, Judge Hillson.

CROSS-EXAMINATION

BY MR. ROWER:

Q. Mr. Christ, I'm Jack Rower in the AMS Dairy Programs. Nice to see you again.

A. Thank you.

Q. Mr. Christ, on page 3 of your statement, sixth paragraph down, you make the statement, "Dairy farmers whose milk is continuously pooled under any Federal milk order during the preceding year would not be effected by this proposal."

I wanted to try and clarify for the record, there are Federal orders in which milk is pooled, once is pooled continuously; is that correct?

A. That's correct.

Q. Would milk pooled on, say, Order 30 meet touch base ten times to qualify in Order 32 based on what you said?

A. No, not under our proposal. If it

had been pooled during the preceding 12 months, or preceding 11 months in the Upper Midwest order, it would be eligible to become pooled in this order without any additional performance requirements other than the initial, is it touch and go or --

Q. Touch base?

A. Touch base, yes. Just one initial touch base would do it. So any milk that's been continuously pooled under any Federal order can remain continuously pooled without any new restrictions.

Q. Mr. Stevens is going to ask you something in just a second.

CROSS-EXAMINATION

BY MR. STEVENS:

Q. Mr. Christ, I want to see if I understand your testimony with respect to the -- I believe the transportation credits. You described the situation where in order to be entitled to those that the handler would have to report, would have to submit something that shows, I think your statement said, one would be a line item showing that it was paid to a producer?

A. Yes. That would be one form of demonstration that the money flowed to someone who actually paid the transportation cost.

Q. Now, again, correct me if I'm wrong, I thought I heard earlier in some of the testimony that when these -- when this hauling is done, that sometimes there is some subsidy; in other words, there could be a situation where the producer would have a haul on, but the producer themselves would not pay the whole haul?

A. That's correct. That's fairly common in the Midwest.

Q. Now, in that situation, how would that fit in with what you described in terms of the line item of payment to the producer?

A. In the case of subsidized hauling, the hauler is paid by two parties. The one party is the producer for a portion of the cost and the other party is the handler for the remainder of the cost. Now, the handler could pay the transportation credit to the producer, shown as a line item, presumably the producer is paying that much or more to the hauler, or the handler could show it as a payment directly to the hauler.

In either event, it would be money paid to someone that's either providing the service or paying for the service.

Q. Okay. So am I understanding that right that that would sort of zero out, in other words, that would cover the entire cost of the haul, whether it was subsidized to the producer, whether part of it was paid by the producer and subsidized by somebody else, that being one instance, and the second instance being where the handler would have their own hauler?

You know what I'm saying, where there would be another -- say a coop certainly might be a situation to haul milk; right?

A. Yes. It's possible for the coop to operate their own hauling system. It's getting less common in recent years, but nevertheless, as was testified earlier, the money goes to the coop, in effect it's going to the producer. So I think the limitation -- the documentation requirements would be smaller there.

Now, the transportation credit is not

going to cover the full cost of the hauling, it's going to cover a portion of it. So if the full amount is paid either to the hauler or to the producer, even greater amount will be paid for hauling service by either the handler or the producer.

Q. Now, do you see any instance in that, in what we're describing here, where there would be a difficulty in a Market Administrator looking at the submitted information and being assured that that -- that it is what it represents to be, that the hauling was paid that way or would there be some reason for him to doubt that?

A. Well, the Market Administrator has access to very detailed records in each of the handler's bookkeeping systems, and they could determine accurately that the money actually flowed either to the hauler or to the producer. They can determine that.

Whether it's a payment that would just replace some other payment that would be made is a question that's not as easy to answer. Maybe the producer would have been paid more in the absence of the transportation credit, and with the transportation credit they're paid the same amount of money but in two portions.

RECROSS-EXAMINATION

BY MR. ROWER:

Q. Jack Rower again, Mr. Christ. I would like to return to this question I asked earlier. If milk of a dairy farmer in Order 30, for example, touches base once a month, the dairy farmer is pooled, but is he pooled continuously? I mean, if he touches base once a month, say for 11 months, in Order 30?

A. In Order 30 --

Q. Would that be continuous, all his milk is not pooled? I'm sorry for interrupting.

A. In Order 30, a producer touches base once and that will keep him pooled for an indefinite period of time. It can last for many years. For example, we went through Federal Order Reform, we did not have to requalify individual producers. Even in the event where milk is depooled because of price diversions, we do not have to -- it's not required that a producer touch base once again. So Order 30 is very, very loose in that respect.

Q. But the dairy farmer for markets provision in Order 1, for example, doesn't all of the milk of the producer need to be pooled continuously?

A. Okay, I can't answer that question because I'm not intimate with the provisions of Order No. 1. So I am sorry, I just can't answer the question.

MR. ROWER: All right, thank you.

RECROSS-EXAMINATION

BY MR. STEVENS:

Q. I have another one. This is Garrett Stevens again. I have a follow up, and answer it if you can. Again, I'm hoping that we can get some -- that the record can reflect in terms of these transportation credits how the Market Administrators would be able to verify these things and make sure, I guess, that no party is getting the benefit that they didn't -- or getting a credit for something that they didn't get a transportation benefit from.

Just follow my example and see if I'm getting to a point that you can deal with or that you have -- I would just like a comment any way it comes out in the sense we were talking about a coop who might haul the milk for their membership, that's one instance. A hauler may be working for the handler also. But in the instance of the coop, the credit, it would seem to me, would be going to the benefit of the individual producer whose milk was shipped; is that right?

A. Okay, I didn't make that clear earlier when I said the money should either go to a hauler or to a producer.

Q. Right.

A. It should be to the hauler who actually made that shipment, or it should be to the producer whose milk was involved in that shipment.

Q. So if -- I'm thinking of the instance where it might -- the payment might be made to the benefit of the cooperative, and that would be to the benefit of all the producers of the cooperative and may not be to the benefit of that individual producer to the extent that you are alluding to?

A. That's correct. But that sort of thing is common within cooperatives where they share all the costs and benefits of the organization. But I think the Market Administrator could easily establish that the cooperative incurred a certain amount of costs in making the shipments that were associated with the transportation credits. As long as those costs were equal to or greater than the transportation credits, he would be satisfied that the money was used for that purpose.

Q. Okay. And when you say that, then the point comes to my mind, if the coop, then, is getting the credit for the transportation and is -- and the producer, the individual producer gets some of the -- well, say they get all the money, then that answers the point, but if they're not getting all the money and some of the money is retained by the coop and then distributed to the cooperative members, it seems to me under that instance someone would be getting a credit or, you know, a benefit for something that they actually didn't receive?

A. Okay, but that is the nature of the internal pool within a cooperative. They pool costs and returns within a cooperative. But I think it should be satisfactory if the cooperative incurred at least as much cost in making the shipments for which the transportation credits were provided as is represented by the transportation credit.

Q. Okay, thank you very much.

JUDGE HILLSON: Any other questions? Mr. Rower?

MR. ROWER: No thank you.

JUDGE HILLSON: Does anyone else have any cross-examination of Mr. Christ? Do you want to do any redirect, Mr. English? I'm assuming that we're all done. Do you have any questions, yes or no?

Mr. Christ, you may step down. My recollection was that was your last witness. Is that correct, Mr. English?

MR. ENGLISH: Yes, that's my last witness.

JUDGE HILLSON: And my recollection was that Mr. Vetne was going to call a couple, two witnesses at this time. I see Mr. Vetne with his collating team in the back of the room over there. Are you ready to call a witness, Mr. Vetne?

MR. VETNE: Virtually.

MR. ENGLISH: Virtually. A virtual witness virtually or virtual witness?

JUDGE HILLSON: Mr. Vetne, call your witness, please.

MR. VETNE: Call Mr. Gulden. John Vetne calls Neil Gulden.

NEIL GULDEN,

a Witness, being first duly sworn, testified under oath as follows:

JUDGE HILLSON: Speak into the mic, and you need to please state your name and spell it for the record.

THE WITNESS: My name is Neil Gulden. It's N-E-I-L G-U-L-D-E-N.

JUDGE HILLSON: He's your witness. Do you want me to mark any of these exhibits at this point or do you want to do it as we go along? What's your preference?

MR. VETNE: We can mark the statement for one.

JUDGE HILLSON: The statement

I'll mark as Exhibit 38.

(Exhibit 38 was marked for identification.)

MR. VETNE: Then 39 is the document that says Federal Register.

JUDGE HILLSON: That's Exhibit 39.

(Exhibit 39 was marked for identification.)

MR. VETNE: And then there's two one-page exhibits, not necessarily in the order that they'll be mentioned, but let's just mark them. One heading Old Federal Order 1079.

JUDGE HILLSON: I'll mark that as Exhibit No. 40.

(Exhibit 40 was marked for identification.)

MR. VETNE: The next, F.O. 32/CWT Class and Blend Prices.

JUDGE HILLSON: I'll mark that as Exhibit 41.

(Exhibit 41 was marked for identification.)

MR. VETNE: And finally --

JUDGE HILLSON: Almost the same one.

MR. VETNE: Should have done it the other way around. And I have Federal Milk Order Market Statistics 1989 Annual Summary.

JUDGE HILLSON: That's marked as Exhibit 42.

(Exhibit 42 was marked for identification.)

MR. VETNE: And there's one more exhibit that I'll be producing later in testimony.

DIRECT EXAMINATION

BY MR. VETNE:

Q. Mr. Gulden, you give us your name and affiliation in your statement, but your statement doesn't say much about your past. Can you briefly describe your experience history, employment positions in the dairy industry?

A. I've been employed by Associated Milk Producers, Inc., since 1970, and my responsibilities have been mainly in the management area. And my title is Director of Fluid Marketing. And I have been involved in

Federal order hearings and analysis since approximately 1976 to date.

Q. You have a prepared statement, and we'll go through and insert it, identify it as exhibit numbers, as we go along I won't interrupt you. Thank you.

A. I am Neil Gulden, director of Fluid Marketing for Associated Milk Producers, Inc. (AMPI). My office address is 315 North Broadway, New Ulm, Minnesota 56073.

My testimony is in opposition to DFA/Prairie Farms Proposal No. 2, and Dean Proposals 6 through 8, addressing the issue of repooling milk after voluntary depooling. I am joined in that opposition by Foremost Farms, Land O'Lakes, Central Equity and National All-Jersey. This coalition, based on June 2004 information, represents about 2,400 dairy farmers and over 360 million pounds of milk on Order 32, Order 32 milk.

We oppose DFA/Prairie Farms and Dean Proposals 2 and 6 through 8 for three principal reasons:

First, price inversion and depooling is a national issue resulting from price formulas and the timing of price announcements. We strongly believe that the issue should be addressed in a national hearing in which USDA is not self-limited by the scope of a local order hearing notice, and may at least entertain price formula and announcement timing as alternative remedies.

Second, we endorse the view expressed by a witness for DFA and Prairie Farms at the last Mideast order hearing that restrictions on voluntary depooling due to price inversions "may cause financial damage to be borne by the manufacturing sectors of the market, [and] producers should [not] incur any penalty because of price outcomes which... are the result of the order program providing for the advance pricing of Class I and II milk that serves the interest of handlers." That's 69 Federal Register 19291, 19300 (April 12, 2004). Be Exhibit 39, I believe.

Q. Exhibit 39?

A. Page 3.

MR. VETNE: Your Honor, and to those listening, is an excerpt from not the Full Decision of the Secretary on the Mideast order hearing, and the decision characterizes attributes or refers to testimony advanced by DFA and Prairie Farms. The decision actually says it's DFA, a DFA witness; however, attached to the Secretary's decision for context and admission purposes is the brief submitted by Dairy Farmers of America, Michigan Milk Producers and Prairie Farms addressing that issue, as well as the excerpts from the transcript addressing that issue. So it's clear what the Secretary is referring to is a position taken by DFA/Prairie Farms jointly, which was in the testimony advanced and been referred to in the Secretary's decision.

Q. (By Mr. Vetne) Please continue, Mr. Gulden.

A. I would like to read into the record part of Exhibit 39 in addition to what's been the testimony.

Q. Reading from Federal Register page?

A. Page --

Q. There's a printed page at the bottom of the exhibit.

A. Page 2 of the exhibit.

Q. Which is Federal Register page 19297.
Proceed.
A. Starting in the second paragraph, it says, "Opposition to Proposal 8 was raised by DFA. DFA was the opinion that class price inversions are a function of the order providing advanced pricing to handlers for Class I and II milk. The witness indicated advanced pricing is a needed and good provision of the Federal milk marketing orders.
"However, if the Class I sector of the market were not provided advanced pricing, reasoned the DFA witness, depooling might never occur. Nevertheless, noted the DFA witness, there should be no reason why Class III and IV handlers should ever have to equalize class use values with the blend price by paying this difference into the pool for the benefit of Class I handlers simply because of price inversion."
I'll skip down a little ways. It says "... but doing so can result in causing financial damage to the reserve and balancing sectors of the market."

Continuing with my statement. Third, we believe that the proposals digress from the central purpose of pooling, which USDA recently reconfirmed, in a legal brief to the 7th Circuit in Chicago, is to prevent "ruinous competition among dairy farmers for fluid market."

The option of pooling or not pooling milk delivered to a nonpool plant has been a mainstay of the Federal order system and it should remain so. Class I prices have for decades been based on the value of milk used in manufactured product, plus a differential.

At the insistence of fluid milk processors, regulated Class I prices are calculated and announced by USDA in advance, before the beginning of the month, based upon past manufacturing milk values. Regulated milk prices for manufactured product uses, however, are based on current values and announced retroactively, after the marketing month has passed. This also has been true for decades.

Under pricing formulas employed for decades, there is always a lag between changes in the value of milk and changes in the advance Class I price. As a result, a sharp increase in the current value of milk for manufactured products will periodically produce a Class III (or Class IV) price that exceeds the statistical "uniform" or "blend" price and on occasion will exceed the Class I price. This has also been true for decades. Exhibit --

Q. 42?

A. -- 42, Federal Milk Order Market Statistics for 1989, Table 12, for example, shows that considerable milk was voluntarily depooled in nine Federal order markets during the latter part of -- that should read --

Q. 19.

A. That should read 1998, I hope.

JUDGE HILLSON: You mean 1989 milk order refers to 1998?

THE WITNESS: 1898 should read 1998.

MR. VETNE: 1898 should read 1998 -- I mean 1998 --

JUDGE HILLSON: That's my point.

MR. VETNE: The whole thing is wrong.

MR. ENGLISH: I agree, the whole thing is wrong.

JUDGE HILLSON: It's talking about -- is it talking about 1989 or 1998?

MR. VETNE: 1989 Annual Summary, which is Exhibit 42.

JUDGE HILLSON: I know, but during the latter part of that should be 1989?

MR. VETNE: 1989, yes.

THE WITNESS: Let me reread that. I'll reread that last sentence, your Honor.

A. This has also been true for decades. Federal Milk Order Market Statistics 1989, Table 12, for example, shows that considerable milk was voluntarily depooled in nine Federal order markets during the latter part of 1989 because the blend price "was at or below the Class III price."

The occasional inversion of the relationship between Class I or blend prices, and Class III (or IV) values, is a caused by advance pricing for milk use in Class I and II products, at the request of the fluid milk processors. As a result, regulated producer prices do not reflect the current value of milk in these products. There is good reason to reconsider whether advance pricing for Class I and II products continues to be good policy from a regulatory standpoint.

There is a wealth of market information and economic data available for handler now that was not available two or three decades ago to help predict raw milk values and apply predicted values to future sales of finished products.

The recent growth of healthy and vigorous trading at the CME in milk and dairy products, along with non-exchange risk management tools, has greatly enhanced the ability of handlers and producers to manage risk of price volatility. Rather than look to remedy the cause of price inversion -- advance Class I pricing, which is advance Class I pricing or take an additional step toward letting the marketplace govern, proponents of repool limitations prefer to treat the symptom and further insulate the Federal milk order system for marketplace realities. It is time, rather, for Class I handlers to compete for raw milk based on its current value, as manufacturers of Class III and IV products have done all along.

The fact that the Federal order pricing system periodically results in Class I prices so low that blended Federal order returns are lower than Class II, III or IV prices does not make a case for punishing milk not pooled by limiting repooling. The antirepool proposals are a bad idea for Order -- that should read 32. It is a particularly bad idea to consider placing depool-repool limitations in Order -- should read 32 -- when the "problem" of price inversion and voluntary depooling is national in scope and, as observed by Mr. Kinser, multimarket handlers can readily shift repool limited milk to another order.

A proposal addressing the same issue is pending in Order 30, and Order 33 interests have also advanced a similar amendment although the latter proposals, Exhibit --

Q. This would be proposed Exhibit 43,

which unfortunately is not yet stapled.

JUDGE HILLSON: Do you have copies?

MR. VETNE: I do have copies. They're right here, five pages. Take the top five pages.

JUDGE HILLSON: I'm going to label the document that has the Ohio Dairy Producers at the top.

MR. ENGLISH: You said it was five, but this is only three -- actually six.

JUDGE HILLSON: This is -- I'm labeling this Exhibit No. 43. Six pages, is that what it's supposed to be?

(Exhibit 43 was marked for identification.)

MR. VETNE: It's a request from Ohio Dairy Producers and the Ohio Farmers Union for amendment to -- similar amendments to the Mideast order. And these two letter requests were printed from the USDA website, Market Administrator's website, and the department has issued an invitation for additional proposals.

These letters requests for rulemaking

are the basis for that invitation and these letters requesting a hearing are available on the Internet site.

JUDGE HILLSON: Okay. Do you want to continue with your statement?

THE WITNESS: Yes, sir.

A. Exhibit 43 are not advanced by any handler or 9(c) cooperative under that order.

The Federal order formula for Class III milk simply establishes a value for cheese milk based on commodity prices. The Class III price (Class IV if it is higher) has a differential value added to it to determine the Class I price. The differential value ($2.00 in order 1032) is a legally set, artificially high, subsidized price for milk used in Class I.

Cheese milk gets no such subsidy from the Federal order because its prices are obtained entirely from the marketplace. Cheese milk receives no benefit from the Federal order unless the money created by the differential value results in a blended value that is higher than the Class III price. That doesn't mean that these producers shouldn't share in the congressionally-mandated enhanced Class I milk values when the blended value is higher than the Class III price.

The Class I price is determined approximately two weeks prior to the month for which it is applicable, using the formula described above and the commodity prices at that time. At the end of the applicable month, the final Class III price is set using the same formula. This results in a six-week lag between Class I and Class III price announcements in which the market value can rise or fall, depending on market conditions.

For April 2004, the market value of Class III, during this six-week period, increased $6.02 per hundredweight, completely eclipsing the Class I differential value in all markets. This caused the estimated value of the blended Federal order return to be substantially less than the estimated Class III price, resulting in most Class III milk being depooled.

In effect, the Federal order created no benefit to the cheese maker because the market value of cheese milk was higher than the subsidized Class I and resulting Federal order blended value.

Proponents of Proposals 2 and 6 through 8 contend that this Class III milk should be penalized by limiting the amount that can be pooled the following month if market conditions warrant. We disagree strongly with this radical change in historical Federal order pooling philosophy.

Limiting repooling of milk forces a cheese plant to decide whether it is more cost effective to depool, to remain pooled in order to avoid future limitations, or to do a combination of both. In either case, estimating Federal order blended values or producer price differentials is not an exact science. Undoubtedly some milk would end up depooled when it should have been pooled and vice versa, causing losses in revenue.

Any pooling of cheese milk where Class III price is higher than the blended Federal order return is simply a transfer of money from market driven cheese plant returns to other order participants, whose business leans more toward shipping a higher percentage of their milk to the Class I market.

The Federal order should be sharing money derived from Class I handlers, not taking money from one group of producers (cheese milk) and using it to offset a low Class I price created by the orders' own pricing system.

Exhibit 41 shows an example of what happens when the cheese values (Class III price) increase dramatically and actually overtake the Class I price during the six-week time period from when the Class I price is set and the final Class III is set.

In January '04 a positive PPD is available for all producers because the Class I mover changed very little between 12/19/03 and when the Class III was set on 01/03/04 and created an effective differential between Class I and Class III of a positive $2.24. This resulted in a return of $0.69 (PPD) from Class I revenues which should be shared with all milk pooled.

In April '04, the effective Class I differential was negative $4.02 because of the rapidly increasing cheese market between

3/19/04 and 4/30/04. That resulted in a negative PPD of $4.11 -- that should be changed, excuse me. That should be $4.02 and caused most of the Class III milk to be depooled. That doesn't mean Class III handlers did anything wrong or took any money they weren't supposed to from the pool, in fact, they took nothing from the pool because there was nothing to share.

It simply means that Class I values were too low relative to Class III and the return from milk going to Class I (fluid use) was not very competitive with milk used to manufacture cheese. The point is that cheese milk should not be forced to pool or be threatened with limits on what they can pool the in the following months just because the order pricing system isn't generating enough Class I money to produce a positive PPD.

Cooperatives, government officials and Extension Service personnel, incidentally, must be careful to avoid adding the confusion of many producers that a negative PPD represents a loss or deduction from their milk checks. It is simply an expression of arithmetic for the difference between Class III price and the blend price.

Pooling all Class III milk would not produce a positive PPD when Class I and Class III prices are inverted. Dairy Marketing Services, in its March 2004 newsletter article entitled "Negative PPD is Not Negative," did a good job of describing the negative PPD in a way that would avoid negative thinking. And I quote:

"Despite what you may think, a very low or negative PPD this spring does not result in you receiving less money for your milk. The total amount of money generated by the Federal order marketwide pool is fixed based on the level of commodity prices. The money in the -- the money in the pool, should be pool -- can be disbursed to producers via higher component prices and a low PPD, a high PPD and lower component prices, or something in between the low or negative PPD is simply the result of a calculation that is needed to balance the pool. In fact, a negative PPD can be viewed as a positive price signal in that it can only happen when milk prices are rising rapidly."

Arguments that depooled milk is not serving the fluid market or is not available to the fluid market just don't hold water. First, in order to pool milk in any month, a block of milk must be shipping the Federal orders' required percentage to a distributing plant or be a part of a unit of supply plants that is doing so.

If milk is depooled, there's generally no reduction in distributing plant sales because the milk might want to pool again as soon as the next month and the sales will be needed for qualification. Depooling doesn't mean the milk isn't serving the market or that the milk isn't available for Class I use or that the milk isn't as valuable to the market as any other milk, in terms of additional seasonal sales and balancing functions.

Depooling and negative PPDs, which prior to 1996 would have been the equivalent of the Federal order blend price minus the Class III price, are not new revelations. Class III prices have been higher than the

Federal order blended price many times as cheese values rose faster than Class I prices. Exhibit 40 shows the months from 1994 through 1999 when this occurred in old Federal order 1079 (Iowa).

Payments from a Federal order to similarly located dairy farmers for pooled milk are the same. Farmer milk prices from their milk buyer, however, vary based on the market selected for the producer's milk.

Since I started working with Federal orders in the early 1970s, this negative PPD effect has occasionally occurred and depooling was often the result if you estimated that the Class III price was going to be higher than the blend price. When there was a Class I revenue to share all milk pooled received its share, added it to their market returns, be it cheese or fluid, and paid producers as best they could.

Over this time period there have been times when cheese was a better return and times when selling to fluid customers was much better than cheese. However, we don't or can't change our business plans for short-term advantages and risk losing our customer base. We all compete for producers based on how we have structured our respective businesses.

We fully recognize the competitive problems caused by the Federal order Class I pricing structure; however, forcing cheese plants to subsidize the other milk in the Federal order pool is the wrong way to solve this problem. The solution, if one is needed, is to price all milk on the basis of the current value of milk. If this is as big a problem as proponents say, it seems that the Class I pricing formulas and timing might be a better place to find a solution in order to get the money out of the marketplace instead of taking it from one farmer and giving it to another. As stated earlier, a national hearing would be a more appropriate way to address this problem.

Proposals 3 and 4 state that if a producer loses association with the order during certain months, they will not be permitted to be a producer in that month or future months depending on which month they lost association (including depooling), unless they ship at least ten days' milk production to a pool plant during those months.

That seems out of sync to me, John. I think we've got some copying problems.

THE WITNESS: Can I take a minute, your Honor? I think that paragraph was incorrect.

JUDGE HILLSON: We'll go off the record.

(Off the record.)

JUDGE HILLSON: Let's go back on the record.

THE WITNESS: The last paragraph I read should be completely deleted, your Honor.

JUDGE HILLSON: Beginning with Proposals 3 and 4?

THE WITNESS: Yes.

JUDGE HILLSON: You just want the paragraph deleted?

THE WITNESS: Yes.

JUDGE HILLSON: You may continue.

A. Creating Federal order rules that force handler to make decisions on pooling or depooling, where it's only a matter of degree which causes more economic harm, will make Federal orders less and less appealing to more and more dairy farmers. I wouldn't want to see more Federal orders jeopardized because of issues that have nothing to do with sharing Class I money, as intended. This would be a tremendous setback to dairy farmer income.

Proponents have asked the Secretary to consider and decide the antirepool proposals on an emergency basis. This would be entirely irrational. Price inversions and depooling have been with us for decades. It has been a factor in marketing decisions, business development decisions, and regulatory decisions for the course of those same decades.

The only difference in depooling between 1991, when DFA and Prairie Farms opposed repooling limitations, and today, is the unusual quantity of price inversion experienced last spring. This difference does not create an emergency. The spring 2004 cow is already out of the barn and way down in the pasture. AMPI and other observers are of the opinion that price inversion is not likely to recur to the degree observed last spring in the near future.

This was left off on copying. Let me read this last paragraph into the record.

A change in regulatory policy departing as far from the past agency practice as the one proposed to treat the consequences of price volatility in Class I pricing lag that have long been a feature of the system requires the benefit of a recommended decision with opportunity for industry briefing and exceptions before a change is made.

THE WITNESS: And that concludes my statement, your Honor.

Q. (By Mr. Vetne) Mr. Gulden, do you have any additional documents before anyone else wants to ask you questions?

A. No, I don't.

JUDGE HILLSON: Who would like to ask this witness questions?

Go ahead, Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods. Good

afternoon, Mr. Gulden.
    A.   Good afternoon.
    Q.   I want to start with your last statement in your statement that AMPI and other observers are of the opinion that price inversion is not likely to occur to the degree observed last spring in the near future. Well, the last one in your printed statement before you added a paragraph that doesn't appear. Do you see that?
    A.   Yes, I do.
    Q.   Now, just a few months ago up in Order 30, we all had a hearing similar to this; correct?
    A.   Yes.
    Q.   And do you remember testifying at that time that AMPI, at least for AMPI, I'm not sure if it was for other observers but may have also been other observers, were of the opinion price inversions were not going to occur at all in the near future?
    A.   I don't remember testifying.
    Q.   You don't remembering testifying to that?
    A.   No.

Q. But we're about to have a price inversion; right?

A. I don't know.

Q. Don't know?

A. Those markets have not been fully developed yet at this point.

Q. You don't think there's going to be any price inversion -- is there going to be depooling for this December, sir, per Order 32?

A. It's possible.

Q. Possible. Possible. So the pontification of when all this depooling is going to occur or when we're having price inversions isn't quite as scientific as perhaps your last statement would suggest?

A. It certainly isn't.

Q. Now, Mr. Yates commented to me while you were testifying that thought he had woken up and he was hearing a South Carolina bottler complaining about paying Class I prices.

Do you agree with me that if you reverse Class I and Class III throughout your statement, that you would have the complaint that Class I bottlers have for having to

subsidize cheese manufacturers?
    A.   It's the intent of the order is to -- is for Class I handlers to pay a subsidized price over and above the Class III value or Class IV, whichever is higher, to be shared amongst all the dairy farmers.
    Q.   I'm interested in paying a subsidized price, sort of a non sequitur. Who's getting the subsidy in a normal month? The Class III manufacturer; correct?
    A.   Some, not all.
    Q.   I mean, you, yourself, just testified on page 3 that the Federal order sets an artificially high price for Class I; correct?
    A.   I think it's a price that could not be maintained in the free market and the open market, yes.
    Q.   And so you acknowledge that, that that's what the Class I price is, it's a market price that could not be maintained in the free market; correct?
    A.   That's correct.
    Q.   And yet, you have a statement that says it is time, rather, for Class I handlers to compete for raw milk based on its current

value as manufacturers of Class III and IV products have been doing all along.

So that means you agree that we're paying an artificially high price and that we should be able to compete on the same terms, which would mean we shouldn't have to pay an artificially high price, right, sir?

A. No, it means I believe that the lag in the Federal order is -- you have too much lag in the Federal order relative to the mover for Class I relative to the final Class III price for Class I, and that those commodity changes from the time the mover is announced until the time the Class III price is announced aren't reflected in the Class I value.

Q. But the Class I value that you say should be competing on current value, but compete for raw milk on the market, is nonetheless artificially high; correct?

A. Well, it's a regulated price. It's a price that can be avoided by legislation.

Q. And similarly, you're complaining that if depooling is limited that that will somehow take monies from one group of

producers, cheese milk, and use it to offset a low Class I price; correct?
A. Class I price that is too low relative to commodity values, yes.
Q. Too low but simultaneously artificially high?
A. You can play games with me if you want to, but --
Q. I'm using your words. You're the one that used the word artificially high.
A. True, but you're mixing them up. If you want to ask me a question, I'll answer it.
Q. I am asking you a question. Is it not the case that on a normal month when you don't have depooling that one group of producers take money from another group of producers, that is to say that the dairy farmer shipping to Class I operations have money taken from them under the Federal order system, as it's designed, as you said, for the benefit of the cheese milk producers?
A. No.
Q. Correct?
A. For the benefit of all producers. It's a shared.

Q. That's for the benefit of all producers. So why isn't it for the benefit of all producers that we don't depool and we allow the cheese milk to share some of their benefit with all producers in months when you depool?

A. In my opinion, and as a practice of the Federal order system, Class III milk or any milk used for -- used any nonregulated milk for manufacturing purpose has always been -- has always been able to voluntarily pool their milk.

Q. But that's precisely the point of this hearing, to find out whether that's fair or not; right?

A. That's my response is that it is fair. And has been for a long time.

Q. I'm intrigued by your comment on page 6 that arguments that depooled milk is not serving the market, and then you have or not available through the market, but you can -- it's there as an "or," not as an "and" arguments that depooled milk is not serving the market just don't hold water.

Well, depooled milk, by definition,

didn't get shipped to a pooled distributing plant in the month it was depooled, was it?

A. That's correct.

Q. So during that month it didn't serve the market, did it?

A. It wasn't needed.

Q. That wasn't my question, sir. It didn't serve the fluid market that month, did it?

A. It served the market as -- it was still there, it didn't go away. The milk was still there. If the customer needed milk, we could -- we could make it available.

Q. Well, let me ask the question one more time, the way your counsel did for others, and that is: Don't you agree that milk that's depooled, by definition, didn't get shipped to a pool distributing plant during that month and, therefore, did not serve the fluid market during that month?

A. It was not a part of the fluid market. It was a reserve supply from the fluid market.

Q. And so being a reserve supply by itself means it serves the fluid market, in

your opinion?
A. Yes, it does.
Q. So it doesn't actually have to ship, in your view, to serve the fluid market?
A. It does not.
Q. Just has to be there?
A. It has to be there. It's a reserve supply.
Q. Be there except on paper for the pool; right?
A. Ask your question again.
Q. It can be there physically, but it won't be there on the paper for the pool regarding the pool, right, when it's depooled?
A. That's correct.
Q. On Exhibit 40 you're showing there have been past negative PPDs since Federal Order Reform resulted in a higher Class I differential for Iowa; correct?
A. I don't know those numbers, but I believe you're right.
Q. About $0.20, $0.40, depending on what part of Iowa?
A. I believe so.
Q. If you blended that out, for

instance, in May of '96, if you had the higher Class I differential, if your argument for your lawyer on brief is to compare this to the number of times it occurred, post Federal Order Reform, you would agree with me that some of these months, especially say May of '96 when you had a negative PPD of what is equivalent of a negative PPD of .02, if you had $0.20 or $0.40 more to blend out, that number probably wouldn't have been negative; right?

A. That's possible, yes.

Q. I noted that your counsel had or you read a paragraph, one of the excerpts from a page of Exhibit 39, and I appreciate the fact that the excerpt is somewhat longer, but I note that you didn't read two other -- well, a lot of it, actually. You agree that Dean Foods, in that proceeding, took the position consistent with this proceeding; correct?

A. I believe they did, yes.

Q. And notwithstanding what DFA said, you agree that the Secretary said the following: "The tentative decision and this final decision make no finding on whether advance pricing is a cause or contributor to class price inversions."

A. That's the words, yes.

Q. And additionally the Secretary said, "Neither the tentative decision or this final decision make any findings regarding the damage that may result to cooperatively owned manufacturers by being prevented from rejoining the pool"; correct?

A. Yes.

Q. So the Secretary has not made a determination on those issues, at least from that proceeding; correct?

A. No, that's true at that point.

MR. ENGLISH: I have no further questions.

JUDGE HILLSON: Mr. Beshore.

MR. BESHORE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Neil.

A. Good afternoon.

JUDGE HILLSON: Please identify yourself again.

MR. BESHORE: Marvin Beshore for Dairy Farmers of America and Prairie Farms.

Q. (By Mr. Beshore) You've made comments about and placed in an exhibit, Exhibit 39, the fact that DFA took a position on different proposals in another order hearing a couple of years ago that it's taking here, and I'm wondering what you want to make of that -- what you are intending to make of that proposal -- make of that fact that someone -- has AMPI ever changed it's true view during your tenure with it over the years?

A. On anything?

Q. On anything, yeah.

A. Yes.

Q. And when you changed, it was in the right direction? You learned something and made a change in your position to a more correct position; correct?

A. Hopefully.

Q. Fair enough? Hopefully. Are other people entitled to do the same thing?

A. Sure.

Q. Even DFA?
A. Even DFA.
Q. By the way, you're asking portions of or excerpts of our brief in that earlier proceeding to come into the record. Do you have any problem with the rest of it coming in? Would you be ready to endorse all of it here?
A. I am presenting it as I have, and I haven't endorsed any more than that.
MR. VETNE: Your Honor.
JUDGE HILLSON: Do you have an objection?
MR. VETNE: We're getting into argument. The excerpts, as I described, were designed to be in context in response to a depooling or no repooling proposal, and I believe that we have all of the portions in the brief that relate to that.
JUDGE HILLSON: But that doesn't prevent Mr. Beshore from asking a fairly basic question on cross-examination. I gave you all the same leeway. And it's actually basically been asked and answered anyhow.

MR. VETNE: Thank you.

Q. (By Mr. Beshore) Let me ask this, Neil. You've made the argument a couple of times, more than a couple, probably, that Federal orders, their only purpose is to share Class I revenues. Is that -- have I correctly stated or paraphrased your position?

A. I don't think I said only purpose, but it's their main purpose, is what I meant to say.

Q. What other purposes do they have if it's not their only purpose, in your view?

A. Well, just they have similar marketing -- similar marketing -- similar prices for -- to have similar prices for fluid customers of similar location.

Q. Do they have any functions with respect to manufacturing prices and values and returns?

A. Only to the extent that formulas in the Federal order are used to set Class I prices.

Q. Only to set Class I prices?

A. Right.

Q. Is there also -- is there not also --

well, do not Federal orders, in fact, blend all use values to all producers, not just Class I?

A. They do on milk pooled, yes.

Q. And isn't that, in fact, one of their functions to provide a uniform return for all values to all producers in the pool?

A. Yes, it is, on milk pooled.

Q. Okay. And in that circumstance, they're not only sharing Class I values, but sharing all class values, are they not?

A. On milk pooled, yes.

Q. On milk pooled, right.

A. Yes.

Q. And you support that system, do you not?

A. Yes.

Q. Uniform prices, uniform sharing of all values in the pool?

A. Sure, of the milk that's pooled, share in that value, yes.

Q. Right. And in fact, in order to -- you have powder production in the AMPI system; correct?

A. Yes.

Q. And you pool it on Order 32; correct? Some of it, anyway?

A. The milk?

Q. Milk that goes into Class IV.

A. Yes.

Q. And you supported over the years, even before we had four classes of milk, Class IIIA pricing in Federal orders, did you not?

A. Yes.

Q. AMPI.

A. Yes.

Q. So that all producers would share the lower value of Class IV in the marketplace, or of butter and powder values; correct?

A. The concept was that Class IV was helping to balance the market and that the value -- when the value of Class IV was lower than Class III, there was a competitive problem they couldn't compete, and that the order shared some responsibility in helping to pay for that disparity between Class III and Class IV because of the balancing function of the powder plants.

Q. You had a real problem with Class IV, with butter and powder milk, when it had to be equalized at the cheese value in order to get a share of the Class I value; correct? Wasn't that the IIIA issue? In order to get a piece -- there was no issue if you weren't pooled; right? No problem at all if you're not pooled?

A. The issue being what, Marvin?

Q. The issue being that in order to get a share of the Class I price in the pool, you were having to equalize with the pool at the Class III price, which was cheese price, that was a problem, was it not?

A. Because -- before Class IIIA?

Q. Before IIIA.

A. Yes, that was a problem.

Q. And so you used the Federal order system to change the class -- to change the Class IV price to reduce it, correct, to a IIIA value, to change the class -- to change the price of milk being used to produce butter and powder to a IIIA price; correct?

A. Right.

Q. A price that was lower than Class III; correct?

A. Sometimes.

Q. Well, the only times it was a problem was lower than Class III; right?
A. Right.
Q. So that you could get the Federal order to require all producers in the order, especially the Class I producers, to share the costs of the market in your class -- in your butter and powder production; correct?
A. Yes, that was the result.
Q. And that was -- that's one of the purposes of Federal orders too, isn't it, Neil?
A. Yeah.
Q. When it works that way for butter and powder production producers, manufacturers?
A. Yeah, in the order system, a decision. That's the decision from USDA on it.
Q. That you requested, that you, AMPI and others requested?
A. We were part of it, yes.
Q. You support that system still today, do you not?
A. Yes.
Q. And you pool your -- by the way, is

it your position that butter/powder values should only be pooled -- that you should only have to pool butter and powder when the price is lower, not when it's higher?

A. Absolutely.

Q. In other words, the Class I producer supply in Class I should have to share in your lower butter/powder values only when they are low and not when they're high?

A. The Class I -- say that again. The Class I producers --

Q. Producers who don't have a choice in whether to be pooled or not.

A. Okay.

Q. Supply and distributor plants, they should share in the reduced values of butter and powder when you choose to pool it; correct?

A. Yes.

Q. Their blend price should be blended down by those lower butter and powder values when they're low and you choose to pool it; correct?

A. Right.

Q. But the Class I producers should not

share in the higher butter and powder values when you choose to depool them when they're high; correct?

A. They should not share in those values because the order did not create any value to share, Marvin. There is no value. If the Class IV price is higher than the blend price, there has been no enhancement of manufacturing values.

Q. What did the order do to create the lower Class IV values that you get subsidized by the Class I producers?

A. The order didn't cause the lower price.

Q. The market did; correct?

A. The market did.

Q. But you, by pooling, you get other producers to share those lower market-driven values; correct?

A. That was the argument we made and was accepted and approved by USDA

Q. Right. And that's the system that we have in place today; correct?

A. That's right.

Q. And you want to keep it that way?

Share it when it's low and keep it to yourself when it's high; correct?

A. I'm not proposing to change it.

Q. Now, with respect to sharing in the Class I values, you want to share in the -- don't you agree that in any pooling system, you need to have performance requirements to define who's going to be in the pool?

A. I think you do, yes.

Q. And isn't the issue of repooling or depooling simply an issue of performance requirements to determine who is going to share in the pool?

A. If your question is how do you split up the money, is that what you're saying, Marvin?

Q. We've agreed you need performance requirements, you need some definitions to decide who's going to share --

A. Right.

Q. -- in the pool.

A. Right.

Q. And when we're talking about changing the provisions of Order 32 here concerning depooling and repooling, isn't that just an issue of how you define the performance that's required in order to share?

A. I think, and I don't know if this is in response to your question or not, kind of lost me, but I think as long as whatever the performance requirements are, if I'm meeting them, okay, on my whole milk supply, whether it's pooled or depooled or not on my total supply that's available to pool, if I'm meeting the performance requirement on that block of milk, then I have met the provisions of the order and that milk -- and there shouldn't be any penalty because I've met the order provisions.

Shouldn't be any penalty about rejoining the market when there is a higher blend price than a Class III. I have not shirked my duties, I have not declined to ship any milk, and I am shipping the same, before I -- after I depooled as before I depooled.

Q. Well, the provisions presently, the performance requirements presently change from month to month. I mean, they're not the same every month of the year; correct?

A. That's correct.

Q. You don't have any problem with that?
A. No.
Q. They're going to be different from month to month, isn't that all we're doing with changes in performance relating to pooling and repooling?
A. No, I don't believe so.
Q. Okay. Let me -- just one final question relating to your final sentence in your prepared statement. You're of the opinion that price inversions not likely to occur to the degree observed last spring in the near future. You're not sure whether there's going to be a price inversion for December, I think you testified?
A. I'm not positive, no.
Q. Then with what degree of certainty can you make the statement that price inversions are not likely to occur to the degree observed last spring in the near future if you can't be certain what the price is going to be for December?
A. Just my opinion, Marvin.
Q. Okay. Thanks.
JUDGE HILLSON: Anyone else

want to cross-examine in witness? Does the government have any questions of this witness?

You can go again, Mr. English.

RECROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods. Just a couple of questions I have, Mr. Gulden. On page 5, at the bottom, does AMPI always pay its producers a Federal order component prices?

A. No.

Q. Do you pay them less than Federal order component prices?

A. At times.

Q. Do you do that rather than showing a negative PPD?

A. Yes.

Q. So as a matter of mathematics, you don't show negative PPDs, but you pay producers less on the components?

A. I think that's what I said, yes.

Q. And those producers note that other producers are being paid more on the components?

A. I don't know if they know it, but

some of them do, yes.

Q. Sure. And they call you up about it?

A. Sure they do.

Q. And they complain about it; right?

A. Sometimes.

Q. Thanks.

A. I explain it to them.

Q. But they do call you and they complain about it, because that confuses them too; right?

A. Yes, to say the least.

Q. Thank you.

JUDGE HILLSON: Mr. Vetne, do you have any redirect on this witness? Did you want Exhibits 38 through 43 admitted into evidence?

MR. VETNE: Yes, so moved.

JUDGE HILLSON: Any objection to these exhibits being received into evidence? Hearing none, Exhibits 38 through 43 are received into evidence.

You may step down, sir.

And I believe you have one more witness to call, is that correct, Mr. Vetne?

MR. VETNE: Yes. And the front

desk is copying those statements now, take five to be ready.

JUDGE HILLSON: You need a five minute break again? We'll take five minutes again.

(Recess.)

JUDGE HILLSON: Mr. Vetne, call your next witness, please.

MR. VETNE: Yes, John Vetne, next witness is, and presumably the last witness is, Eric Metzger.

JUDGE HILLSON: I wouldn't presume too much. Presume that he's your last witness. We shouldn't presume around here.

MR. VETNE: He's my last witness.

ERICK METZGER,

a Witness, being first duly sworn, testified under oath as follows:

JUDGE HILLSON: Could you please state your name and spell it for the record.

THE WITNESS: My name is Erick Metzger. First name is Erick, E-R-I-C-K, last name, M-E-T-Z-G-E-R.

JUDGE HILLSON: And before you get started with his testimony, you handed me two exhibits?

MR. VETNE: Yes, two packages stabled, a statement of Erick Metzger would be the next one.

JUDGE HILLSON: That will be 44.

(Exhibit 44 was marked for identification.)

JUDGE HILLSON: And the second document, the one that's headed 1999 Milk Order Provision Suspensions will be Exhibit 45. It will be so marked. Back to you.

(Exhibit 45 was marked for identification.)

DIRECT EXAMINATION

BY MR. VETNE:

Q. Mr. Metzger, you described a little bit of your background in the first part of your testimony, but let me supplement that. Your role here as a witness at this hearing on behalf of Central Equity, National All-Jersey and others, have you ever performed that role before?

A. No, I have not.

Q. Have you, outside the Federal milk order, the hearing process, have you ever been a witness in a proceeding?

A. No, I have not. Does that include deposition? I have been deposed.

Q. And you have a prepared statement and accompanying exhibit. Why don't you just go ahead and start reading your statement.

A. Thank you. My name is Erick Metzger and I am employed as General Manager of National All-Jersey, Inc. (NAJ) with offices at 6486 East Main Street, Reynoldsburg, Ohio 43068. I have served in this capacity for the past six months. My work experience includes 12 years with the American Jersey Cattle Association as Herd Services Manager, and prior to that, ten years with the American Guernsey Association in various capacities, including five years as its CEO. I earned a Bachelor's Degree in Animal Science from Purdue University in 1982 and a Master's of Business Administration from Franklin University in 1999.

NAJ is a national membership

organization incorporated in 1958. It currently includes approximately 1,000 members -- and this is a correction -- over 90 percent of them qualify as small businesses. With annual revenues of just under $400,000, NAJ itself qualifies as a small business. NAJ's mission is twofold. First, to promote equity in milk pricing. Second, to increase the value of and demand for Jersey milk.

My first personal experience with the impact of amending Federal milk marketing orders happened during my youth. I was raised on my family's farm in northern Indiana, which included a 40-cow heard of Registered Guernseys. We produced milk that was marketed by a cooperative as fluid milk under the Golden Guernsey trademark label.

Given that demand for that milk, everything we produced was sold to consumers as fluid milk, and we were paid the Class I price for 100 percent of our milk. Then the Federal orders were amended to include marketwide pooling, and even though all of our milk was still sold as higher value fluid milk, we were paid a lower price based on the marketwide pool.

This change had a significant negative impact on our family's income. My any family's case, we enjoyed a pricing benefit that was yielded to "have-not" producers for the good of all producers.

My testimony in this case is to urge the Secretary to resist what may seem to be politically attractive proposals, by the nation's largest milk cooperative, and by the nation's largest milk processor, to artificially limit market access and to edge the Federal order system back towards have and have-not producers. This testimony addresses Proposal 1 and on Dean Proposals 4-13 as they may be advanced for purposes other than solely as a response to depooling. Neil Gulden previously gave testimony on depooling proposals.

This testimony is presented on behalf of National All-Jersey, in the interests of its members throughout the Federal order system, Central Equity Milk Cooperative, Associated Milk Producers, proposed by Foremost Farms USA Cooperative, First District

Association, Land O'Lakes, Inc., Wells Dairy, and Milnot Holding Company. The cooperatives for moment I present this testimony marketed in excess of 200 million pounds of milk, from over 1,200 producers, on the Central order during June 2004. The vast majority of these producers are small businesses, and these small businesses would bear the brunt of burdens proposed by DFA, Prairie Farms and Dean Foods, to make access to the Central order pool more costly and less efficient.

Land O'Lakes, including its predecessor cooperatives, has marketed milk to plants regulated under the Central order (or its predecessors) since the 1960s, primarily in the St. Louis area and eastern South Dakota. Foremost and its predecessors, likewise, has supplied milk to plants in the Central order, primarily Anderson-Erickson and Prairie Farms, since the 1960s.

Central Equity is not as familiar to USDA or the industry as AMPI, LOL, and others interested in this hearing. Central Equity, a Capper-Volstead cooperative, was organized in Southwest Missouri as a cooperative corporation in March of 1987, with the cooperation and assistance of Calvin Covington and David Brandau of National All-Jersey, to secure improved markets and component premiums for high solids producers. From 1989 to 2004, Central Equity producers marketed their milk with protein or solids premiums through or to regulated handlers. From 1987 through 1988, through Southern Milk Sales, to Oxford Cheese in Kansas, and other customers.

The market to Oxford Cheese ended when Mid-Am bought the plant. From 1988 to 1994 to Farm Fresh in Chandler, Oklahoma. From 1994 to 2003, to Kraft Foods in Bentonville, Arkansas. During 2003, Kraft notified producers that all procurement functions had been transferred to Dairy Marketing Services (DMS), and later that year DMS announced that protein premiums would end and producers' promotion dollars would be sent to Midwest Dairy instead of the Southwest Dairy Museum. Further, DFA shipped its own milk to Kraft, and displaced DMS milk was shipped to Cabool, at a lower differential.

Central Equity's predicament of milk

in search of a home was resolved in early 2004, again with the assistance of NAJ, when it came to Central Equity's attention that Milnot might represent a home in search of milk. Since March 2004, Central Equity has marketed milk to Milnot in Seneca, Missouri, to Wells Dairy in Iowa, and -- again, a correction to the testimony -- to a fluid -- strike the "expects to market milk" and instead should read "and to a fluid plant in metropolitan St. Louis starting" -- correct the word "next" and insert the word "this" month.

Currently, Central Equity markets milk in excess of 20 million pounds of milk per month from about 190 dairy farms. The note in the left margin represents that 95 percent of those 190 producers qualify as small businesses.

These are located in Missouri, northeast Oklahoma, Kansas, Southern Illinois, Iowa, and Arkansas. Central Equity producers, to secure a place in the Central order pool like their dairy farm neighbors, are pooled through Wells Dairy and are required to "touch base" at the Wells Dairy plant in Iowa because there is no closer "touch base" facility accessible to Central Equity.

The Milnot Company was founded in 1912 in Litchfield, Illinois. The Seneca plant was built in the late 1940s -- 1948, to be exact -- on the Oklahoma-Missouri line - literally: the state line runs through the plant - and has been producing condensed and evaporated milk products since that time.

Milnot no longer owns the Litchfield plant. DFA and its predecessors supplied the Milnot plant for many years. In September 2003, when the supply contract was up for renewal, DFA advised Milnot that it no longer needed Milnot as an outlet and that it could not offer milk long-term because all of the milk from the procurement area would be needed -- strike the word "after early" and insert the words "in June" 2005 at a new cheese plant under construction in New Mexico.

Milnot contacted Lone Star as a possible alternative supply, but was told by Lone Star that Milnot would have to go through DFA because DFA is the marketing agent for the

Greater Southwest Agency to which Lone Star had committed its milk supply. Milnot later contracted with Central Equity to secure a long-term and reliable source of milk.

Proponents of Proposal 1 explained that, in the opinion of DFA and Prairie Farms, too much "milk is blending down the returns" of the Central order and that the proposal is designed to "reduce the milk that can be pooled and may be pooled in the future." Hollon testimony, Exhibit 19, page 19.

This is the same philosophy expressed by DFA in advocating pooling restrictions for the Western order two years ago and then voting to terminate the Western order when the Secretary did not go far enough in limiting access to the pool for other dairy farmers in the Utah-Idaho milkshed. Exhibit 25.

This philosophy, expressed in self-interest by an organization that controls supply or access to a disproportionately large share of the fluid milk market, and would rather not share that revenue with non-members, is not new. Twenty-two years ago, Dairymen, Inc., a DFA-predecessor, expressed much the same view when the Alabama-West Florida market was created, asserting that it was the intent of the Act, and the policy of USDA, to "accommodate only the pooling of enough milk to meet the... market's Class I needs" and necessary reserves to balance Class I.

Firmly rejecting this notion of legislative intent and agency policy, USDA responded: "The Act provides no basis for concluding that a Federal order should restrict the absolute volume of Grade A milk that is pooled. What is intended is to provide regulations to ensure that the market's fluid needs will be met under marketing conditions characterized by orderliness and stability." 47 Federal Register 5124 at 5132 (February 3, 1982.)

When the Upper Midwest order was first created in 1976, by merger of smaller markets, several parties argued that liberal pooling provisions should not accommodate the growing volume of Grade A milk and that such accommodation "would dilute the pool or would jeopardize the ability of distributing plants to attract an adequate supply of milk for fluid use."

USDA rejected these arguments, providing instead for "a broad basis for pooling Grade A milk supplies produced within and close to the proposed marketing area... [to] obviate shipments of milk for the sole purpose of attaining pooling status." 41 Federal Register 12436 (March 25, 1976) at pages 12442 through 12451. Pooling was not limited to milk supplying and balancing the Class I market, but rather accommodated milk ready, willing and able to serve the Class I market but not needed.

The broad pooling and market efficiency policies of USDA, as well as the agency's perception of statutory purpose, are expressed in rulemaking decisions. Day-to-day reinforcement and application of those policies have been expressed in hundreds of decisions to suspend or adjust pooling requirements when pooling of all milk normally associated with a market could not be accommodated efficiently because of increased milk production, decreased demand, shift in regulation of plants, loss of a fluid market outlet or other circumstances.

These informal rulemaking decisions, often accomplished in days or weeks, are identified with Federal Register references in the last pages of Federal Milk Order Market Statistics. Some of these are summarized in Exhibit 45 to illustrate the policies historically applied by USDA, the factors and circumstances that may affect pooling and marketing practices, and the types of difficulties experienced by producers that have occurred repeatedly where pooling standards were too rigid to adjust for institutional variables and supply and demand conditions of the future.

What is new today is that USDA's Dairy Programs appears to be lending a favorable ear to the proposition that some Grade A milk ready, willing and able to serve a fluid market to which there is little access or need, should not participate in a Federal order pool. The Western order decision, which DFA rejected as not going far enough, appears to be the first USDA decision in the history of the program that by design and effect would have cut off pool access to a large number of producers in the natural milkshed that had historically been associated with the market pool. If this is to be the agency's policy in the future, the industry deserves forthright acknowledgment of that policy fact, and of the reasons for change in policy.

Wise men say that past is prologue. It is interesting to observe that many of the institutional and logistical factors relevant to milk marketing and pooling mentioned at this hearing are the same as those discussed in the 1976 Upper Midwest decision to which I referred above. These include:

Institutional factors that affect supply and inhibit free market adjustment of supplies between markets, such as:

Consolidation of cooperative suppliers; consolidation of handler operations, fewer in number but greater in size; limitation of market access or "pooling base" to some markets in which the fluid milk supply was controlled by few organizations; local milk markets lost to competition or plant closings.

Logistical factors such as:

Pooling of milk from Minnesota in "distant" markets in Southern Illinois and Kansas City to find a pool home for milk because of limited local pooling base (market access); uneconomical movement and transportation of milk to qualify for pooling; unnecessary pumping of milk for transfer, which adversely affects milk quality; inability to recover costs, or pay a competitive price, for milk supplied to distant customers; lower returns to producers whose cooperatives had to engage in inefficient pooling practices due to institutional obstacles to pooling.

I do not refer to the Upper Midwest decision to advocate an Upper Midwest solution to perceived Central area problems. The decision, however, is instructive in its acknowledgment of factors relevant to pooling standard analysis, and too the agency's reasoning process and policies.

For example, where a combination of institutional and regulatory factors created marketing inefficiency, USDA fixed its part of the equation by eliminating some regulatory obstacles to efficiency. In this proceeding, where marketing inefficiencies is touted as a problem, the solutions proposed by Proposals 1 and 4 through 13 is to add regulatory obstacles to efficiency as the solution.

Handler and cooperative consolidation are institutional factors that greatly affect a producer's ability to gain market access (or pooling base) in the Central market. Although DFA declined to provide relevant data on its supply and its supply contracts, it is a matter of public record that Dean is obligated by long-term contract to purchase milk from DFA or through DFA marketing affiliates.

Since agreements may be altered by mutual agreement, I assume that Dean may buy milk from third parties if DFA consents. The degree, though undisclosed, to which DFA controls access to fluid milk plants by supply agreement is very relevant to reasonable performance standards for the rest of the market.

For example, if DFA 's share of the

Class I plants is 70 percent and its share of the producer pool is 50 percent in a market of 35 percent Class I use, the other 50 percent of producers must compete for the remaining 10.5 percent of -- strike Class I -- of the market's Class I sales. But some of the remaining Class I market, like the part supplied by DFA, will be served by dedicated patrons of a distributing plant and committed supplies by smaller cooperatives.

That leaves a residual for reserve supply producers in the milkshed that is but a very small fraction of the Class I use of the market as a whole. It is the ability of this reserve supply nevertheless to participate in the marketwide pool that avoids cutthroat competition between farmers for fluid milk sales which impelled Congress to authorize milk marketing orders in the first place about 70 years ago.

Proposal 1, and the Dean proposals, will clearly create costs, inefficient movement of milk, and aggravate inequity between producers. Exhibit 12, producer milk by destination, shows that there are many counties in the milkshed in which no milk is moved during some months to pool plants and other counties in which the only pool plant delivery is to a supply plant.

The number of producers who would be required to "touch base" at a pool plant, even though there is no need for the milk, under DFA/Prairie Farms or Dean proposals from these counties is disclosed in Exhibit -- the exhibit reference there should be 32, the exhibit that Mr. Stukenberg identified and was received yesterday.

Q. So producers not only by pounds but numbers by county. 32. This morning, I'm sorry.

A. Without doubt, there are many producers that do not touch base who are located in counties that have some deliveries to pool plants. If supply plants are eliminated, as per Dean Proposal No. 4, hundreds of additional producers would be deemed not to have met a "touch base" requirement, and all producers could participate in the pool only if their milk was delivered one to four days per month, depending upon proposal, at a distributing plant.

Dean Foods, no doubt, has visions of tank trucks lined up at its plants begging for an opportunity to touch base, but market inefficiency created by any of the touch base proposals would just as likely discourage available supplemental milk supplies from being offered to Dean.

To handle the added deliveries, which the market does not need, milk silos would have to be built to increase capacity, trucks would have to move more milk greater distances to touch base. Milk currently delivered to the touch base plant would be displaced and also hauled, at unnecessary expense, to manufacturing plants.

Grade A milk currently commingled with Grade B milk for efficiency, and 15 percent of Land O'Lakes' Order 32 supply falls in this category, would have to be segregated with added trucks and drivers. With just a one-day touch-base requirement per month, and elimination of supply plants at which to touch base, I'm advised that the monthly additional cost to Foremost would be about $270,000 on deliveries to Anderson-Erickson and Prairie Farms, plus a backhaul cost of nearly the same amount on milk displaced by the "touch base" delivery.

For Central Equity producers, it means that milk from each farmer ordinarily delivered to Seneca, Missouri, would have to trek one to four times monthly under Proposals 1 and 5, to Le Mars, Iowa, or possibly to a new market in Southern Illinois, and arrangements would have to be made to find a home for the displaced milk.

The proposed limitations on diversions and increased supply plant shipping requirements would have identical consequences, if adopted. The proposals are not based on any evidence of new need for milk, but rather a desire to get milk available off the market that is not needed. If this milk, nevertheless, decides to pool on Order 32, as it must as marketing access is being restricted by institutional factors and new regulatory barriers in adjoining markets, unnecessary shipments, unnecessary pumping, unnecessary handling, and unnecessary backhauls will add to total market costs and be passed back to small business producers who can ill afford them, or to consumers who don't deserve to carry the cost of regulatory inefficiency.

Central Equity does not operate a supply plant, so the immediate consequence of the proposals to Central Equity would stem from the touch base requirements and diversion limitations. It is our opinion that this could spell the end of Central Equity and its role as a marketing tool for our producers.

Central Equity dairy farmers would then be denied their right to join or remain members of the cooperative of their choice and would have to seek membership in a cooperative with excess pooling base or market access (through sales to fluid plants) if they want to continue in the milk business.

The Secretary should, we believe, reject proposals to create inefficiency and costs for the purpose of either discouraging available supplies in the milkshed from participating in the Central order pool, creating a revised pool that is not marketwide, or constructing by regulation a type of individual handler pool such as desired by Dean Foods.

If the Secretary, nevertheless, decides to adopt any of these proposals, because it would represent a major departure from past pooling policy, the Secretary should emphatically and not countenance avoidance of a recommended decision. Rather, a recommended decision should issue, expeditiously if that is necessary, forthrightly explaining the application of marketing facts to any departure from past policy or any new insight on statutory intent.

This concludes my statement.

Q. So far so good. Do you have any additional comments that came to mind while you were reading that you would like to share before folks get their chance to ask you gentle questions?

A. I do not. Thank you.

JUDGE HILLSON: Do you want Exhibits 44 and 45 received in evidence?

MR. VETNE: I do.

JUDGE HILLSON: Any objection to that? Okay, Exhibits 44 and 45 are received in evidence.

Anyone have any questions of this witness?

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Metzger.

A. Good afternoon, Mr. Beshore.

Q. You've not testified before Federal order hearings as you indicated. Your predecessors at National All-Jersey, Mr. Covington, like Brown, is a predecessor also --

A. Yes, sir.

Q. -- occasionally testified at Federal order hearings. To the best of my recollection, that testimony was always presented with respect to things like component pricing. Are you aware of that?

A. Probably the vast majority of it was, yes.

Q. And National All-Jersey being a breed association, fair enough?

A. That is not correct. National

All-Jersey is primarily supported by producers with Jersey cow, but we have a number of members who milk other breeds.

Q. In any event, it's not a milk marketing cooperative?

A. Correct.

Q. In fact, it does not market any milk; isn't that correct?

A. That is correct.

Q. It's not recognized under any Federal orders as a qualified marketing association?

A. That is correct.

Q. And in Order 32, National All-Jersey is not involved in the marketing or pooling of any milk and filing pool reports; correct?

A. Correct, we do not file any pool reports.

Q. And if my recollection is correct, I don't recall any previous Federal order occasions where National All-Jersey has gotten into marketing issues as opposed to any Federal orders as opposed to issues such as component pricing, which would be directly related to the interests of your members. Are you aware of any?

A. I am not aware of any without reviewing all of the previous Federal order testimony done by National All-Jersey staff. I couldn't comment one way -- assuredly one way or the other.

Q. And I'm also interested in the same respect, in a way, your testimony is presented on behalf of three, four, five, six, seven substantial -- or seven -- at least six of which are very substantial marketers, processors of milk, but you're the witness for them; correct?

A. That is a statement of fact, yes, I am the witness.

Q. Now, because you're the witness and they're not, for instance, you were not personally involved in the negotiations with respect to the transactions with the St. Louis area Dean plant to which one of your -- one of the organizations to which you're representing is now supplying milk; correct?

A. I was not personally involved with those negotiations.

Q. And the same thing applies to the negotiations with Milnot, does it not?

A. I actually was not working with National All-Jersey at the time that contract was negotiated.

Q. Okay. So taking the Milnot situation, your testimony about what -- what negotiations were between Central Equity and Milnot is based on second or third or some other level of knowledge; correct? Secondhand or thirdhand or some level of knowledge that's not your personal knowledge?

A. The testimony was based upon my personal interview, or interviews, with people that were involved in those negotiations.

Q. So you're relating what has been told to you by one or more persons involved in that negotiation?

A. That is correct.

Q. And in the same -- in the same way, when you discuss potential costs that organizations might have if one or more of the proposals in the hearing notice were adopted, those were figures that were presented to you by a person or persons with those organizations, and you don't have personal knowledge of how they were calculated or what they may represent; correct?

A. That is correct, they were provided by the appropriate parties.

Q. Let me ask you a couple of questions about if you have a position on the organizations you have, a position on proposals that were not mentioned.

Proposal 3, we've heard from AMPI and Foremost, Neil Gulden, I asked him about Proposal 3, and also Foremost, Joe Weis, about Proposal 3. Do the other organizations that you're testifying for have a position on Proposal 3 for whom you're testifying?

A. I presume the Proposal 3 is the transportation credit?

Q. Transportation credits.

A. Okay. No, I don't believe that they do, and that's why Foremost testified on their own for that particular issue.

Q. You have not, then, analyzed what effect it would have, what impact it would have, for instance, Central Equity's deliveries to the Class I market in St. Louis?

A. No, we have not. It is fair to assume that the impact would be rather minimal, because that contract is for approximately one-and-a-half million pounds of milk a month, which is less than 10 percent of Central Equity's total market.

Q. That's the contract with the Dean's plant?

A. That plant in O'Fallon, Illinois.

Q. Is that a year-round supply?

A. As I understand the contract, it is for a duration of 12 months and deliveries to be made each of the 12 months.

Q. And the Pet plant in O'Fallon, Illinois, is, in fact, a Dean Foods plant, is it not?

A. I believe that is correct.

Q. Now, you've made the contention on the last page, unnumbered page of your statement of Exhibit 44, that adoption of some proposal, proposals could spell the end of Central Equity. Which proposals are you asserting could spell the end of Central Equity?

A. It would be best if I were to consult with counsel for the exact proposal. In general, any proposal that would require, for example, increased touch base, the haul from Seneca, Missouri, to Le Mars, Iowa, is approximately 500 miles. If each producer were required to touch base at Le Mars once a month, or the prescribed six months, that would impose hauling costs on Central Equity that would be virtually unrecoverable. And that is, as I understand it, is almost one of the more literal touch base requirements or change that's being proposed.

Q. Well, you have a market in O'Fallon, Illinois, do you not, that we just discussed?

A. We do. Again, that is for one-and-a-half million pounds per month milk a month, which is less than 10 percent of Central Equity's marketings, and to try to coordinate touching base there would probably not be able to accommodate enough milk to keep them qualified in the pool simply because of the small volume.

Q. Don't you have a contract to supply Wells also, or is that just a touch base deal? Not you, Central Equity. Doesn't it have a contract to supply Wells with volumes of milk per Wells' requirements?

A. It does have a contract with Wells. However, the vast majority, it is primarily a touch base contract. The vast majority of Central Equity's milk goes to the Seneca, Missouri, plant to be used by Milnot, because most of Central Equity's producers are located in the Missouri/Oklahoma area. In order for that milk to meet a touch base requirement using the Wells plant would incur exorbitant hauling costs.

Q. Does Central Equity have a contract with Milnot to supply the Seneca plant?

A. Yes, it does.

Q. And it has committed itself to supply certain volumes of milk to the Seneca plant?

A. Yes, it has.

Q. So that the volumes that are committed to the Seneca plant, I assume -- is that all the milk Central Equity has is basically committed to supplying Milnot?

A. The vast majority of its milk is committed to supplying the Central -- the Seneca plant for Milnot.

Q. And if that milk is not available to supply Milnot because it's required by the

Class I market in Order 32, is Central Equity obligated to Milnot?

A. There can and have been fluctuations in the milk supplied to Milnot on a month-to-month basis based on producers coming into the cooperative, producers leaving the cooperative, seasonal production changes.

Q. What I'm asking is, has Central Equity agreed to -- has Central Equity bargained for all of its milk supply essentially for manufacturing use?

A. For all of its milk, no. Not for all of it, no.

Q. For milk that goes to Wells, is it received at Wells and then taken back and delivered to Milnot?

A. No, it is not.

Q. Now, are you aware of other non-manufacturing milk options that are available to producers in southern Missouri, such as the Central Equity producers in the Central Equity coop?

A. Obviously there are producers in the area that are not Central Equity producers, so, you know, there are milk marketing options in the area from which Central Equity obtains its milk. Whether the milk is not committed to Central Equity, whether that milk is going -- other milk is going strictly for manufacturing or to Class I utilizations, one would presume that some of that milk goes to Class I utilization, but I couldn't commit to that.

Q. Well, I guess what I'm wondering is, isn't it true -- are you aware that milk in southern Missouri, a lot of milk in southern Missouri, and milk marketed by other organizations, that producer members in southern Missouri goes to higher Class I markets to the south and east?

A. I would presume that to be the case, yes.

Q. And those markets would be available to Central Equity if it chose to market its milk for fluid purposes in higher priced areas to the south; is that fair?

A. It is my understanding that when the Milnot plant was looking for an alternative source of milk, it was also looking for pooling options, or pool homes for that milk if it was able to obtain milk directly from shippers as independents, okay, and that no pooling options were available to Milnot. That basically is why the Wells facility in Le Mars was chosen. It was the closest pooling plant available to Milnot and Central Equity that was willing to accept milk from those two entities.

Q. So Milnot wanted milk to manufacture -- to process into canned evaporated milk in southern Missouri; correct?

A. That is correct.

Q. But it wanted to be able to have the milk pooled on a Federal order so that it could pay the producer's price generated by the Class I revenues of the Federal order; correct?

A. It wanted to make the milk available to serve the Class I market if needed.

Q. It wanted to make the milk available in the Class I market if needed, that's your understanding? That's your testimony?

A. That is my testimony.

Q. Well, Central Equity -- to your knowledge, did Central Equity -- doesn't

Central Equity have options to make all of its milk available to the Class I market in the south and east like other small cooperatives in southern Missouri do?

A. We are not aware of anyone or any handler that is wanting Central Equity's milk for that purpose.

Q. Have they talked to anyone, to organizations such as DMCI, which is a small cooperative in southern Missouri, who markets all of its milk in the southeastern United States?

A. I'm not aware if they did or did not.

Q. How about Arkansas Dairy Cooperative, which has members in the same area there, markets milk in the cooperative, which has members in southern Missouri and markets its milk to Class I markets in the south and southeast?

A. I'm not aware of any discussions.

JUDGE HILLSON: Let's go off the record for one minute.

(Off the record.)

MR. BESHORE: I don't have any other questions at this time for Mr. Metzger.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English with Dean Foods. Mr. Metzger, I don't think I have a lot of questions, but let me see if I can follow up with a few there. Wells has another plant in Omaha; correct?

A. I believe that's correct.

Q. So Central Equity could touch base at Omaha, couldn't they, which is closer than going up to Le Mars, Iowa, for their milk?

A. I don't know.

Q. In addition, of course, now as others have been kind enough to clarify, there is the opportunity to touch base at Dean Foods' Pet O'Fallon operation; correct?

A. With a very small amount of Central Equity's overall milk.

Q. Which you said was one-and-a-half million pounds; correct?

A. I believe that is correct.

Q. Which is less than 10 percent of their 20 million pounds, that you admit they have 20 million pounds?

A. I believe that's correct, yes.

Q. Would you agree with me that on a 30 day month with 20 million pounds -- would be 21 million pounds, you have 700,000 pounds for a touch base for one day; correct? 700,000 pounds would work out to be a one-day touch base for all the farmers in Central Equity.

A. That would be correct. However, I believe it is also important to understand that at the time that Central Equity entered into its contracts, both with Wells and with Milnot, the O'Fallon plant option was not available to them. In addition, the contract with the O'Fallon plant has a duration of only 12 months. And whether that will or will not be renewed at the end of that period remains to be seen.

Q. Let's explore that a little bit. The 12 months just started less than a week ago; correct?

A. I believe that's correct.

Q. And your counsel, Mr. Vetne, in questioning some other witnesses, called a contract that lasted more than a month or two a long-term contract; correct?

I don't know what the objection was

about it. Did you hear your lawyer ask witnesses that a contract that lasted more than a month or two was a long-term contract?

JUDGE HILLSON: Do you have an objection? Grab the mic, state who you are.

MR. VETNE: I think it misstates the record preceding this, because I don't recall asking a question to that effect, certainly not representing in my question that longer than two months was long-term.

JUDGE HILLSON: I don't remember.

Q. (By Mr. English) Do you remember a question asked by Mr. Vetne of Mr. Hollon that there were contracts that DFA had for longer than a month, characterizing them as long-term contracts?

A. I may have been wandering at that point, which could happen at any point during these proceedings.

Q. Regardless of the characterization, it is a one-year contract, as you yourself have stated. You indicated that that option wasn't available, but that's because Central Equity hadn't asked Dean Foods, isn't that the case?

A. I don't know if that is the case or not.

Q. Isn't it the fact that at every single Federal order hearing for the past three years where Missouri has come anywhere within a hundred miles of the record, 250 miles of Atlanta, that Dean Foods has made it perfectly clear, along with Prairie Farms, that they have trouble getting milk into St. Louis?

A. Having only attended one previous Federal order hearing, I cannot testify as to whether that is fact or not.

Q. Was that at the Order 30 hearing back in August, is that the one you attended?

A. I attended part of that hearing.

Q. So you don't remember whether Dean actually, in that hearing too, that they were looking for milk?

A. Personally, I do not have knowledge of that fact. I, however, am not doubting.

Q. And since you're not actually employed by Central Equity, you don't know whether Central Equity knew for the last three years that Dean Foods has been saying point blank we need milk in St. Louis, or more than three years? You don't know because you're not an employee of Central Equity, so you don't know what they know about whether they heard Dean Foods say that; correct?

A. That would be correct.

Q. But regardless, at least for the next year, Central Equity has the ability to pool these two days' touch base of their entire requirements at O'Fallon in addition to whatever they can do with their touch base deal with Iowa; correct?

A. I believe the math would work that way, yes.

Q. Just a couple more questions. You reference -- I'm sorry, the pages aren't numbered as the earlier witnesses', which is my doing, but the second to last page when you're talking about your understanding of Dean Foods and DFA arrangements, I take it your reference there to the matter of public record that Dean's obligation to long-term contract is your counsel's interpretation of Exhibit 36? Which was the --

A. Which was the --
Q. Dean Foods --
A. Annual report.
Q. Annual report.
A. That is correct, that would be --
Q. Where you got that from?
A. That would be where, yeah, counsel got that from and their interpretation of that annual report.
Q. So that was counsel's interpretation and not yours; correct?
A. That's fair.
Q. Were you in the room when I followed up with questions of Mr. Kinser with respect to that on redirect?
A. I was and I was not wandering.
Q. And so you heard, for instance, that Dean Foods has indeed made substantial payments in order to modify that contract; correct?
A. I heard that. I don't recall hearing a time frame of when those payments were made.
Q. Regardless, of course, whatever your counsel's interpretation was, apparently that agreement did not prevent Dean Foods from

entering into an arrangement with Central Equity; correct?

A. In this instance, that is correct.

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

JUDGE HILLSON: Any other questions? Do the USDA folks have any questions?

Do you have more questions, Mr. Beshore?

MR. BESHORE: I do.

RECROSS-EXAMINATION

BY MR. BESHORE:

Q. Mr. Metzger, do the organizations on behalf you're testifying have any position on the depooling, DFA's depooling proposal and Prairie Farms Proposal No. 2?

A. Both -- well, first of all, I believe Neil Gulden stated in his testimony that he was representing a consortium which included National All-Jersey and Central Equity. Having recently participated in board meetings of both National All-Jersey and Central Equity, I can acknowledge that both organizations believe that the problems that arise from depooling and repooling are a result of the timing mechanism of price announcement and the time lag between when the Class I movers announce and then subsequent components. And therefore, the issue, while it needs to be addressed, is best addressed in a national hearing to cover all those orders instead of on an order-by-order basis.

Q. Is that the position of Wells Dairy?

A. I cannot speak to that.

Q. How about Milnot?

A. Were they listed as --

Q. Organizations on behalf of whom you're speaking.

A. Right. My question is are these the organizations, to which you are inquiring about, were they listed on Mr. Gulden's testimony as him testifying on behalf of them? That would be my best source of information when Mr. Gulden said he was testifying on behalf of, if they were listed as part of that group, then that would be their position.

If they were not listed in Mr. Gulden's testimony, then I would not have knowledge of their position on the depooling and repooling issue.

Q. In any event, Central Equity, their position is in opposition to the depooling remedies on the table in this hearing?

A. That would be correct.

Q. Now, do you know -- by the way, in seeking pooling options in the St. Louis area, do you know whether Central Equity attempted to sell milk to the Mid States plant, which is not supplied by DFA, is not a Dean plant, it's a substantial fluid milk plant in the St. Louis area?

A. I do not know.

Q. So you don't know that it's not available, you can't testify that it's not available; correct?

A. That would be correct.

Q. Is Central Equity primarily made up of Jersey producers?

A. No, it is not. It's primarily made up of Holstein producers.

Q. So they would not -- I'm just wondering if they have avoided marketing milk to the higher -- the ones that are located -- many of them are located -- do you know what percentage, where these producers are located in Order 7 rather than Order 32 in southern Missouri and Arkansas?

A. As far as the farms, the farm locations, I would say virtually all of Central Equity's producers' farms would be within the marketing area of Order 7. However, I also know that Central Equity, since its inception, it first started marketing milk in March of this year, Central Equity has outpaid to producers, has outpaid, shall we say, the primary competition in their milk procurement area, if not every month, virtually every month.

Q. So marketing milk to the higher price -- the Class I market to the south and east is not a good option when you can market to a premium manufacturing market and pool in Order 32?

MR. VETNE: Objection. The question assumes facts not in evidence, such as the markets, the producers to which a comparison is being made are not receiving blended revenue. It's not an after established question.

JUDGE HILLSON: I'm going to

let him answer the question, if he can answer it. If he doesn't have an answer for it, that's fine. If he wants to qualify his answer, he can do that. I'm going to direct him to answer that question.

A. Help me out. What's the question again, please?

Q. (By Mr. Beshore) The question is, again, I heard you testify Central Equity has a better pay price than the other producers in its Order 7 milkshed. Correct?

A. That is correct.

Q. So what I'm asking you, then, is it your testimony that selling milk to a manufacturing market with -- by the way, are you aware of the prices in the Central Equity sale to Milnot?

A. On a month-to-month -- off the top of my head, I am not. I know that access to the -- off the top of my head, I am not.

Q. You would be aware, would you not, that it involves premiums over the minimum classified value of the Class IV milk being processed by Milnot?

A. Yes, I believe Central Equity did

negotiate an over order premium for the milk.
Q. And the sale to Milnot represents 80 percent, 90 percent of the volume of Central Equity, somewhere in that area?
A. It would be approximately 80 percent, perhaps a little higher. I don't believe it could be 90 percent because of the volume that's required to go to a distributing plant.
Q. With that sale to Milnot, touch base sales to Wells, they're able to outpay the competitors in their milkshed, that's your testimony; correct?
A. That is correct.
Q. Those competitors involve organizations supplying the fluid milk markets right in St. -- right in Springfield, Missouri, for instance; correct?
A. That would be where some of the competitor milk goes.
Q. And it also goes to points in the southeast as well, does it not?
A. I assume that would be correct.
Q. Do competitors include DMCI, were they included?
A. That would be a fair assumption, but

I do not know that for sure.

Q. Basically you're saying they get a better pay price than the DFA producers in southern Missouri; right?

A. I believe that's been the case for the last several months.

Q. Thank you.

JUDGE HILLSON: Any other cross-examination? Any redirect? Mr. Vetne.

REDIRECT EXAMINATION

BY MR. VETNE:

Q. Mr. Metzger, the pay prices that you and Mr. Beshore just discussed, they compared the pay prices between Central Equity and other producers, do Central Equity pay prices include any revenues that are reblended between regions from other parts of the market or other parts of the country?

A. No, I don't believe so.

Q. And the producers to which comparisons were being made to DFA members, they receive a revenue that is reblended within the market and within a region and to some extent between other parts of the country?

A. I believe that could be happening, yes.

Q. And you don't know in comparing those blend prices whether the revenue generated from the sale of a producer in Missouri that is going to Springfield or a DFA producer was going to Little Rock, Arkansas, is returned to that producer?

A. That is correct, I do not know that.

Q. It may be going to some other producer for competitive reasons?

A. That is correct.

Q. The milk that's delivered to what we've been referring to as Seneca, Missouri, the Milnot plant, the silos that receive that milk going to the Milnot plant, what state are they located in?

A. The unloading is actually done on the Oklahoma side of the state line that runs through the plant.

Q. All the milk that's going to Milnot is delivered within the marketing area?

A. That is correct.

Q. And the producers for part of the supply to Seneca, Oklahoma, with a Missouri

ZIP Code, producers in Oklahoma, of course, are in the marketing area?

A. That is correct.

Q. And producers in Kansas are in the marketing area?

A. That is correct.

Q. And producers in Southern Illinois are in the marketing area?

A. That is correct.

Q. And some of the producers in Missouri -- I've learned to say that, Missouri -- some of them are located in the marketing area?

A. That is correct.

Q. And some -- let me see if you recall this when Mr. Beshore was asking you questions -- some, in fact a substantial number of members of Central Equity are located along that -- along the, say, northeast line from Seneca up to the Mississippi River, Mexico, Missouri, for example, northeast of Columbia, a lot of producers come from that central part of Missouri?

A. That's right.

Q. Were you recalling, when Mr. Beshore asked you the question, that it's no man's land, it's not --

JUDGE HILLSON: There's no possible way --

Q. (By Mr. Vetne) It's no man's land, it's not Order 7, it's not Order 32, it's not Order 30, it's a doughnut hole?

A. Correct. There are a number of unregulated counties within Missouri.

Q. A significant percentage, maybe not a majority, but quite a number of Central Equity producers are located in that unregulated area?

A. That's right.

Q. And compete -- as a matter of fact, your competition includes an unregulated fluid milk plant located in Columbia called Central Dairy?

A. That is right.

Q. Unregulated by the Central order. As well as plants -- as well as producers going into the east to St. Louis, to the west to the other Wells plant, to the south and to the north, there's a lot of competition going all directions from that area?

A. That's right.

Q. Now, you testified that you weren't personally involved in the negotiations between Central Equity and Milnot. Is it not true that your organization and your predecessors in your organization had involvement in arranging that contract between Central Equity and Milnot?

A. That is correct.

Q. And Dave Brandau, who works in your organization?

A. Yes, sir.

Q. Sitting two tables away from you there --

JUDGE HILLSON: How do you spell his name?

MR. VETNE: B-R-A-N-D-A-U.

Q. (By Mr. Vetne) He was involved; is that right?

A. That is right.

Q. And some of the material to which you refer in your statements, your background on those negotiations include both discussions with Mr. Brandau as well as the business records of National All-Jersey that were produced in that process; correct?

A. That is correct.

Q. And you also received some information from, to present your testimony, from others who pooled both their position and their information so that it could be presented like you, sort of like -- well, like -- like most frequently do, Mr. Hollon for two cooperatives this time and three cooperatives another time; a representative for Foremost who has firsthand knowledge of the information you assembled in your testimony is present, Mr. Weis; correct?

A. Yes, sir.

Q. And he continues to be present. And likewise, AMPI provided information contributing to your testimony from which AMPI has personal knowledge, and Mr. Gulden is here?

A. That is correct.

Q. And Joe Hilton, who is General Manager of Central Equity and was, like Mr. Brandau, involved in the negotiations for the contract is in the room?

A. Yes, sir.
Q. And throughout this hearing, a representative of Milnot and Wells have been in the room most of the time; correct?
A. Yes, sir.
Q. To the extent somebody has a question concerning the facts you have assembled or facts from your business records, these people and those sources are available for purposes of verifying the facts as well as providing credibility to your testimony; is that correct?
A. That is correct.
Q. And you do not have any instruction either not to pose a question or to plan confidentiality from any of those sources; is that correct?
A. That is correct.
Q. Now, for Chandler, Oklahoma, a fluid plant supplied by Central Equity for a period of time is, what, how far from the supply area of Central Equity members?
A. I'm sorry, my geography of Oklahoma is not up to par.
Q. That's fine. Nevertheless, for a

good period of time, Central Equity supplied a fluid plant because there was a market there; if somebody asked for the milk and then at some point turned the milk away because they found another supplier?

A. That's right.

Q. And for a while, Central Equity's milk was marketed by DMS, DMS is a multi-cooperative organization that supplies to the southeast and northeast; correct?

A. Yes.

Q. And DMS elected at some point to put the milk to Cabool, Missouri, when Kraft said we're only going to get our milk from DFA from now on, rather than sending that milk to a plus differential market to the south; is that correct?

A. That's right.

Q. That was a DMS marketing decision?

A. Yes, sir.

Q. In fact, your producers complained because the producers were delivering to Cabool at a minus $0.30 rather than going to someplace where there was a greater revenue?

A. That's right.

Q. In response to a question about touch base, I think it was Mr. English was doing some math on a daily delivery. Isn't it true that most of the Central Equity producers are not picked up on a daily basis but rather on an every-other-day basis?

A. That's right.

Q. And if those producers every month had to truck from Oklahoma or Missouri or Kansas over to the O'Fallon, Illinois, plant, that's a distance of 600 miles or more for most of them, isn't it?

A. For some of them, yes.

Q. And Wells in Le Mars, Iowa, is even further?

A. Yes.

Q. I do have one correction I want to suggest to you. Your testimony referring to the number of producers and volume of milk in your testimony referring to the number of producers and volume of milk by the coalition on these representatives on behalf that you're testifying, page 2, the cooperatives that you represent in that, that Neil Gulden represented in his testimony, they're

identical cooperatives; correct?
A. Yes, sir.
Q. And the numbers you gave us, for the producer numbers and pounds, were doubled for the producers, 2000, 400 and -- almost double for the pounds of 360 million.
Can I suggest to you that Mr. Gulden's testimony was prepared more recently than yours and will you accept his representation of the numbers?
A. I will. And I appreciate your correction of my error.
Q. I don't assume responsibility for that mistake.
JUDGE HILLSON: Where exactly is that correction? You said it was on the second page.
MR. VETNE: Second page, second full --
JUDGE HILLSON: It says in excess of 200 million.
MR. VETNE: 360 and the 1,200 is doubled to 2,400.
Q. (By Mr. Vetne) Has DFA at any time, to your knowledge, ever sought the Central

Equity to get supplemental milk to the markets it serves?

A. Not to my knowledge.

Q. But it has -- DFA has sought to induce the producers who consist of Central Equity to join DFA as member producers?

A. That is correct.

Q. And although Central Equity has trouble finding market access, DFA has pooling base or pooling access to spare, you're not aware of any problem DFA has in pooling producers, wherever they might be?

A. No, I'm not aware of any problem.

Q. Do you know, by the way, where that supply that's going to be withdrawn -- DFA talked about being withdrawn from Milnot next year, going to be moved to a 7 million pounds a day cheese plant in New Mexico, do you know where those producers are located? Do you know where those producers are located?

A. Quite a few of them would be in the, as I understand it, area where Central Equity producers are now.

MR. VETNE: I have no further questions of this witness.

JUDGE HILLSON: Mr. Beshore.

FURTHER RECROSS-EXAMINATION

BY MR. BESHORE:

Q. Mr. Metzger, I want to explore comments in response to Mr. Vetne with respect to the DMS marketing of the -- by the way, DMS never marketed Central Equity's milk; correct? His question may have implied that it did, but didn't market Central Equity's milk?

A. People who or producers who were supplying a plant directly were instructed that that plant had now turned all their procurement responsibilities over to DMS.

Q. Those were independent dairy farms, were they not?

A. Yes.

Q. They weren't -- it wasn't the Central Equity cooperative, it was independent dairy farmers before Central Equity was in business, wasn't it, if you know?

A. Before Central Equity was serving as a marketing agency.

Q. Now, when DMS was marketing milk of those independent dairy farmers, I think you testified that milk was delivered into a plant

in Cabool, Missouri; correct?
A. Yes, sir.
Q. And they had a problem with that; is that your testimony?
A. Yes, because the transportation differential was lower than where that milk had been going previously.
Q. Now, do you understand that the Cabool plant is a pool plant on Order 7, Southeast order? Are you aware of that, Mr. Metzger?
A. I presume that to be correct.
Q. And that the blend price on Order 7 at Cabool is in excess of the blend price on Order 32, as numerous witnesses have testified in this hearing, that Order 32 blend prices are considerably less than Order 7 blend prices in these overlapping milkshed areas, you would accept that?
A. I believe there are exhibits to that effect.
Q. Now, but you're saying these producers were unhappy of being pooled on Order 7 at the higher blend price than Order 32. Is that your testimony?

A. I know that the producers had problems with the lower transportation differential. I have not heard comments from producers that were comparing the two blend prices per se.

Q. Isn't that what they ought to be comparing, if they weren't?

A. That would certainly be an option available to them.

Q. Well, isn't that what they ought to be comparing, price that they're getting, period, regardless of whether it's minus 30 or minus 40 or whatever? You know, the bottom line, the mailbox is what counts; isn't that correct?

A. After all assessments, correct.

Q. I wonder if the difference, problem that the -- I wonder if the difference between Order 7 -- by the way, are you aware that Order 7 is not a multiple component order?

A. Yes, sir.

Q. So when you're selling milk to the fluid market on Order 7, you're selling it on the basis of fat and skim?

A. Yes, sir.

Q. But when you're selling milk on Order 32, you're selling on the basis of the component values which are driven by the manufacturing markets; correct?
A. Yes, sir.
Q. Isn't that the big problem Central Equity had with marketing on Order 7?
A. Not necessarily, because when they were first looking for a place to pool the milk, they were actually trying to explore independent handlers in Order 7 that might be more accessible than the market they ended up with, or the pool plant that the distributing plant they ended up with in Le Mars, Iowa.
Q. Well, they were trying to find distributing plants in Order 7 that would cut a pooling deal with them like Wells did so they could sell their milk at solids values of manufacturing plants like Milnot, now wasn't that really what was going on?
A. I'm sorry, restate, please.
Q. Do you have any personal knowledge of the attempts to sell milk to plants in Order 7? Central Equity's attempts to sell milk to plants in Order 7.

A. I personally was not involved, but I have talked to folks who were involved.

Q. Now, were they not just attempts to qualify milk on Order 7 for moving purposes as has been done with Wells as opposed to supply milk for the needs of the Order 7 market?

A. There were attempts to make the -- to participate in the Federal order pool. Whether it was 7 or 32 was immaterial.

Q. Okay, thank you.

JUDGE HILLSON: You're excused, Mr. Metzger.

Since we have two more witnesses and since I don't believe any of your comments are going to be brief, I want to give the court reporter a break. I want to take 15 minutes and we'll go on till we're done. We'll take a 15 minute break and come back just before 6:20 and we're going to go until we're done.

(Recess.)

JUDGE HILLSON: My understanding now is that Mr. Stevens is going to call a witness on behalf of USDA. Who are you going to call?

MR. STEVENS: Thank you, your

Honor. Mr. Stukenberg.

JUDGE HILLSON: Okay. And you're still sworn in.

I was handed one exhibit, Mr. Stevens?

MR. STEVENS: Yes, that was the one I gave you before.

JUDGE HILLSON: The one you want in?

MR. STEVENS: Right. I'm going to ask that to be marked.

JUDGE HILLSON: It will be Exhibit No. 46.

(Exhibit 46 was marked for identification.)

JUDGE HILLSON: And you may ask your questions when you're ready, Mr. Stevens.

MR. STEVENS: Thank you.

DIRECT EXAMINATION

BY MR. STEVENS:

Q. Mr. Stukenberg, does the Market Administrator's office have a proposal they want to present some information at the hearing on?

A. Yes, sir, Proposal No. 14.

Q. Did you prepare a statement that you want to give?

A. Yes, sir.

Q. We have had it marked as Exhibit No. 46. Would you go ahead with that?

A. Yes, sir. Start off with the statement which is about half way down the page.

The current order language for payments into and out of the Producer Settlement Fund (PSF) contain provisions which at various times during each year result in the requirement that "funds in" and "funds out" are due on the same day. The attached calendars illustrate that this same-day payment in and out occur during four months in 2004 and will occur during two months in 2005.

The order language allows the Market Administrator to uniformly reduce PSF payments if the PSF balance is insufficient to make all payments. The Market Administrator must consider reducing PSF payments any time one handler does not have a payment posted to the PSF before payments out are made. These occurrences could have the potential to adversely affect handler payments to producers in a timely manner.

Each Central order regulated handler who makes payments into the PSF has unique circumstances which affect each transaction in a different manner.

Some handlers may place a wire order in the morning, but the funds don't actually transfer until the afternoon at a time they cannot control. Other handlers who use ACH wires place a wire order on one day and the funds do not transfer until the next day. This can be especially troublesome if there are handler errors and no time to correct the wire until after the due date.

Given the large geographic area of the Central Federal order marketing area, some handlers are located in a different time zone than the Market Administrator's office. The time zone difference can result in funds being posted to the PSF as late as 5 p.m. (Market Administrator time) on the due date.

Late postings of incoming funds have a direct effect on when outgoing funds can be wired from the Market Administrator's office and still transact during the same business day. Since the order stipulates the date of payments from the PSF, there are times that the Market Administrator must consider reducing payments from the PSF as allowed by the order.

In almost all months the Market Administrator --

Q. All other months?

A. All other months the Market Administrator office is able to initiate wire transfers during the morning on the day after payments are due to the PSF. Stipulating that payments are due out of the PSF the day after the incoming payments are due, eliminates the potential for pro rata payments from the PSF except in the event of a "real" nonpayment.

The implementation of this proposal would also reduce the pressure on regulated handlers to meet arbitrary and inconsistent wire times that occur due to time zones, local bank policies, and in many cases, their own corporate accounting policies. As evidenced by the calendars, the proposal to change the order language does not affect or change the

PSF payment due dates during any month.

And that concludes my statement.

Q. You've adjusted the last sentence of that, according to his testimony.

A. That's correct.

Q. Maybe you want to go over that one more time, the last sentence.

A. The last sentence?

Q. Yes.

A. As evidenced by the calendars, the proposal to change the order language does not affect or change the PSF payment due dates during any month.

Just a matter of clarification.

Q. And then at the top of the exhibit there's actual order language?

A. As proposed as written in the Federal Register.

Q. So you would like the record to reflect that as if you read it?

A. Yes, sir.

JUDGE HILLSON: Any further questions?

MR. STEVENS: Nothing further.

JUDGE HILLSON: Anyone want to

cross-examine this witness? Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Mr. Stukenberg, in the months when the proposal would be -- the proposed amended language would apply, would this have any affect on changing the day when payments to producers are due?

A. No, it should not.

Q. Thank you.

JUDGE HILLSON: Anyone else have questions? I take it, Mr. Stevens, you want Exhibit 46 --

MR. STEVENS: If I could, your Honor.

JUDGE HILLSON: I move Exhibit 46 into evidence.

And I see Mr. Beshore has another question. The document is received.

MR. BESHORE: I do have another question on that.

Q. (By Mr. Beshore) Market Administrator issues that have come up in the course of the hearing with respect to administrative assessment, okay?

A. Yes, sir.

Q. Does depooling have an effect on the cash flow to the Market Administrator's office under the administrative assessment?

A. Yes, sir, it does.

Q. Has it, in fact, the massive depoolings in the last year or so, have they affected the rate at which the Market Administrator has assessed milk which is pooled?

A. Yes, sir, we have increased the rate.

Q. What has that change been?

A. We've gone all the way from $0.035 to the current rate of $0.05.

Q. And that's the maximum allowed in the present order language?

A. Yes, sir, it is.

Q. When the $0.035, was that the rate the Market Administrator had found appropriate when you had level volumes of milk pooled under the order in, what, 1.2 billion per month range?

A. That's approximately the rate at that time. It possibly could have been a little bit lower when there was more milk pooled, and then as milk became depooled, our operating funds obviously declined and we consequently had to raise the rates, yes.

Q. Although milk is depooled, you've still got to maintain the same functions in the Market Administrator's office?

A. Yes, sir, we do.

Q. If there were regular poolings of milk under the order in a range that you had been in at the $0.035 or so rate, would you be able to continue or to reduce it to that rate or something near to that rate?

A. Once our reserves are built to the point where we can operate and not have to worry about the depooling milk in the future, yes, they would decrease.

Q. Thank you.

JUDGE HILLSON: Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods.

There was some questions about the call provisions. Have there been any requests in the last several years for the call provision to be implemented in this order?

A. If you're asking for an increase in diversion limitations and that sort of thing, yes, there were two of them. One was requested by DFA and one was requested by AMPI on two different occasions, yes, sir.
Q. And that is to say the increase diversion limitation, that is to say to allow lower diversions?
A. That's right.
Q. And did your office take action?
A. No, we did not.
Q. Thank you.
JUDGE HILLSON: Does anyone else have a question of this witness?
You may step down, sir.
MR. STEVENS: I just have one other matter. Not with this witness.
JUDGE HILLSON: You're not going to call another witness?
MR. STEVENS: This is the performing change one that the department puts into every hearing, and you don't present a witness, but put on the record that it's --
JUDGE HILLSON: Why don't we finish up with -- Mr. Beshore wanted to recall

Mr. Hollon, so why don't we do that first and then I'll turn it back over to you.

Mr. Hollon, I will remind you that you are still under oath, I think it was yesterday, and it carries over to today.

So go ahead, Mr. Beshore.

FURTHER DIRECT EXAMINATION

BY MR. BESHORE:

Q. Mr. Hollon, do you have some testimony you would like to give, some comments with respect to some issues that you've not addressed previously?

A. Yes. There were several questions that came up today and several things that I now understand better after hearing some of the testimony, some of the proposals, so I have seven points I would like to make.

Q. Would you proceed with those comments, please?

A. In the case of proposals that dealt with touch base requirements, we would oppose any touch base requirement of more than one day per month for August, September, October, November, January, and February as overly restrictive with the Central Federal order.

With the proposal to eliminate supply plants, now that I have heard the proposal and understood it, we would also oppose any elimination of supply plants in the Central order. We do agree that the usage of supply plants is small, but I think that they are still part of the supply network and we would like to see it maintained. We do propose, however, that there be increased requirements; that was part of our proposal.

There was also a proposal that as a part of it chose to eliminate the ability of an in-area supply plant to earn qualification by using direct-ship in the area milk, and we would oppose that should the Department find for that proposal.

There was also a proposal and some discussion, and I must admit I was confused most of the time when it was being discussed, so I wanted to make clear that either inadvertently or deliberately, if there is a proposal that or provision that would eliminate -- I'm going to confuse myself again -- that would change the current order provision that out-of-area supply plants cannot -- or must -- cannot use in-area direct milk to qualify, we would oppose that. That is currently in place and we would like to make sure that stays in place in any proposal.

There were two series of questions, one regarding the 125 percent and 115 percent proposals about what constituted the definition of continuously pooled. And just to make sure, our view is that continuously pooled would incorporate the ideas of all the milk of a producer every day for whatever period. I think our proposal was three months; I think the Dean proposal was six months. To explain that, to be continuously pooled would be all of that time.

So if a producer were to come from another order into the Central order, and the Central order Market Administrator staff were to do an audit to make sure that producer was qualified, the milk of the entire month every single day would have to be pooled in the other order to meet that continuous concept.

Lastly, or two more, there was some questions about what might be required to get a transportation credit payment. And we do not agree that there should be any detail about payments to haulers or payments to producers, a payment to a cooperative should qualify to receive that.

And I would point out that Orders 5 and 7 and their transportation pool, the requirements are that the person requesting the credit has to provide geographical information: where was the farm located, where was the plant located; they have to prove that milk was actually hauled, you know, produce a manifest of some sort, and would have to produce producer data to make sure that the producer himself qualifies in that case. Can't be -- cannot be an in-area producer. But there's no requirement to submit hauling bills, for example, or any type of gross proof of payment.

In Order 30, for the transportation credit that's in place there, again, the person requesting the credit must provide geographical data: a from, a to, the fact that the milk was actually hauled, that there was a supply plant on the other end of it, but there's no requirement that there be detailed payment data involved.

Part of the -- I think part of that mind-set that initiated that discussion was a protection from abuse. And I would point out that the rates that were established and testimony clearly indicated that the rates were below the competitive costs of, or the actual cost of transportation. So that is certainly a protection from abuse. The minimum price enforcement mechanism of the order will provide protections in the case of an independent producer.

With regard to Proposal 14, just testified to by Mr. Stukenberg, we have no opposition to that proposal. And we did note in his calendar that the first date for which there would be a problem would be May. We would certainly support a decision in effect by them to make sure that problem is taken care of.

And I have one last piece of data. I had a call today from some of the folks who did work for me on the transportation, producer transportation credit, and while I neglected to ask, and none of you asked me either, the data that I provided was on straight line miles that resulted in the 4.5 cents cost. And when you include -- when you use that with road miles, it is 6.2 cents cost on all milk, or 1.7 cents more. So with regard to Exhibit 18, Table 10C, that was my calculation. The only number I have is the 6.2 cents number, so I would offer for the record that when we use a mileage finder that does road miles, that that cost is 6.2 cents.

When I summed up all of the credits and said the effect on the blend would be 8.1 cents, that would make it be 9.8 cents.

That's all I have.

JUDGE HILLSON: Do you have any more questions, Mr. Beshore?

MR. BESHORE: No more questions.

JUDGE HILLSON: Anyone else have any other questions of this witness?

You may step down, Mr. Hollon.

THE WITNESS: Thank you.

JUDGE HILLSON: Why are you raising your hand? You're throwing me off here.

MR. VETNE: I have some official notice requests after or before Mr. --

JUDGE HILLSON: Let's let Mr. Stevens go. Okay, Mr. Stevens, you have the floor.

MR. STEVENS: Now another item, but the first item is the Proposal 15, which is the one the Department puts in all of these hearings, and this is really more of a thing to put on the record, that the Department puts these proposals in and will make conforming changes in the order as so stated in that proposal.

The other thing that was brought to my attention was that all the parties should, in their briefs, if they are asking for specific order language, they should include in the briefs that specific order language that they're asking for, because there have been modifications here and there have been -- it's not always the same as it is in the proposals.

So it would certainly assist the Department in evaluating the record if in your briefs you be sure to have the order language that you're asking for to be specific and in its latest form, if you could. Thank you.

JUDGE HILLSON: Mr. Vetne, you have something?

MR. VETNE: Yes, sir. I've been making a list of publications for which official notice is requested as we've been going on here. And here they are:

The 2002 Census of Agriculture Publication, now published by USDA, as well as the maps relating to dairy in those publications, request official notice of it as it relates to milk.

JUDGE HILLSON: I take it there's no objection to that?

Okay, that will be noticed.

MR. VETNE: Almost all of this -- not all of it is available on the Internet. We have a lot of information in what's prepared by the Market Administrator. There's a couple of things that I didn't see that I found particularly useful on the Market Administrator's website, but there's a couple of market service bulletins, one is for

December '03 and another is for March '04, I would like official notice of those. They are also available on the website.

JUDGE HILLSON: They will be officially noticed.

MR. BESHORE: What months?

MR. VETNE: December '03 and March '04.

Also available on the Market Administrator's website there's a really cool item, you have to be interested in milk, it looks like a -- I have copies of everything I'm asking for official notice. Rather than use the paper, I'm asking official notice.

There's a map, and you can click on a letter -- you can click on the map and the state, under the map, provides county-by-county marketings, and I notice now it's well producer numbers, for the counties in the marketing area, but it's not just milk marketed in Order 32, it's all milk marketed under Federal orders for all those counties. And that helps us make some analysis of what the competition is and where -- what milk isn't pooled here and that might be going elsewhere, that kind of thing.

JUDGE HILLSON: How is that noticed? What is it that I'm noticing on that one?

MR. VETNE: Okay, it's -- it doesn't have a date. It's compilations of Federal Order Milk Marketing by County during December for the counties in the marketing area for December 2000, 2001, 2002 and 2003. So it's a recent addition to the Market Administrator's website.

JUDGE HILLSON: That also will be officially noticed.

MR. VETNE: The Department periodically publishes a document called Producer of Milk By State and County to All Federal Marketing Areas, or producer milk by state, sometimes not county. The recent ones are on the website, the older ones are not. And I would like to rely on those to --

JUDGE HILLSON: It's an official government publication?

MR. VETNE: I'm looking for 1988 to date. NASS -- the latter one, there's some that aren't available, in fact most are not available on the website.

NASS, National Agricultural Statistic Service, website information documents. Dairy Products, Milk Production, which was a monthly publication, and Milk Production Disposition and Income, which is usually I think April or May version of Milk Production that contains expanded data.

JUDGE HILLSON: So noticed.

MR. BESHORE: What period of time?

MR. VETNE: 2000 to date. And for marketing Orders 5, joining marketing Orders 5, 7 and 30, the -- and most recent bulletins showing producer milk by state, or state and county that supply those markets, as well as the plants that are regulated, regulated under those orders.

JUDGE HILLSON: Is that on the website as well?

MR. VETNE: All of the Market Administrators in various forms have this information on their websites. It's not identical in the form, but the information is similar.

I'm sorry, I should have also said the Southwest order. So the adjoining markets: Upper Midwest, Appalachian, Southeast, Southwest, and Central. That's five. It keeps growing. Adjoining markets.

MR. BESHORE: What period of time?

MR. VETNE: For the most recent year, the most recent list of handlers. I'm looking for supply information for the most recent period and handlers list for the most recent periods.

JUDGE HILLSON: You mean after 2002 or -- what do you want to --

MR. VETNE: It's not something that's published. Sometimes this information is published once a year, so whatever the most -- for 2003, 2004, all right, let's just say that. We'll capture it all that way.

And finally, I made copies unnecessarily, got charged a bundle, but information on the DFA.com website, there's a footprint there showing counties of production, the relative volumes, and other information under the "Who We Are" subpage of that. There's other useful information under the Joint Ventures subpage of the DFA website, and I believe it's under Joint Ventures, but if it's not, there's reference in the DFA Leader, which is acceptable; it's a magazine published and available on the net, Volume 7, Number 8, August '04, which refers to the construction of the 7 million pound a month cheese plant in New Mexico.

JUDGE HILLSON: Mr. Beshore has a comment.

MR. BESHORE: I object to that, not because of its intrinsic reliability, but because it's not information for which official notice can and should be taken. And if there was something there you wanted to ask the DFA witnesses about, they've been -- Mr. Hollon has testified as recently as 10 minutes ago.

MR. VETNE: I can and have that information that I thought important from those parts of the DFA website and I made tons of copies. And it's getting late, and certainly I make it available to anyone who wants to look at it and take a copy home.

On the other hand, the only question here is authenticity. I would like the published USDA material, if this information can be authenticated, and there's no dispute it can get authenticated, but DFA has proponent material on its website, therefore, current law, it would be admissible as an admission because it's a statement of a party.

MR. BESHORE: We're deviating grossly from the manner in which we make a record in these --

JUDGE HILLSON: I don't normally take official notice to something like the USDA publication.

MR. BESHORE: Absolutely, that's what the rules provide for. Factual material relating to parties involved here or whatever is appropriately presented when witnesses are testifying and everybody -- we're done with that.

JUDGE HILLSON: On the other hand, it's on your website, so --

MR. BESHORE: I'm not objecting to the reliability of the information, as I indicated, but we don't make these records by coming in and saying I've reprinted people's websites and I'm going to put all this information into the record, here it is.

MR. VETNE: I would only add two things. One is earlier in this hearing I made reference to DFA material on the website, and, your Honor, commented why can't you take official notice of that.

JUDGE HILLSON: DFA website?

MR. VETNE: Yeah. And the other thing is, I make myself available, I can do this, I've got the data, I've assembled it, I copied this, just to authenticate it -- the only question is authentication where there's a party admission involved, I don't think it should be necessary.

JUDGE HILLSON: I'm going to take notice of it even though it doesn't squarely fit in at point rather than calling witnesses and having them authenticate it. It says any matter that can be judicially noticed by the person, and I think anything on a website I think can be noticed, so I'm going to notice it.

MR. VETNE: Thank you. That's

all I have.

MR. BESHORE: What on our website has been noted?

JUDGE HILLSON: Well --

MR. BESHORE: Press releases about the quotas in the New Mexico plant?

JUDGE HILLSON: He only used the part that's --

MR. BESHORE: Well, parts of what? The website is quite extensive.

JUDGE HILLSON: I'm going to say that if it's on the website, it can be used. And it can be -- and I'm just going to leave it at that. I admit -- you've already made your point. I agree that this isn't the regular way of doing things, but to have him get up there and call witnesses and put in documents now, I don't think it's going to gain that much. If you want me to ask him to narrow down the document, the parts of the website that there's a notice, I can do that.

MR. BESHORE: I've already requested that, but I really object to taking notice of anything on the website that might be used in briefing. It's just not an appropriate way to make the record.

JUDGE HILLSON: I'm just not sure -- I mean, this -- the laws of judicial notice when it comes -- when it's in terms of websites, I'm not sure I have dealt with that.

Do you have comments on that, Mr. Stevens.

MR. STEVENS: I don't have any comment, other than to say the parties can ask you to take official notice of things and you can grant that or not grant it as you choose, and the stuff will be used when -- as to Mr. Beshore's comment, the stuff may well be used when people write their briefs, but it will be given the weight by the Secretary, you know, it's appropriate --

JUDGE HILLSON: Right.

MR. STEVENS: -- as all the rest of the stuff that's come in in this hearing.

JUDGE HILLSON: Mr. Vetne, do you want to at all limit the focus on any particular areas of the website? Can you narrow it?

MR. VETNE: As I said, I

perused the website, I made copies and have copies here, I have them in my hand, and I'll be happy to focus and limit it to what I provide -- to what I have here. I can read it.

JUDGE HILLSON: Why don't you just tell us what parts of the -- what, on the website, are you talking about?

MR. VETNE: There's a part of the website that says "Who We Are," and there's a page that says F.A.Q., who is DFA, where is it headquartered, there's information on that, on that website, about total pounds marketed, number of producers, number of pounds, manufacturing plants operated, where they are, Borden Cheese, joint ventures. There's a whole page on joint ventures: Hiland Dairy, Roberts Diary, National Dairy Holdings, Ideal American, etc., etc., etc. --

JUDGE HILLSON: If the reporter can get all that down, I'm very impressed, but you're going to have to talk a little bit slower, she's trying to actually write down what you're saying.

MR. VETNE: Yeah. There's sort

of an operating structure map, which I -- which helps visualize, a picture's worth a thousands words, on operating structure. There's also a map, this one is in color on the website; it's a little flag showing geographically where the manufacturing plants are, and you click on the flag and there's a description of the plant and what it does and where it fits in the picture.

JUDGE HILLSON: How many pages total do you have?

MR. VETNE: Probably about 30.

JUDGE HILLSON: Is there anything else?

MR. VETNE: There's a footprint of all production and sales where the producers are. And the other thing I have here is, I referred to it earlier as a joint venture, and a description of each of the joint ventures as well as that article in the DFA newsletter about the New Mexico plant.

That is, in a nutshell, what I think is relevant to this hearing, because, among other things, as has been testified, it has a competitive command present, at the current time and in the future.

JUDGE HILLSON: I'm going to take notice of those, a limited portion of the website.

I guess it's time to go off the record and discuss the briefing schedule. So let's go off the record.

(Off the record.)

JUDGE HILLSON: We've had an off-the-record discussion. Corrections to the transcript, we're going to presume the transcript is going to arrive around Christmas, and no one is going to want to look at it right away, so the corrections to the transcript need to be submitted by January 19th. So received by the AMS January 19th, and you can e-mail, whatever, to submit them.

The parties' briefs are going to be due by February 9th, this is 2005. And just to reiterate Mr. Stevens' request, the parties need to include specific order language in the briefs if they have such language in mind.

And with that, the hearing is closed. Thank you.

(The hearing concluded at 6:59 p.m.)

CERTIFICATE

I, Glenda Moeller, a Certified Shorthand Reporter in and for the State of Kansas, do hereby certify that I appeared at the time and place first hereinbefore set forth, that I took down in shorthand the entire proceedings had at said time and place, and that the foregoing constitutes a true, correct, and complete transcript of my said shorthand notes.

WITNESS my hand and seal this 19th day of December, 2004.

Glenda Moeller, CSR, RMR, CRR