

BEFORE THE SECRETARY OF
THE UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

- - -

In the Matter of Proposed) Docket Number
Amendments to the Tentative) AO-166-A77;
Marketing Agreement and Order) DA-08-06

- - -

VOLUME III

- - -

PUBLIC HEARING BEFORE:

Peter M. Davenport
U.S. Administrative Law Judge
U.S. Department of Agriculture
DATE: August 20, 2008
TIME: 1:21 p.m.
PLACE: Westin Cincinnati Hotel
21 East Fifth Street
Cincinnati, Ohio 45202

REPORTED BY: Monna McCormick, RPR, CRR, CLR
Notary Public, State of Ohio

I N D E X

| | | |
|----|-----------------------------------------|------|
| 1 | | |
| 2 | WITNESSES: | PAGE |
| 3 | EVAN KINSER | 474 |
| 4 | CROSS-EXAMINATION BY MR. BESHORE: | 474 |
| 5 | CROSS-EXAMINATION BY MR. TAYLOR: | 508 |
| 6 | CROSS-EXAMINATION BY MR. RICHMOND: | 510 |
| 7 | CROSS-EXAMINATION BY MR. STEVENS: | 513 |
| 8 | CROSS-EXAMINATION BY MR. YALE: | 520 |
| 9 | CROSS-EXAMINATION BY MR. BESHORE: | 527 |
| 10 | REDIRECT-EXAMINATION BY MR. ENGLISH: | 529 |
| 11 | | |
| 12 | CARL CONOVER | 532 |
| 13 | DIRECT EXAMINATION BY MR. ENGLISH: | 533 |
| 14 | CROSS-EXAMINATION BY MR. BESHORE: | 541 |
| 15 | CROSS-EXAMINATION BY MR. TAYLOR: | 542 |
| 16 | MICHAEL MEYER | 545 |
| 17 | DIRECT EXAMINATION BY MR. ENGLISH: | 545 |
| 18 | CROSS-EXAMINATION BY MR. BESHORE: | 556 |
| 19 | | |
| 20 | PATRICIA D. STROUP | 565 |
| 21 | DIRECT EXAMINATION BY MR. ENGLISH: | 565 |
| 22 | CROSS-EXAMINATION BY MR. BESHORE: | 573 |
| 23 | | |
| 24 | | |

I N D E X (Continued)

EXHIBITS

| NUMBER | DESCRIPTION | PAGE |
|--------|-----------------------------------------|------------|
| 22: | Written statement of Carl Conover | 533 546 |
| 23: | Written statement of Michael Meyer | |
| 24: | Written statement of Patricia Stroup | 565 |

ADMISSION OF EXHIBITS

| | |
|---------------|-----|
| 18 through 21 | 531 |
| 22 | 546 |
| 23 | 545 |
| 24 | 573 |

1 APPEARANCES:

2 On behalf of the U.S. Department of
3 Agriculture:

4 GARRETT B. STEVENS, ESQ.
5 Deputy Assistant General Counsel
6 U.S. Department of Agriculture,
7 Marketing Division
8 Room 2343, South Building
9 Washington, D.C. 20250

10 On behalf of Michigan Milk Producers
11 Association, Foremost Farms U.S.A.
12 Cooperative, Dairylea
13 Cooperative, National Farmers Organization
14 and Dairy Farmers of America:

15 MARVIN BESHORE, ESQ.
16 130 State Street
17 Harrisburg, Pennsylvania 17108

18 On behalf of Dean Foods' Company, National
19 Dairy Holdings and Prairie Farms Dairy,
20 Inc.:

21 CHARLES M. ENGLISH, ESQ.
22 Thelen, Reid, Brown, Raysman & Steiner,
23 LLP
24 701 Eighth Street, NW
Washington, D.C. 20001

On behalf of United Dairy, Inc.:

JOHN VETNE, ESQ.
11 Red Sox Lane
Raymond, New Hampshire 03077

On behalf of Continental Dairy Products,
Inc., Select Milk Producers, Inc.:

BENJAMIN F. YALE, ESQ.
Yale Law Office, LP
527 N. Westminster Street
Waynesfield, Ohio 45896

1 Also Present:

2 Erin Taylor, USDA AMS/Dairy Programs
3 Bill Richmond, USDA AMS/Dairy Programs
4 Gary Jablonski, USDA Dairy Programs
5 Clifford Carman, USDA Dairy Programs

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

1 THE JUDGE: Mr. Kinser, do you want
2 to retake the stand?

3 Before we go, Mr. English, do you
4 have anything further?

5 MR. ENGLISH: Just a quick
6 clarification, correction, or whatever you
7 characterize it as.

8 EXAMINATION

9 BY MR. ENGLISH:

10 Q. Mr. Kinser, would you turn to
11 Exhibit 21, which is the five-page chart --
12 table of charts of various months that you
13 discussed prior to your testimony.

14 Did you, during the break, notice
15 anything with respect to one of those months
16 that you would like to clarify at this point?

17 A. Yes. At breaks, in looking at the
18 calculation for November of 2007 --

19 Q. Which is the last calculation on
20 the last page?

21 A. That is correct.

22 In glancing at the class
23 utilization of the south in excess of 200 and
24 300 percent, clearly that's in error. And in

1 glancing across, in trying to sum those, they
2 will not sum to 100.

3 In my effort to be more green and
4 save paper, my formulas carried as opposed to
5 the absolute numbers, so the blend prices there
6 actually turn out to be correct, but there are
7 multiple numerical problems in the math. It
8 won't track. So I would propose just striking
9 the whole thing rather than trying to go through
10 and correct number by number.

11 Q. The whole thing, the month of
12 November?

13 A. That's correct, the whole
14 illustration of November of '07.

15 Q. So we'll end up with nine months of
16 illustration rather than ten?

17 A. Yes.

18 Q. It doesn't change your analysis or
19 testimony, it's just for -- it appears that
20 there's something wrong with November of '07;
21 it's easier to strike it?

22 A. That's correct.

23 Q. Fine.

24 MR. ENGLISH: Then, however you

1 want to proceed on my motion, it doesn't have to
2 be now, Your Honor, they are on the record for
3 the issue of the hearing. Otherwise, the
4 witness is available for cross-examination.

5 THE JUDGE: Very well. Defer the
6 admission formally of all of the exhibits until
7 after cross.

8 Mr. Beshore.

9 CROSS-EXAMINATION

10 BY MR. BESHORE:

11 Q. Good afternoon, Evan.

12 A. Good afternoon, Marvin.

13 Q. Marvin Beshore representing the
14 cooperative proponents.

15 Evan, you have indicated that you
16 are testifying on behalf of Dean Foods and also
17 National Dairy Holding and Prairie Farms; is
18 that correct?

19 A. No, that is not correct.

20 Q. Correct me, please.

21 A. I indicated that I am testifying on
22 behalf of Prairie Farms as it relates to posing
23 Proposal 1. NDH has their own witness and will
24 offer their own testimony. And my testimony,

1 with the exception of the opposition of
2 Proposal 1, is Dean Foods' testimony alone.

3 Q. So National Dairy Holdings and
4 Prairie Farms, you're only speaking to them with
5 respect to the opposition Proposal 1 and not
6 with respect to any of your alternative
7 proposals or any other oppositional positions?

8 MR. ENGLISH: He never said that at
9 all.

10 THE WITNESS: Can you restate your
11 question?

12 BY MR. BESHORE:

13 Q. I just want to make sure that I
14 understand. You're -- I was attempting to
15 summarize what I understood your answer to be to
16 my prior question.

17 As far as NDH and Prairie Farms are
18 concerned, you are just stating opposition to
19 Proposal 1 and not support for any of the
20 alternative proposals?

21 A. That is not correct.

22 Q. Okay. Help me, because I'm
23 having --

24 A. I am making no statement on behalf

1 of NDH. NDH has their own witness and make
2 their own statement of their position.

3 I am taking a position of behalf of
4 Prairie Farms limited to the opposition of
5 Proposal 1. Everything in my testimony beyond
6 my opposition of Proposal 1 relates to Dean
7 Foods' position alone.

8 Q. So the Secretary should not
9 interpret, as far as Prairie Farms is concerned,
10 that your statement -- that they are endorsing
11 any of your alternative proposals?

12 A. Not for my testimony today.
13 However, given the time to review on brief, we
14 may include in brief the updated position that
15 Prairie Farms has in relation to the other items
16 of consideration at this hearing.

17 Q. Okay. With respect to the -- your
18 comments on the possible impact of adoption of
19 Proposal 1 on the transportation credit
20 balancing funds in orders 5 and 7 -- and those
21 comments are at the bottom of page 5 of your
22 testimony -- would you agree with me that to the
23 extent that there would be any impact from the
24 adoption of Proposal 1 on the transportation

1 credit balancing fund in orders 5 and 7, the
2 only impact would be if there is milk produced
3 on farms in the southern region of Order 33
4 where we propose Class I differentials to change
5 and that milk is being marketed to orders 5 and
6 7 in a manner that trans -- that payments from
7 transportation credit balancing funds are
8 requested, those are the only volumes that would
9 have any potential effect?

10 A. That is correct.

11 Q. And when you -- wouldn't you --
12 you're aware from the statistical data that has
13 come in, and you would presumably be aware just
14 from your market knowledge, that milk in the
15 southern region of Ohio of Order 33, I should
16 say, substantial volumes of milk produced in
17 that region are pooled on orders 5 and 7 on a
18 year-round -- five primarily and possibly seven
19 on a year-round basis?

20 A. Yes.

21 Q. And those poolings -- by virtue of
22 the terms of orders 5 and 7, those year-round
23 poolings are not eligible for any payments from
24 transportation credit balancing?

1 A. Correct.

2 Q. So if there is any -- if there were
3 to be any impact at all from the adoption of
4 Proposal 1 on the operation of those funds, it
5 would solely be with whatever seasonal
6 supplemental supplies for Order 5 and 7 may
7 possibly originate from the counties in the
8 southern region of Order 33?

9 A. I would agree with that.

10 Q. By the way, if it's possible to, we
11 would endorse your suggestion that it's possible
12 to insulate what I think would be a minor impact
13 on the transportation balancing funds in some
14 way from the proposal, we would have no problem
15 with that.

16 A. Thank you.

17 Q. Now, let me go to your comments and
18 your alternatives for a couple minutes. I take
19 it, are your policy options "A" through "E"
20 basically your order of priority in terms of the
21 actions you're advocating be taken by the
22 Secretary on the basis of this hearing?

23 A. No.

24 Q. They are not?

1 A. No.

2 Q. What is your first priority?

3 A. My first priority would be "D," to
4 divide the order into small orders.

5 Q. Recognizing that's not possible at
6 this hearing?

7 A. It's possible that the Secretary
8 could expand the scope of the hearing so that it
9 could not be concluded -- reached under the
10 current hearing notice.

11 Q. Well, it's possible under the
12 current hearing notice he could not take that
13 action, correct?

14 A. I would agree.

15 Q. If that action were to be
16 considered, it would have -- the hearing would
17 have to be reopened, a new hearing notice, set a
18 new hearing, et cetera?

19 A. I would agree.

20 Q. Okay. Let's look at that first
21 option, then.

22 Exhibit 21 is your attempt to model
23 on a static basis how those three orders might
24 look; is that correct?

1 A. That is correct.

2 Q. Let's just use January of '07,
3 which is your first month, as an example,
4 because I don't want to run through them all. I
5 want to take one. That's the first one.

6 Can you tell me, and you may have
7 covered this on direct, but I'm not sure I
8 understood it, how it is that you determined
9 what volumes of Class II, III, and IV milk would
10 be pooled on the proposed three separate orders?

11 A. I believe I covered it on direct,
12 but it is a little complicated, so it probably
13 bears repeating.

14 I know from Exhibit 7, Dean Foods'
15 Supplemental Request No. 3, what the
16 distributing plant pool reports look like as far
17 as a percentage of class by region. I also know
18 what the market looks like in total. So the
19 first thing I did was set aside what I know
20 about the distributing plants, and that left me
21 a balance that I did not know. And that balance
22 is really what is seen in the third column in
23 called "difference."

24 So, for example, between what the

1 market had and what Exhibit 7, Dean Foods'
2 Supplemental Request No. 3, shows, I could not
3 account for just over 6 million pounds of
4 Class I milk.

5 Q. And 206 million pounds of Class II,
6 478 million pounds of Class III and 74 of
7 Class IV?

8 A. That is correct.

9 So as it relates to the 6 million
10 in Class I, I allocated that based on the
11 distributing plant receipts, which is the next
12 line above the headings. So the 195 million,
13 the 2981 million and the 187 million
14 relationship was maintained and in allocating
15 the Class I pounds that I could not explain by
16 the distributing plant reports.

17 The remaining classes, II, III, and
18 IV, were allocated by the milk being available,
19 basically making the assumption that the
20 milk that was in the marketplace was going to
21 basically be what sort of qualified in that
22 marketplace to pool, so I allocated according to
23 the top line the 80 million, the 718 million,
24 and 353 million between the different regions

1 for classes II, III, and IV.

2 Q. And what was your source of those
3 milk available numbers in those regions?

4 A. The milk available number and
5 the -- came from two sources, only because of
6 timing. One was DFA-3B, which was presented in
7 Exhibit 5. And the other was Dean Foods'
8 Supplemental 2, which was exhibited in No. 7.

9 Q. Essentially, those were data sets
10 that represented the production of milk in the
11 geographic areas of those regions?

12 A. It represents the definition that
13 was asked for by your clients.

14 Q. Do you use the DFA -- I'm sorry,
15 the proponent cooperatives's definition of
16 "availability"?

17 A. That's correct.

18 Q. Now, what is Dean Foods' policy
19 with respect to -- by the way this is not the
20 first hearing in which Dean Foods has advocated
21 splitting existing orders into multiple, smaller
22 orders; is that correct?

23 A. That's correct.

24 Q. What is Dean Foods' policy with

1 respect to whether milk's presently pooled but
2 used for Class II, III, and IV should continue
3 to be pooled in newer and smaller orders?

4 A. Can you restate your question?

5 Q. What is Dean Foods' policy with
6 respect to whether milk currently being pooled
7 on existing orders, such as Order 33 in this
8 case, should continue to be -- that is used for
9 Class II, III or IV products, whether it should
10 continue to be pooled on smaller orders if an
11 existing large order is broken into pieces?

12 A. If you broke it apart, you would
13 have to have different pooling provisions for
14 each of the orders.

15 Q. But should, for instance, in this
16 case, all of the 478 million pounds of milk
17 utilized in Class III and pooled in January of
18 '07 be pooled in the new orders?

19 A. In this illustration, it was.

20 Q. And what is Dean Foods' policy with
21 respect to whether it should be?

22 A. We tend to focus on the dollars
23 that we pay for our milk supply going to the
24 producers that supply our milk.

1 Q. And let me ask the question again:
2 What is Dean Foods' policy with respect to
3 whether existing milk pooled on a large order
4 but used for non-Class I should be pooled on
5 smaller orders that you craft? "You" being Dean
6 Foods.

7 A. We understand that the market has
8 to flex to reflect local supply and demand
9 conditions, but our concern about the presence
10 of milk by definition, meaning that it should be
11 included in the pool.

12 Q. So just as you've shown in these
13 illustrations, you -- if I understood that
14 answer correctly -- you understand that those
15 milk supplies need to be pooled?

16 A. I don't believe that was
17 characterization of my answer.

18 Q. That's what you've done in your in
19 Exhibit 21, however, is it not?

20 A. That's what occurred in Exhibit 21.

21 Q. But Dean Foods' policy would be to
22 have a different result?

23 A. Dean Foods' policy would be that
24 the orders should be broken up and that the

1 rules around the order, particularly relating to
2 this line of questioning of diversions, be
3 reflective of what is needed to maintain a
4 reasonable reserve milk supply for each of the
5 independent orders.

6 Q. Are you proposing -- do these
7 calculations on Exhibit 21 reflect the
8 application of such pooling terms for these
9 three orders?

10 A. No, they just apply the current
11 rules that bring forth a milk supply for the
12 whole Mideast market allocated between three
13 proposed markets. They do not define whether
14 the result is what's correct for the
15 marketplace.

16 Q. But it's your first recommended
17 option for this hearing?

18 A. Knowing that you and I are in
19 agreement that the Secretary cannot adopt this
20 out of this hearing, we'd have to reconvene a
21 further hearing to obtain further information
22 and further exploration of the details of how
23 three independent marketing orders would be
24 structured. This is purely to illustrate to the

1 Secretary that there is a way that the money
2 could be redistributed to accomplish the
3 proponent's desire.

4 Q. So if this money was redistributed
5 to accomplish -- by breaking it into pools -- to
6 accomplish the proponent's desire -- first of
7 all, what do you understand that desire to be?

8 A. That the argument is that there
9 needs to be higher values of milk in the
10 southern portion of the marketing area.

11 Q. And you think this would accomplish
12 that in a manner superior to Proposal 1?

13 A. Yes.

14 Q. And would that be accomplished
15 because of the difference in blend prices
16 reflected in Exhibit 21?

17 A. Yes.

18 Q. Okay. Let's look at that just for
19 a moment, then.

20 On Exhibit 21, you show -- and this
21 is January of '07. That's the other one I want
22 to look at. You show the difference in blend
23 prices in the right center of that spreadsheet,
24 correct?

1 A. That's correct.

2 Q. And the southern order would
3 have a -- would have had a blend price of \$19.52
4 in January of '07, correct?

5 A. Correct.

6 Q. And the Northwest would have been
7 18.95, correct?

8 A. Yes.

9 Q. Northeast 19.28?

10 A. Yes.

11 Q. And your next line, then, you show
12 that the difference between the South and the
13 Northwest would have been 57 cents?

14 A. Yes.

15 Q. And is it your view that that
16 difference then would have -- would accomplish
17 the proponent's objective of moving --
18 attracting more milk supplies to the southern
19 region?

20 A. The largest increase, as I
21 understand it in the proposal, is 40 cents. And
22 this would cause a spread to be greater than 40
23 cents. And so it would accomplish the desired
24 outcome.

1 Q. The 19.52 blend, where would -- for
2 the south, that would be at, what, Cincinnati?
3 Let's just talk about Cincinnati.

4 A. Actually, it would be -- actually,
5 the way this turns out, it is in a place that
6 doesn't exist. It's in a 2.08 zone. There is
7 no 2.08 zone. We have two dollar zones and we
8 have 2.20 zones in the current --

9 Q. Where -- what would be -- under
10 your proposal, what would be the blend price be
11 at Cincinnati? I'm talking about January of '07
12 on Exhibit 21.

13 A. 19.70.

14 Q. And the blend price in the
15 Northwest, what -- what location is that at?

16 A. 1.80.

17 Q. And is that throughout the entire
18 Northwest region?

19 A. All the distributing plants in
20 proponent's Northwest region had differentials
21 of 1.80.

22 Q. Are you certain of that, Evan?

23 A. I can't find Exhibit 5.

24 Q. Could you --

1 A. I found it.

2 Q. Did you find it?

3 A. Yes.

4 Q. You have Exhibit 5?

5 A. Yes.

6 Q. And Plant No. 1 on Exhibit 5 is --
7 well, I'm looking at the maps.

8 Is there a list?

9 A. Exhibit 5, EFA sets all requests 1
10 A, as I understand it, presented by market
11 administrator, is a list of the pool
12 distributing plants broken by region, which also
13 illustrates the differential of each plant under
14 the current order language.

15 Q. Okay. So in the -- looking at it,
16 at the northeast, 19.28 under your reconfigured
17 blends would be at what locations?

18 A. 2.08.

19 Q. For the Northeast?

20 A. Yes.

21 Q. Which plants?

22 A. It doesn't exist either. What I
23 did was I used the straight-line average of the
24 differentials, basically assuming from a Class I

1 revenue into the pool that all the plants were
2 perfectly equal. We all know that's not true.
3 But, again, given limited time in the attempt to
4 illustrate this for the Secretary, that's what I
5 did.

6 So when you take straight-line
7 average of Northeast plant, which range in
8 differentials from \$2 to 2.30, the average --
9 the average is 2.08.

10 Q. When you say a straight-line
11 average?

12 A. I'm not weighing it by the volume
13 processed by any individual plant.

14 Q. You're just assuming each plant had
15 equal volumes?

16 A. Correct.

17 Q. You only have one plant at 2.30,
18 but you weighted the 2.30 -- okay. You assumed
19 every plant had equal values and weighted all
20 plants in the Northeast that way and it came out
21 to 2.08?

22 A. Yes.

23 Q. So the \$2, though, then, in
24 Cleveland, would have had a blend price of

1 19.20?

2 A. Correct.

3 Q. And it would have been, what, 19.30
4 in western Pennsylvania, assuming that equal
5 weights factor?

6 A. You're now looking at -- by western
7 Pennsylvania, the 2.10 zone?

8 Q. Yes, I was simplifying that.

9 A. Because there is another plant in
10 western Pennsylvania that that's not 2.10.

11 Q. 2.30.

12 A. Correct.

13 Q. Yeah. Okay.

14 So the -- the 19.20 in Cleveland;
15 19.30 in Pittsburgh, under your averaging?

16 A. Yes.

17 Q. Under your average.

18 Okay. And all of the plants in the
19 Northwest would be at 18.95, correct?

20 A. Yes.

21 Q. Okay.

22 A. All the pool distributing plants.

23 Q. In the South, the plants at the \$2
24 zone would be at, what, 19.44?

1 A. Yes.

2 Q. Okay. Now, the -- the
3 utilization -- I'm not sure what exhibit this
4 is, but by one of your -- one of your requests
5 of the market administrator was to determine
6 where the milk came from, from the plants in the
7 various regions. Do you recall that?

8 A. Are you referring to Exhibit 16,
9 Foods' request 1 A and 1 B?

10 Q. That might be it. Does that --

11 A. It depicts the regions and the
12 source by percent such that you have 100 percent
13 both from a delivered standpoint and 100 percent
14 by receipt standpoint including other area.

15 Q. Now, if you look at the southern
16 district in those -- in that data set, the
17 sources -- just what were the sources? Is
18 January of '07 shown?

19 A. Yes.

20 Q. And January of '07, from what group
21 areas did the southern plants get their milk?
22 How much -- what percentage of their milk supply
23 came from the Northwest?

24 A. 42.23.

1 Q. Okay. And in your system, the
2 Northwest would have delivered 42 percent of the
3 milk down to the southern region, but none of
4 the milk in the Northwest would be pooled in the
5 south -- or as reflected in your calculation to
6 that southern region price, correct?

7 A. That's correct.

8 Q. And by the same token, none of the
9 production -- reserve production in the
10 Northwest is pooled in that proposed southern
11 order, correct?

12 A. I want to hold my prior answer.
13 One moment.

14 Can we go back to the prior
15 question?

16 Q. Yes. The question was -- to go
17 back and clarify it, or if you need to change
18 your answer, if you need to.

19 A. I just need --

20 Q. 40 percent of the milk, milk supply
21 from the southern region was delivered from the
22 Northwest would not have been pooled in the
23 southern pool according to your, you know, your
24 proposed pools here, correct, because you're --

1 the milk that was reflected in the southern pool
2 was just the milk that was available physically
3 in the South, correct?

4 A. And you're -- the latter part of
5 your question is what I'm now questioning
6 because it depends on my -- my answer depends on
7 my understanding of the proponent's definition
8 of available milk. And so I'm going to state
9 for the record, my understanding of the
10 available milk did not differentiate where the
11 milk was delivered so long as it was delivered
12 to a distributing plant.

13 So if it was produced in the
14 Northwest but delivered to a southern plant, it
15 was considered part of the Northwest available
16 milk supply. And if that is a correct
17 interpretation of available milk and how I
18 performed the analysis in Exhibit 21, I would
19 agree with your statement.

20 Q. Well, in any event, you were
21 pooling, the southern pool, you were reflecting
22 essentially just the milk that was
23 geographically produced in the southern region
24 with the possible supplement of milk that was

1 physically delivered from other locations?

2 A. You say that in such a way as to
3 imply that those southern deliveries did not
4 affect the available milk in the south. And if
5 they did, then it did affect how the milk was
6 allocated in my simplistic pool.

7 Q. How the southern -- the southern
8 deliveries didn't affect the milk that was
9 available in the south?

10 A. Excuse me. The northern deliveries
11 to the Northwest to go back to our question
12 about the exhibit.

13 Q. Okay. Well, the only difference
14 between regional production and pooling in your
15 pools is possibly physical deliveries from
16 outside defined geographic region, correct?

17 A. Yes, but now that it's been --
18 earlier, we were talking about a position. Dean
19 Foods has never allocated that a delivery should
20 not be a part of a pool. So I don't want you to
21 bifurcate my statements.

22 Q. Well, the point that I was getting
23 to in the question that was on the table before
24 we went back to the prior answer was the way

1 these pools are calculated, the reserve supply
2 associated with the deliveries to meet those
3 Class I needs in the South, for instance, the
4 reserve that's associated was the deliveries
5 from the Northwest which is, basically -- which
6 supplies more than 40 percent of the milk to the
7 south, reserve associated with those deliveries
8 is not reflected in your pooling at all, is it,
9 in the South?

10 A. I'm going to disagree. You've got
11 a market that the way this works is about 70
12 percent, plus or minus few percent, Class I
13 utilization. So it allows for 30 percent to go
14 into the other classes.

15 Q. Well, in what way in calculating
16 the pounds reflected in that southern pool did
17 you add in reserve supplies from the Northwest
18 and in supplying 40 percent of the milk? How
19 did you add that in?

20 A. It wasn't added in the sense of
21 trying to determine how much reserve supply was
22 needed in the South as much as it was taking the
23 reserve supply of the marketplace and allocating
24 it according to the production that existed in

1 an area.

2 Well, I don't even want to say it
3 that way because we've had arguments about what
4 available milk is. Just allocating it according
5 to the proponent's definition of available milk.

6 Q. Which includes -- which is just
7 production in the area plus physically delivered
8 milk. That's what it is, isn't it?

9 A. I'm not sure I agree with that. I
10 think...

11 Q. You do. Okay.

12 So you just use whatever --
13 whatever pounds we're showing as available,
14 you're assuming that was the milk that was going
15 to be in the pool, period.

16 A. No, no, no. I --

17 Q. For purchases of allocating the
18 surplus in the market?

19 A. Yes. The same existence -- the
20 same relationship between available supply was
21 maintained in allocating the Class II, III, and
22 IV portion of the pool. So for example, if the
23 Northwest was 2 X milk available of the South,
24 then they got 2 X the South of Class II, 2 X the

1 South of Class III and 2 X of the class the
2 South of Class IV.

3 Q. Let's turn -- what's the second --
4 your second option out of this hearing is to,
5 what, lower the Class I differentials?

6 A. No.

7 Q. What's the second option, your
8 second preferred result?

9 A. For the -- well, lower the
10 Southeast Class I differentials, so, yes, I
11 stand corrected. Lower the Southeast -- excuse
12 me, that's not correct. Repeal the decision in
13 the southeast.

14 Q. What is your third option?

15 A. To deny the proponent's request.

16 Q. Maintain the status quo, period?

17 A. Yes.

18 Q. And the fourth option?

19 A. Suspend the hearing until more data
20 is available.

21 Q. And your final option is to -- is
22 what?

23 A. Pushed into the corner, the final
24 option is to challenge the assumption that the

1 lowest point of the order is correct and, thus,
2 you must make adjustments the other way as
3 opposed to assuming the highest end of the order
4 is correct and adjust backwards.

5 Q. So basically that option, which is
6 your --

7 A. Our last option.

8 Q. -- Proposal 20 -- or Exhibit 20,
9 correct, reflected in Exhibit 20?

10 A. The proposal is 19. The
11 illustration of 19 is in the maps presented in
12 20.

13 Q. Okay. And the proposal is
14 Exhibit 19. The map is Exhibit 20.

15 Dean Foods suggests that as a
16 matter of federal milk pricing policy, the
17 increased cost of transportation of milk, which
18 have occurred over recent years as there's no
19 dispute, it's been testified to, that rather
20 than those costs being moved forward into the
21 Class I price to consumers, they should be
22 accounted for in the system by reducing dairy
23 farmer's prices in some portions of Order 33,
24 correct?

1 A. No.

2 Q. You're reducing Class I
3 differentials in some portion of -- in the
4 Northwest portion of Order 13, Proposal 19,
5 correct?

6 A. You put forth an assumption or an
7 assumed basis that I'm not sure I agree with.

8 Q. You don't agree that transportation
9 costs for moving milk has increased in recent
10 years? They haven't increased for Dean Foods?

11 MR. ENGLISH: Which question do you
12 want him to answer?

13 MR. BESHORE: Either one. Both of
14 them.

15 MR. ENGLISH: I object to multiple
16 questions.

17 BY MR. BESHORE:

18 Q. Have transportation costs
19 increased?

20 A. Yes.

21 Q. Have they increased for Dean Foods?

22 A. Yes.

23 Q. And they've increased for Dean Food
24 suppliers as well, have they not?

1 A. And we have noticed changes in
2 graining charges.

3 Q. They have increased for Dean Foods
4 suppliers, have they not?

5 A. I would assume that was the
6 testimony.

7 Q. No, you know that to be the case,
8 do you not?

9 A. That's true.

10 Q. And as far as in Order 33 -- and
11 you also have heard testimony that that's at the
12 root of the problem to be addressed here, have
13 you not?

14 A. I'm not sure that's the root.

15 Q. That's what the testimony has been?

16 A. It seemed like the testimony was
17 concerned what happened in the southeast and how
18 that affected this marketplace and it was
19 complimented, then, by freight.

20 Q. And let's look at what proposal --
21 how Proposal 19 -- I'm sorry -- your Proposal 1
22 alternative, which is reflected in exhibits 19
23 and 20 would address that.

24 Let's look at Indiana, third page,

1 Proposal 20. You would address that by reducing
2 the price of Class I milk at Dean's plant in
3 Huntington County, Indiana, correct?

4 A. Yes.

5 Q. You would also address the problem
6 by reducing Class I cost of milk at Dean's plant
7 in Fulton County, Indiana, correct? And
8 Rochester plant?

9 A. Yes.

10 Q. Okay. And when you go up to
11 Michigan, you'd address the problem by reducing
12 the cost of Dean Foods' milk at -- all of your
13 plants in the state of Michigan, correct?

14 A. Yes.

15 Q. And the plant in Ewart, for
16 instance, Liberty Dairy, you would reduce the
17 cost of Class I milk there by 15 cents?

18 A. Yes.

19 Q. You would reduce Dean Foods' cost
20 for Class I milk at the Country Fresh plant in
21 Kent County by 15 cents?

22 A. Yes.

23 Q. And the price of Class I milk at
24 Dean Foods' Country Fresh plant in Genesee

1 County by a dime, correct?

2 A. Correct.

3 Q. And you'd reduce, what, Prairie
4 Farm's cost of milk at their plant in Calhoun
5 County by 15 cents?

6 A. Correct.

7 Q. And the cost of milk at Dean Foods'
8 Country Fresh plant in Wayne County by five
9 cents?

10 A. Correct.

11 Q. And you would -- by the way, I'm
12 sure Mr. Hitchell didn't intend really to
13 testify in error this morning, but Kroger has a
14 plant in Michigan, an Order 33 plant in,
15 Michigan, in Wayne County; is that correct?

16 A. Is there two questions there?

17 Q. I don't think so.

18 A. I thought you asked if Mr. -- if
19 Mr. Hitchell did not intend to testify or -- did
20 not --

21 Q. His testimony reflected they had
22 two plants in Order 33, and I think he
23 inadvertently forgot the Michigan plant.

24 A. His testimony said what he said,

1 but I agree that Kroger has a Michigan plant.

2 Q. And your proposal would reduce the
3 price of milk at that plant, the price of
4 Class I milk at that plant in Wayne County,
5 Michigan, correct?

6 A. Yes.

7 Q. By reducing Class I prices, you
8 would also be reducing the location value of
9 milk delivered to all plants in the state of
10 Michigan and in the portions of Indiana and Ohio
11 where you're reducing Class I prices, correct?

12 A. Yes.

13 Q. So that the dairy farmers in the
14 state of Michigan would not only experience a
15 reduction of 15 cents on -- let's talk about the
16 Liberty Dairy whatever, the dairy farms
17 delivering there would not only experience a
18 drop in 15 cents in the Class I value, which is
19 what Dean would be experiencing, but they'd
20 also -- they would have their location value
21 dropped 15 cents in all classes of milk,
22 correct?

23 A. That would be the correct -- that
24 would be the implication for the proposal.

1 Q. That's how your proposal would
2 work?

3 A. Yes.

4 Q. And all diversions in the state of
5 Michigan and the counties where you're reducing
6 prices would be reduced in their value as well?

7 A. That's correct.

8 Q. By a nickel, a dime or 15 cents,
9 correct?

10 A. That's correct.

11 Q. And are you suggesting this would
12 solve the problem?

13 A. It's a step towards solving the
14 problem. Candidly, I've not had the time to do
15 the analysis to see if this matches up with the
16 proponent's example. The logic of this was
17 we've got extreme surplus. It's inverse.

18 Q. You want to -- you've got -- the
19 logic of it was what again?

20 A. You've got an extreme surplus.

21 Q. You're trying to reduce the
22 production of milk in the state of Michigan and
23 these other counties while you're dropping the
24 prices; is that it?

1 A. I'm not sure it's going to reduce
2 it. It would probably slow the rate of growth.

3 Q. And that's your objective?

4 A. It's responding to -- trying to
5 stay consistent with the Secretary's policy in
6 establishing differentials that it was a
7 recognition of supply and demand and adjust the
8 differential, the modern supply and demand.

9 Q. And that would assist in covering
10 the cost of milk deliveries to Cincinnati in
11 exactly what fashion?

12 A. There was discussion earlier today
13 about the local movement of milk, and in my
14 testimony, the value of milk at location. And
15 so if the alternative option is more attractive
16 or less attractive, depending on what two basis
17 are going to be compared, you either motivate
18 milk to move or motivate milk to stay.

19 Q. And therefore by motivating -- by
20 dropping the price in Michigan, you'd be trying
21 to push the milk south?

22 A. Yes.

23 Q. On the same trucks that use the
24 same diesel fuel that know what the cost is,

1 correct?

2 A. Coming in from the same farms that
3 are growing at pretty significant pace.

4 Q. Now, by increasing the -- by
5 lowering the differentials by a dime or 15 cents
6 in Michigan, you would have -- the differential
7 would now be what, a \$1.70 or \$1.65 in Michigan
8 and northern Indiana?

9 A. Actually, you'd have \$1.75, \$1.70,
10 and \$1.65 depending -- I believe in all these
11 regions, depending on whether it's a nickel,
12 dime or 15 cent change.

13 Q. Okay. Have you considered the
14 consequences on competition with your
15 competitors to the south by reducing your
16 Class I prices in those areas?

17 A. They'll be some risk of unintended
18 consequences. Part of the reason that the
19 proposal is as it is, is try to get as isolated
20 as possible in the Southeast. The idea was to
21 go to Miami. The interesting thing about Miami
22 is there's no competition south, east, west;
23 it's all to the north. So you can figure
24 competition rather simplistically. But as you

1 move north, you begin to get competition from
2 four directions.

3 When you get to northern Michigan,
4 you get to the point where competition is south.
5 So it's sort of the opposite end of the pole and
6 work your way back down.

7 So I tried to stay as centralized
8 in the order as possible so as to minimize
9 disruption outside the order and hopefully make
10 a nickel changes between zones as opposed to 20
11 and greater changes between zones to help
12 minimize the disruption of Class I movement.

13 Q. You were provided by the EFA a copy
14 of our proposal and all the supporting
15 information at the time or within a day or two
16 after it was submitted USDA, were you not?

17 A. I went back in my e-mail, and if I
18 recall correctly, the date stamp that I have of
19 sort of coming in-house was the 10th of June.

20 Q. And that --

21 A. Excuse me. That was not the full
22 proposal. That was merely a map and some
23 talking points.

24 Q. Well, did Mr. English forward you

1 the proposal and all the exhibits?

2 A. I don't recall him --

3 MR. ENGLISH: I object to answering
4 that question. I don't think I had either.

5 BY MR. BESHORE:

6 Q. Did you access it when it went up
7 on the USDA Web site?

8 A. Not immediately.

9 MR. BESHORE: Those are all the
10 questions, I think I have, Your Honor, of
11 Mr. Kinser.

12 THE JUDGE: Very well.

13 Mr. Yale.

14 MR. YALE: I don't think I have any
15 questions, Your Honor.

16 THE JUDGE: Ms. Taylor.

17 CROSS-EXAMINATION

18 BY MR. TAYLOR:

19 Q. I think my colleague has some more
20 questions for you, but I want to look at
21 Exhibit 21.

22 A. Very well.

23 Q. In your second -- your second row
24 of grouped numbers, it starts with a column,

1 South, Northwest, Northeast, and the -- you have
2 the three columns: South, Northwest, and
3 Northeast. The first number under South is
4 175,418,955 pounds?

5 A. Yes.

6 Q. Okay. Could you just explain what
7 two numbers you added together to get that? I
8 know what one number you used. I have not
9 located the second number.

10 A. It was the result of two numbers,
11 the first number being the Class I pounds in the
12 South. So the 1,790,115, that is added to the
13 distributing plant pool receipts of 200,079,373
14 in the second line multiplied by the Class I
15 percent of the South.

16 Q. Allocated --

17 A. The Class I South up above, which
18 are the numbers that came off the MA report of
19 8678. And in that same logic as followed across
20 and down to get through the South, the
21 Northwest, Northeast Class I, II, and so on.

22 Q. Thank you.

23 Just so -- you might have mentioned
24 this earlier, but so we're clear, the

1 utilization for being below that, you said
2 utilization by class within each of the three
3 areas that have been outlined.

4 Where did those utilizations come
5 from?

6 A. Those are computed from the numbers
7 that we were just discussing how I arrived at.
8 So the 69 percent is 175 -- that's the
9 percent -- 175 million is the sum of Class I,
10 II, III, and IV for the South.

11 And just so the record is clear,
12 because I can't recall I perfectly explained,
13 but the other percentages that we were referring
14 to is as to how I arrived at the 175 million
15 that began this question is from the market
16 administrator data in Exhibit 7, Dean Foods'
17 Supplemental Request No. 3.

18 MS. TAYLOR: Thank you.

19 CROSS-EXAMINATION

20 BY MR. RICHMOND:

21 Q. Bill Richmond, U.S. EPA.

22 Looking at the same Exhibit 21,
23 looking at the class prices, I, II, III, IV, for
24 all the examples, it looks like you used June

1 2008 prices, and we were just wondering why you
2 chose that month.

3 A. That's an error.

4 Q. Okay.

5 A. When you do things quickly, things
6 can go wrong. So you're correct. So I guess to
7 the degree that price alignments change between
8 the classes from June -- you said 2008?

9 Q. Yes.

10 A. Then they were not updated in the
11 remaining illustrations.

12 Q. Okay. Thank you.

13 A bit more on the nickel changes,
14 and I think we understand the question you gave
15 as to try to minimize the, but can you expand a
16 bit more on the methodology as to how you
17 specifically came up with the changes?

18 A. If I haven't already, at this
19 point, I will agree my counterpart, Mr. Hollon
20 that sometimes it gets slightly artistic and has
21 a little more to do with colors than anything.

22 What I did, as unscientific as it
23 might sound, is focused on the milk supply and
24 what I believed to be significant points of

1 balancing. Knowing that that sort of -- one,
2 where the supply is at and, two, where supply
3 sort of last alternative is. And so -- if we
4 need to move milk where we have to get it to
5 move from.

6 So I started the change from the
7 South working north, really in Ohio, looking at
8 the strong production in Dane and Mercer County.
9 And then worked my way north, being cautious
10 about moving east and west because of
11 implications on other orders.

12 Seeing then a pretty significant
13 pocket of milk on the northern Ohio, Indiana,
14 southern Michigan border, I opted to take
15 another nickel at that point and hold that for
16 basically the lower tier of Michigan, again,
17 being cautious about the eastern and western
18 perimeters, and looking at also the milk supply
19 in Wayne and that it appears to be zero. And
20 then at that second tier, dropped it down,
21 seeing again a very strong milk supply in
22 Kalamazoo, Calhoun, and Jackson County, and held
23 that predominantly through the central part of
24 Michigan until then getting up north and seeing

1 a few counties without milk supply and opting to
2 then go basically up a nickel, and then at the
3 very most northern part going up another nickel.

4 Q. Okay. Thanks.

5 Again, to clarify for the record,
6 if you could, how would your proposal stand to
7 benefit marketing conditions improve order,
8 benefit dairy farmers given the changes that
9 need to be approved by dairy farmers in order
10 for these to work?

11 A. It probably depends on exactly
12 which dairy farmer you talk to. If you talk to
13 a dairy farmer that's in an area in, say,
14 central Indiana or Ohio, just beyond the
15 perimeter of this, and that assuming their
16 cooperative is pooling, revenues and costs, they
17 could benefit from this in that it will make it
18 more desirable to move milk South.

19 If you move, say, to the heart of
20 Michigan, you're talking about a situation where
21 a dairy farmer would be negatively impacted by
22 probably, pretty much, 15 cents. That would
23 probably not be a very popular outcome.

24 A flip side is that marketplace is

1 in surplus and continues to grow, so if some
2 signal is not sent that there's enough milk, you
3 are just going to continue to create a more and
4 more surplus market.

5 MR. RICHMOND: Okay. Thank you.

6 THE JUDGE: Mr. Stevens.

7 CROSS-EXAMINATION

8 BY MR. STEVENS:

9 Q. I'm interested in the section of
10 your statement where you talk about actions to
11 be considered. And I look at the "A" there,
12 which says "reverse decision of the southeast."

13 I heard the testimony. I'm just
14 trying to get it straight in my mind. Are you
15 requesting that on the basis of this record
16 that's being made here that the Secretary
17 reverse that decision that he made on the
18 Southeast order -- on the Southeast order?

19 A. Not solely on the basis of this
20 record, no. It's my understanding that you have
21 a tentative partial rule in place in the
22 Southeast, and there are comments that either
23 have been or will be filed, but that as the
24 Secretary looked at that, the Secretary also

1 acknowledges the fact that there has been a
2 proceeding where a root of the proceeding was
3 linked to the change that the Secretary made in
4 the Southeast. And, thereby, the Secretary can
5 conclude to change his tentative partial
6 decision in issuing -- I'm not sure if they'd
7 issue another tentative partial or a final
8 partial decision.

9 Q. All right. Now, so what in this
10 record are you pointing to the Secretary to do
11 what you're asking to be done? Specifically,
12 what in this record are you -- that you want the
13 Secretary to look at to consider as he considers
14 that ruling and the final as a result of that?

15 A. The second paragraph of page 3 in
16 statement of Elvin Hollon, Exhibit 14, the --
17 starting with the last-to-the-third line, "have
18 increased the difficulty in supplying the
19 southern tier of the fluid milk processing
20 plants in Federal Order 33."

21 Q. I just want to make sure that we're
22 on page 3 of Elvin's statement.

23 A. Correct. The second paragraph on
24 the page.

1 Q. Okay.

2 A. You can use the whole paragraph.

3 Q. Just give me a minute.

4 Well, okay. I don't understand. I
5 mean, I'm trying to understand what you're
6 saying. You're saying because Elvin said this
7 in this part of the statement, that that's the
8 basis why the Secretary in finally deciding the
9 issue for the Southeast should change the
10 decision that's been made up to this point?

11 A. I would link this with the existing
12 record in which there was testimony to the
13 effect that the actions taken -- the actions
14 proposed and now having been taken by the
15 Secretary would have impacts beyond the
16 immediate area. And I believe that this
17 proceeding, specifically the proponent's
18 underlying position on the proceeding, is an
19 outcome of the Secretary's action in the
20 Southeast.

21 Q. All right. That because of what
22 the Secretary has issued in the proceeding so
23 far in the Southeast, that this has engendered
24 another hearing about similar issues in another

1 marketing order?

2 A. That were even maybe predicted in
3 the hearing record that drove the very first
4 decision.

5 Q. All right. And so that, what you
6 just said, is a basis to change the decision in
7 the Southeast?

8 A. Yes.

9 Q. Is there anything else that you
10 would like the Secretary to know about that?

11 A. Not that isn't already in the
12 record.

13 Q. Okay. Now, I'm just trying to
14 get -- in the order of it, I thought I heard,
15 then, when you were further examined -- I'm not
16 sure I remember it the same way. It is your
17 position, your client's position, your position,
18 that you want this -- the proponent's proposal
19 denied?

20 A. Is your question is that my
21 position, or is that my most preferred position?

22 Q. Well, you did give an order, and I
23 certainly want to understand the order.

24 There are a number of alternatives

1 here, right?

2 A. Correct.

3 Q. Okay. And one of them -- one of
4 the things around this is reverse the decision
5 in the Southeast?

6 A. That's --

7 Q. I don't know if that's one of the
8 alternatives for this hearing certainly, but it
9 is involved in that other ruling?

10 A. Yes.

11 Q. Okay. Leaving that aside, then we
12 have some other alternatives, right?

13 A. Correct.

14 Q. You have alternative proposal?

15 A. Correct.

16 Q. And that you would like granted in
17 what situation?

18 A. Maybe let me restate and I hope I
19 restate this the same as I did with Mr. Baser,
20 so I'll depend on his memory to correct me if I
21 shuffle the deck. It's not my intent.

22 In order of preference, Dean Foods'
23 order of preference would be, first, "D," to
24 divide the Mideast into three-quarters, which

1 again, with Mr. Beshore agreed could not be done
2 on the basis of this hearing record.

3 The next would be "A," the
4 discussion we have just had about reversing the
5 decision in the Southeast so all of our
6 commentary stands on the Position No. 2 two.

7 Position No. 3 would be to deny the
8 request of the proponents.

9 Four to suspend the hearing until
10 more data is available.

11 And then our final and last
12 preferred option would be our alternative
13 proposal.

14 Q. Okay. Now, the fourth one that you
15 said, which is to have some time here, right,
16 to -- I don't want to misstate it here -- to
17 suspend the hearing until data is available to
18 understand the real implications of the
19 Southeast?

20 A. That's my fourth, yes.

21 Q. Okay. And that would be, like, let
22 the Southeast situation play out a little longer
23 to see how that is working; is that what you're
24 talking about? So you have more months, more

1 data, more months of experience of that data in
2 order --

3 A. Correct. Going back to the root
4 argument is that it has disrupted this
5 marketplace and yet this record is lacking in
6 solid numbers, in my opinion, of exactly the
7 disruption that it has had, and that we should
8 maybe just pause a moment, let time unfold, and
9 see what handlers do and allow market
10 administrators to gather that data and make it
11 available to this record for the Secretary to
12 then further think about the right outcome.

13 Q. Okay. And that's Southeast
14 information?

15 A. It's the interplay between
16 Southeast 5 and 7 and this marketing area.

17 Q. Okay. So, in other words, there
18 are issues in the Southeast which further data
19 would illustrate, give you more information on.
20 And there's also more data to be obtained in
21 those orders that you just mentioned, including
22 Order 33?

23 A. Correct.

24 Q. That would shed more light on where

1 we're going here and what needs to be done and
2 what should be done?

3 A. Correct.

4 MR. RICHMOND: That's all I have.
5 Thank you.

6 THE WITNESS: You're welcome.

7 THE JUDGE: Mr. Yale.

8 CROSS-EXAMINATION

9 BY MR. YALE:

10 Q. Benjamin Yale on behalf of select
11 milk producers and Continental Dairy Products.

12 I'm trying to kind of summarize
13 your proposal, particularly with the state of
14 Michigan and what you're saying. I think what
15 you're trying to suggest is that based upon the
16 current location of supplies of milk as compared
17 to the demand for milk in Order 33, it is less
18 of an even surface than what the current
19 differentials are providing.

20 A. I would agree with that.

21 Q. And the reason for that is that in
22 the Michigan area, the ratio of milk supplied to
23 population is much higher than it has been and
24 it's growing?

1 A. I would agree with that.

2 Q. Now, you also, I think in your
3 testimony, said something to the effect that --
4 and in summarizing the 1999 decision of the
5 Secretary on the Class I differentials, that
6 transportation -- or sometimes people call it --
7 there's a location value to Class I milk, right?

8 A. Correct.

9 Q. So, I mean, would you disagree that
10 in the same way that the Michigan ratio of cows
11 to people has seemed to flow in the positive
12 form in terms of cows, higher cows, in the
13 extreme Southeast, it's gone the other way in
14 terms of higher population and fewer milk
15 production, right?

16 A. Just to make sure we have the same
17 definition, extreme Southeast, you're thinking
18 about, say, Georgia, South Carolina?

19 Q. And Florida.

20 A. Florida.

21 Yes.

22 Q. Now, one of the things -- the other
23 part of that equation is the transportation, and
24 I don't think there's anybody that disagrees

1 that cost of transportation has gone up. I
2 mean, you don't make any contingent that
3 transportation costs are going down or --

4 A. No. I did agree that they had
5 increased.

6 Q. So assuming that there was no
7 difference in the ratio of milk to cows in each
8 of the areas, the angle at which that milk price
9 surface would tilt would have to become steeper
10 as the cost of transportation would go up, would
11 it not?

12 A. I believe that's true.

13 Q. So I think we clearly in the almost
14 ten years now since that surface has been
15 designed, forgetting for a moment the changes in
16 the Southeast, that there really has been a
17 change in at least two key factors that we
18 relate to the milk price surface in this area of
19 the country, right?

20 I mean, we have higher
21 transportation cost, and the ratio of cows to
22 people has shifted in the key areas in that
23 area, right?

24 A. I think there's probably few areas

1 in the country where that hasn't occurred.

2 Q. Okay. So I think you would agree
3 that a change in that pricing surface needs to
4 be made?

5 A. Yes.

6 Q. Okay. So I think, as I understand
7 what you're trying to say, is that we agree it
8 needs to be done, but we don't have enough data
9 to determine how to do it, right?

10 A. I would agree. And it's been our
11 position from the Southeast that the approach is
12 in error, and it's been a regionalized approach
13 as opposed to a national.

14 Q. And I think I asked this question
15 of an earlier witness. I believe you would
16 agree that it's the blend that moves the milk
17 and it's not the Class I differential; or not?

18 A. I would agree that it's a blend and
19 location that moves milk.

20 Q. So --

21 A. Let me sort of further clarify it,
22 relative to the milk's alternative. So it's not
23 a single comparison, but a -- it's a surface
24 comparison.

1 Q. All right. So, again, we have this
2 understanding there needs to be a change in the
3 price in surface, and your contention now as I
4 understand it is that it's not -- that we don't
5 have the data really yet to make that correct;
6 and, secondly, that it needs to be done on a
7 national as opposed to a regional basis, which
8 was done in the Southeast, right?

9 A. Correct.

10 Q. And I think you're also suggesting
11 that as part of that change in that pricing
12 structure is to change the actual orders that
13 are there so that the blend prices would change,
14 which might -- I think in your view might mean
15 less money that would have to be paid by
16 processors but more money to the milk -- the
17 people that would supply the milk to that
18 market?

19 A. May I state what I think you said
20 is slightly different; that while you can change
21 differentials and sort of location values of
22 milk, the true comparison in handling milk is
23 not only that information, but also a result in
24 blend price. And so to the degree you could

1 have fewer orders to create more pricing points,
2 it would improve the movement of milk, I would
3 agree with that.

4 Q. Now, does Dean Foods have a
5 position as -- well, let me back up.

6 You recall the '96 Farm Bill that
7 set up order reform that said the department
8 would have between 10 and 14 federal reviews?
9 Do you recall that?

10 A. I recall that that was the
11 directive that led to federal reform.

12 Q. Does Dean have a position whether
13 or not that 14 remains a cap in terms of the
14 number of milk orders that can be used today?

15 A. It's been talked about that it's
16 not in place today. It has expired.

17 Q. I guess this is just another -- a
18 more of a clarification question. I think
19 you've testified there's agreement there needs
20 to be some difference in the pricing scheme.

21 Do you disagree with what MEMA has
22 proposed? And I guess you'd disagree with what
23 SEMA proposed, because that's what arrived at
24 the Southeast hearing, right?

1 A. Correct.

2 Q. Of course the department has to
3 decide if it needs to do anything. And if it
4 does need to do anything, what it needs to do at
5 some point, it's the Secretary's decision,
6 right?

7 A. That's correct.

8 Q. Now, as I understand -- let me ask
9 you this. Do you recall whether or not
10 Mr. Hollon in his testimony suggested this was a
11 permanent or a temporary fix?

12 A. It's my belief -- though, now that
13 you're asking I'm not sure of Mr. Hollon's
14 testimony, but in reviewing the notice of
15 hearing, at least in the introductory paragraph,
16 the word "temporary" is used.

17 Q. So with all that in mind, is there
18 a reason that knowing that we have -- and I
19 think my clients, I can represent, would agree
20 that we need to relook at the pricing surface,
21 but maybe we're not quite ready to do that,
22 unfortunately not ready to do that -- that there
23 still is a need because of the increased
24 transportation costs that some temporary bridge

1 needs to be made between what we had out of
2 order reform and where we want to go with maybe
3 better reform that we can't continue under the
4 present thing, that therefore a temporary fix
5 could be lived with for a short period of time
6 as we move into that next? Or is it better off
7 just to stay where we're at and not have a fix
8 and try to fix it all at once? That's my
9 question. Does that make sense?

10 A. I believe that temporary fixes are
11 not the way to go.

12 Q. Has Dean Foods done anything in
13 preparing to he propose a total national fix?

14 A. I believe Mr. Hollon's testimony
15 included comments to the effect that a study is
16 being done in a partnership between USDA dairy
17 programs and Cornell, and we at least are
18 operating under the assumption that that is in
19 fact true, and that at some point data will be
20 forthcoming to help fill in what we're all
21 guessing at today.

22 MR. YALE: I have no other
23 questions.

24 THE JUDGE: Mr. Beshore.

1 CROSS-EXAMINATION

2 BY MR. BESHORE:

3 Q. Mr. Kinser, in response to either
4 Ms. Taylor -- or was it Mr. Richmond -- you
5 indicated that the prices used on Exhibit 21
6 were for one month, and I think you said that it
7 was June of 2008; is that correct?

8 A. I thought that's what Mr. Richmond
9 claimed in his question, and I don't have reason
10 to disagree with that.

11 Q. Well, in any event, you used the
12 same set of prices for every month, did you not?

13 A. That is true.

14 Q. And let's look at those prices.
15 They -- your Class I mover -- and I'm on January
16 of '07. Your Class I mover is 18.18, correct?
17 And under the South -- well, it's all the same
18 in all of them. Let's look at the southern pool
19 set of prices. 18.18, correct?

20 A. Yes.

21 Q. And your average Class I
22 differential in your southern pool is 2.08. So
23 your average Class I price in the South is
24 20.26, correct?

1 A. Correct.

2 Q. And your Class III price for that
3 is 20.25, correct?

4 A. Correct.

5 Q. A very unusual price relationship;
6 would you not agree?

7 A. I would agree.

8 Q. And, in fact, if that is June 2008,
9 that was a month in which the PPD in Order 33
10 was negative 1.29. And it's likely to be that
11 given these kinds of price relationships,
12 wouldn't you agree?

13 A. Yes.

14 Q. In what way are those prices
15 representative prices to use in determining
16 hypothetical blend prices in Order 33?

17 Are these hypothetical new split
18 pools in Order 33?

19 A. They are going to help -- they are
20 not a good way of illustrating the outcomes.

21 Q. So shouldn't we do for all the rest
22 of the months what you did with November of '07
23 where you had an error and just strike them?

24 A. I would find it difficult to

1 disagree with that.

2 MR. BESHORE: Thank you.

3 THE JUDGE: Mr. English.

4 REDIRECT-EXAMINATION

5 BY MR. ENGLISH:

6 Q. Assuming that the June data is the
7 June data, that chart is correct, correct?

8 A. Yes.

9 Q. And if you altered the prices for
10 other months, the price relationship may change
11 based upon the Class III price, which in most
12 months it's going to be lower, correct?

13 A. Correct.

14 Q. If the Class III is lower and
15 there's more Class III in the Northwest,
16 wouldn't the difference for other months
17 actually be higher than the June 2008
18 difference?

19 A. That's what I would expect.

20 Q. So that the June 2008 number of an
21 80 cent blend price difference between South and
22 Northwest ought to be the smallest difference,
23 assuming the volumes don't alter?

24 A. I would agree with that.

1 Q. And for purpose of briefing, one
2 can put in the actual numbers and come up with
3 actual results, correct?

4 A. Absolutely.

5 MR. ENGLISH: I have nothing
6 further.

7 THE JUDGE: Other questions of
8 Mr. Kinser?

9 Very well, Mr. Kinser, you may step
10 down.

11 THE JUDGE: Mr. English, do you
12 want to renew your motions?

13 MR. ENGLISH: Two motions. We move
14 the admission of exhibits 18 through 21. And
15 then I have the second motion, which may be even
16 more articulated by the fact that given the fact
17 that we do exhibits of this nature overnight
18 when you don't have testimony ahead of time that
19 it comes to this kind of thing, that we continue
20 to believe that there's an issue here with
21 respect to let's continue today, let's not stop
22 obviously, but we think and we can address this
23 at the end of the day, if necessary, that we
24 ought to keep this hearing open to get data.

1 THE JUDGE: Let's wait until the
2 end of the day.

3 Do you have another witness,
4 Mr. English?

5 MR. ENGLISH: Were the exhibits
6 admitted?

7 (Deposition Exhibits 18 through 21
8 were admitted.)

9 THE JUDGE: I'm sorry?

10 MR. ENGLISH: Were the exhibits
11 admitted?

12 THE JUDGE: Yes.

13 I'm sorry, Mr. Beshore, did I cut
14 you off?

15 Mr. Beshore: I wasn't sure if you
16 were going to hear comments on the motion to
17 keep the motions open at some point.

18 THE JUDGE: I told him we would
19 continue. In other words at the end of the
20 hearing --

21 MR. BESHORE: Okay.

22 THE JUDGE: -- we can discuss that.

23 MR. YALE: We will continue to
24 continue that discussion.

1 THE JUDGE: I don't see any purpose
2 in adjourning at this point.

3 MR. BESHORE: That's fine.

4 MR. ENGLISH: The next witness
5 would be Mr. Carl Conover.

6 (*NOTE: The following statement is
7 a verbatim recordation of what was read into the
8 record, not necessarily an exact reflection of
9 the written statement provided by the witness.)

10 CARL CONOVER

11 having been duly sworn, was
12 examined and testified as follows:

13 THE JUDGE: Please be seated. Tell
14 us your name and spell it for the hearing
15 reporter.

16 THE WITNESS: My name is Carl
17 Conover, C-o-n-o-v-e-r.

18 MR. ENGLISH: As before, I've
19 provided stapled copies for the court reporter
20 and for Your Honor and for the table of USDA.
21 Otherwise, this two-page document is copied on
22 the front and back for copies on the back. And,
23 I'm sorry, you marked it as Exhibit 22?

24 (Exhibit 22 was marked for purposed

1 of identification.

2 THE JUDGE: 22, Mr. English.

3 DIRECT EXAMINATION

4 BY MR. ENGLISH:

5 Q. Good afternoon, Mr. Conover.

6 A. Good afternoon.

7 Q. I think it's been now a short
8 hiatus of some kind since you last testified at
9 a federal rule hearing.

10 A. Three or four years, I believe.

11 Q. But it would be fair to say that
12 this is not your first appearance in a federal
13 proceeding?

14 A. I'd say a dozens of these hearings
15 I've testified in.

16 Q. When were you first employed --
17 strike that.

18 Have you ever been employed by the
19 Department of Agricultural in the federal
20 government program?

21 A. Yes, I worked in the -- was
22 employed by the Department of Agricultural in
23 1950. I was hired right here in Cincinnati.
24 Went to work up in the Tri-State market.

1 Q. So you have sort of a local
2 connection to this particular proceeding?

3 A. My home is 30 miles north where
4 we're sitting here, original home was.

5 Q. In fact, I think you were telling
6 me something about disorderly market when you
7 were very young has something --

8 A. I grew up on a dairy farm up there,
9 and I well recall in the late '30s, I would have
10 been ten years old or twelve, something like
11 that, and two times our milk was hauled down
12 here to Fresh Farm Dairy was dumped before it
13 got to the plant. And that was because of a
14 conflict between the cooperatives that were
15 trying to organize and the independents that
16 were trying to deliver the milk.

17 That's disorderly marketing to me.
18 It was to us anyway, because we didn't get paid
19 for that milk and it was a tough nut.

20 Q. So you began working for USDA in
21 1950, and it would be fair to say that you've
22 occupied a number of positions in various market
23 administrator's offices from 1950 to
24 1960-something?

1 A. Yes.

2 Q. 1961.

3 Did you have any office in 1965?

4 A. The Tri-State office, Puget Sound
5 office and Baltimore office into the
6 degradation.

7 Q. And in the dairy farms, what was
8 your final position for your --

9 A. I was chief of order enforcement
10 branch.

11 Q. You retired when?

12 A. In 1980.

13 Q. And since 1980, you've been
14 involved in the number of these proceedings and
15 testified as an expert witness?

16 A. I have.

17 MR. ENGLISH: I proffer Mr. Conover
18 as an expert in federal order program.

19 THE JUDGE: So noted.

20 BY MR. ENGLISH:

21 Q. Mr. Conover, you have a fairly
22 short statement. Would you proceed to give it,
23 please, which is Exhibit 22.

24 A. Proponents in their request to the

1 Department for a price increase in the southern
2 portions of the marketing area state that market
3 data shows a sufficient supply of milk to supply
4 the Class I demand for the market. Exhibit 12,
5 page 2 and 4. This would appear to be an
6 understatement since the Class I use in the
7 market from June 2008 was 39.3 percent of the
8 market supply and 36.4 percent for July of 2008.
9 Official notice requested of Order 33 data
10 available on the MA Web site.

11 What this suggests is that if the
12 milk is available in the market overall, but not
13 in the southern part, that the defined marketing
14 area simply is too large for the market pooling
15 to function as it should.

16 The added value from the Class I
17 use in the market's southern areas is being
18 distributed to producers whose milk is
19 unavailable to those plants. Participation in a
20 market-wide pool should place a burden on
21 producers to supply the market's Class I use.
22 If the blend price at the fluid plant is allowed
23 to reflect more of the Class I use in the plant,
24 the producers would readily meet this burden.

1 A market where the total milk in
2 the market relates to fluid plant needs would
3 allow the fluid plant to attract milk with a
4 higher blend price. In fact, it is differences
5 in the blend prices between orders that largely
6 support movement of milk from where it is
7 located to where it is needed. Such a system
8 accommodates the mandate of the act,
9 Agricultural Marketing Agreement Act, to protect
10 the interest of the consumer and does not
11 require raising Class I price as proposed.
12 7 USC Section 602(2).

13 A proposal such as this one that
14 clearly ignores the direction in the act to
15 protect the interest of consumers, when a less
16 costly method is available to attract milk to
17 these fluid plants, should not and indeed cannot
18 be adopted.

19 I respectfully submit that USDA's
20 recent decision to approach the problem
21 piecemeal without considering less costly and
22 burdensome alternatives, while not improper or
23 illegal in itself, is leading to adverse and
24 unnecessary results. The cooperative proponents

1 make an excellent case and point. It is just
2 that the evidence they present and the point
3 that is made is not the one they intended.

4 A more proper solution to the
5 problem, if there is indeed a problem with
6 attracting milk to the southern region of the
7 Mideast Marketing Order, is to accept the
8 proponent's own conclusion that this market is
9 really three sub regions; that is, it is readily
10 apparent that it is in reality three different
11 markets.

12 If the southern region were a
13 separate marketing order from other regions, I
14 have no doubt that the resulting blend price
15 differences would drive milk to that market
16 without any further need for Class I price
17 increases.

18 It is for this reason that I
19 conclude that the proposal is inconsistent with
20 7 USC section 602(2).

21 Price alignment is of course
22 important, but not as important under the
23 authorization in the Agricultural Marketing
24 Agreement Act as to set a price that is no

1 higher than necessary to attract an adequate
2 supply of milk. Nor should the price be set so
3 high as to create a trade barrier.

4 It is, in my considered opinion
5 after many years' involvement with this program,
6 that an adequate supply of milk for this market
7 exists since less than 40 percent of the total
8 milk distributed as fluid milk.

9 Moreover, USDA adopted a nationally
10 coordinated Class I price surface over eight
11 years ago. The recent changes in that price
12 surface in the southeastern markets was an
13 unjustified abandonment of that pricing surface.
14 The new proposal here is even more so in that
15 the justification is different. There is no
16 AMMA supported justification in this market to
17 raise the price to attract more milk to the
18 market. The milk is already here. The market
19 needs a system that will allow the existing
20 price structure to attract the milk to where it
21 is needed.

22 The proposal doesn't accomplish
23 this purpose. It should be denied.

24 That is my prepared statement.

1 Q. Mr. Conover, at one point you
2 mentioned cooperative make an excellent case in
3 point. What do you mean by that?

4 A. Well, I think they broke --
5 demonstrate that the existing market readily
6 separates into a different order, that's
7 different orders, and that different orders is
8 what I'm suggesting there, is that is the proper
9 solution here.

10 Q. And of course you recognize, as did
11 the previous witness, that that proposal is not
12 presently open for consideration in this present
13 hearing; is that correct?

14 A. Surely.

15 MR. ENGLISH: I have no further
16 questions of this witness. He is available for
17 cross-examination.

18 THE JUDGE: It's right at 3:00.
19 Let's take a 10-minute break and please be back
20 at 10 minutes after 3:00.

21 (Thereupon, a recess was taken.)

22 THE JUDGE: We'll get started if
23 you will get back in your seats.

24 Mr. Beshore, are you ready?

1 MR. BESHORE: Thank you, Your
2 Honor.

3 CROSS-EXAMINATION

4 BY MR. BESHORE:

5 Q. Good afternoon, Carl.

6 A. Good afternoon, Mr. Beshore.

7 Q. We haven't seen each other in a
8 hearing for a while.

9 A. It's been a while.

10 Q. But I guess since we're on the
11 record, I would like to -- would like to just
12 note that 34 years ago or so, you trained a
13 young, shaggy-haired law school student in the
14 fine workings of federal milk orders, and that
15 he appreciated it then and still appreciates it
16 today and will well after -- will for as long as
17 he's around.

18 A. I thank you. And I would say that
19 that student was one of the easiest ones to
20 train that I had occasion to work with.

21 Q. Thank you.

22 One of the things that I recall, if
23 my memory serves me well, is that at that time,
24 you pointed out and made clear that the first

1 purpose of the Agricultural Marketing Agreement
2 Act was to preserve the interests of the dairy
3 farmers in the United States in terms of their
4 milk marketing in ordering markets, correct?

5 A. Yes. That's the primary reason the
6 act was passed, I think, yes.

7 Q. And that remains the case today?

8 A. True.

9 MR. BESHORE: That's all I have.

10 Thank you.

11 MR. ENGLISH: I have nothing.

12 THE JUDGE: Ms. Taylor.

13 CROSS-EXAMINATION

14 BY MR. TAYLOR:

15 Q. Good afternoon Mr. Conover.

16 A. Good afternoon.

17 Q. If I could summarize your
18 statement, you're saying that there is milk
19 available to supply the plants in the southern
20 region of the Mideast order?

21 A. I said there is milk available in
22 the order as it exists.

23 Q. Exactly. And by making -- you
24 would argue, then, by making the southern region

1 its own separate order, its blend price would
2 increase and therefore the milk would then be
3 attracted down?

4 A. Yes, exactly.

5 Q. But by increasing the differentials
6 in the southern region, wouldn't the blend price
7 at that plant location also increase by 20
8 cents, 30 cents, whatever it is to then attract
9 the milk to those plants also?

10 A. Yes, that would do that. But I say
11 it isn't necessary to do that to get the milk
12 attracted. If you can have a system that the
13 blend price for that area raises it without
14 increasing the class prices so consumers will
15 have to pay more, it would be a more -- it
16 would fit with the direction of the Agricultural
17 Marketing Agreement Act better.

18 Q. Would you agree with previous
19 testimony that the cost of transporting -- the
20 cost of fuel, the cost of transporting milk has
21 increased, though, over the past --

22 A. No question that it has.

23 MS. TAYLOR: That's it. Thank you
24 very much.

1 THE JUDGE: Other questions by the
2 department? Other questions?

3 Thank you, Mr. Conover. You may
4 step down.

5 THE WITNESS: Thank you.

6 THE JUDGE: Mr. English, are you
7 presenting the last witness?

8 MR. ENGLISH: No, I think there's
9 two witnesses, because as I said this morning,
10 there's another witness who is not -- I'm not
11 representing. I may assist, but I'm not
12 representing, but the next witness is Michael
13 Meyer. And then after that, there's Patty
14 Stroup from Nestle.

15 THE JUDGE: Very well.

16 MR. ENGLISH: So I have a
17 statement --

18 MR. RICHMOND: May I ask, has this
19 document been marked?

20 MR. ENGLISH: I don't think it has
21 been marked. Can we have it marked.

22 THE JUDGE: Exhibit 22 should be
23 admitted into evidence at this time.

24 Thank you, Mr. Stevens.

1 (Deposition Exhibit 22 was
2 admitted.)

3 MR. ENGLISH: There is a written
4 prepared statement for Mr. Meyer.

5 MICHAEL MEYER

6 having been duly sworn, was
7 examined and testified as follows:

8 THE JUDGE: Tell us your name and
9 spell your name for the hearing reporter.

10 THE WITNESS: Michael Meyer,
11 M-e-y-e-r.

12 THE JUDGE: This will be Exhibit
13 23.

14 (NOTE: The following statement is
15 a verbatim recordation of what was read into the
16 record, not necessarily an exact reflection of
17 the written statement provided by the witness.)

18 (Exhibit 23 was marked for
19 identification.)

20 DIRECT EXAMINATION

21 BY MR. ENGLISH:

22 Q. Charles English for National Dairy
23 Order. Good afternoon, Mr. Meyer.

24 A. Good afternoon.

1 Q. Have you ever appeared before one
2 of these federal hearings?

3 A. I have not.

4 Q. Got an education over the last two
5 days?

6 A. A little bit.

7 Q. Have you been here the entire time?

8 A. Yes, I have.

9 Q. And Meyer Dairy itself has not
10 often appeared at federal order hearings?

11 A. No.

12 Q. It appears the last time would have
13 been 1986 when your cousin David Meyer testified
14 at the 1985 Farm Bill?

15 A. That's correct.

16 Q. You have a prepared statement?

17 A. Yes, I do.

18 Q. And within the prepared statement,
19 you have a couple of tables?

20 A. Yes.

21 MR. ENGLISH: Your Honor, we would
22 propose not reading the tables in, but
23 especially since it's an exhibit, have them
24 brought into the record as we have done with

1 other tables.

2 THE JUDGE: It will be brought in
3 as if read. Thank you.

4 (*NOTE: The following statement is
5 a verbatim recodation of what was read into the
6 record, not necessarily an exact reflection of
7 the written statement provided by the witness.)

8 BY MR. ENGLISH:

9 Q. Mr. Meyer, would you proceed with
10 your prepared statement?

11 A. Yes. Thank you.

12 Good afternoon, my name is Michael
13 Meyer. I'm employed by Meyer Dairy as general
14 manager.

15 Meyer Dairy is one of two
16 distributing plants that are owned and operated
17 by National Dairy that are owned and operated by
18 National Dairy Holdings that are regulated by
19 Federal Order 33.

20 Meyer Dairy is the only national
21 holdings plant that is directly impacted by this
22 proposal to raise Class I differentials in the
23 Mideast order. I appear before you today to
24 oppose Proposal 1 to raise Class I differentials

1 in the southern portion of the Mideast order.

2 We have not had trouble in the
3 past, nor are we having trouble since changes to
4 orders 5 and 7 attracting milk to our plant.
5 However, if in the opinion of the USDA, there is
6 a need to provide further incentive for milk to
7 move from the surplus areas of northern Indian,
8 northern Ohio, and Michigan, to deficit areas of
9 the southern portions of the marketing area, we
10 would support the Dean Foods' alternative
11 proposal to lower Class I differentials in the
12 northern portions of the Mideast order as it
13 pertained -- as a means of providing that
14 additional incentive.

15 The proponent's requested changes
16 would have the impact of raising our milk cost
17 anywhere from just over two cents per gallon to
18 nearly three and a half cents a gallon relative
19 to several of our major competitors. In some
20 areas, proposal would increase our competitor's
21 cost as well, just not the degree that ours
22 would be increased. In some cases, our
23 competitors would see no increase at all as a
24 result of the proposal being considered.

1 If the proposal is adopted, we
2 would be forced to choose between eating the
3 difference in cost and losing business to
4 competitors, thereby forcing our per unit
5 conversion cost higher in the business we were
6 able to retain. We routinely see bids won or
7 lost based on price differences of tenths of one
8 cent. The disadvantages of multiple cents would
9 without question be devastating to our company.

10 As was stated in the proponent's
11 testimony, most of the increase in population in
12 the marketing area is being seen in cities such
13 as Columbus, Ohio, and Indianapolis, Indiana.
14 Consequently, the focus of our marketing area
15 has been in Cincinnati and north toward Columbus
16 and Indianapolis. As a result, we have not been
17 beneficiaries of the recent changes to
18 differentials of federal orders 5 and 7.

19 There's been a lot of discussion at
20 this hearing about how conditions have changed
21 since the current Class I surface -- price
22 surface was implemented in 2000 and that those
23 changes necessitate higher Class I prices in
24 parts of the Mideast Federal Order. While it is

1 clear that fuel and transportation costs have
2 risen dramatically since 2000 and case can be
3 made that additional revenue in the distension
4 marketing relative to the surplus supply areas
5 would help to cover those higher costs, it is
6 our opinion that there are better solutions.

7 Over the period 2000 to 2008, we
8 have seen packaged sales of fluid milk in the
9 Mideast Federal Order decline by 8.8 percent in
10 spite of population growths referenced by the
11 proponents while some milk production in Ohio,
12 Indiana and Michigan, has risen by 28 percent
13 over the same period.

14 It is clear that the producer milk
15 prices in the area are sufficiently high to
16 encourage surplus milk production while the
17 prevailing Class I prices are sufficiently high
18 to discourage demand.

19 Q. And that's where two tables are --

20 A. Correct.

21 Q. -- that should come into the
22 record. But it's been referenced immediately to
23 the prior paragraph, correct, sir?

24 A. Yes.

1 I am clearly not an expert in the
2 inner workings of the federal order system, but
3 trying to solve the problem by charging
4 consumers higher prices and thereby raising
5 producer prices is unnecessarily generous to
6 producers and unnecessarily penalizes consumers.

7 Since it is clear that additional
8 revenue is not necessary to ensure sufficient
9 milk supply, achieving the proper price
10 relationship to encourage the milk to move South
11 could be better accomplished by lowering
12 differentials in the surplus supply area and not
13 forcing higher prices on the consumers in the
14 southern metropolitan markets.

15 The optimal solution to the problem
16 would be to accept the proponent's claim that
17 the various areas of Mideast order have
18 dramatically different conditions and break the
19 orders into three separate orders and let the
20 difference and blend price attract milk to the
21 deficit areas.

22 While we only have a few weeks of
23 data to evaluate the impact of raising Class I
24 differentials in federal orders 5, 6, and 7, the

1 data that's available is compelling. The eight
2 weeks immediately following the June 1 price
3 changes, IRI scan data shows an alarming
4 negative correlation between the differential
5 increases and fluid milk sales.

6 When looking at major markets in
7 the areas affected by the previous decision and
8 markets in the Mideast Federal Order, sales in
9 Atlanta and Miami, areas that are the largest
10 differential increases, were down 8.5 percent
11 and 7.9 percent respectively. Louisville was
12 down 3.7 percent. Cincinnati was down 1.4
13 percent. And Detroit was actually 3.7 percent
14 higher over the same eight-week period.

15 While it is admittedly only eight
16 weeks of data, the implication seem clear.
17 Erosion in sales unfortunately tracts rather
18 closely with the level of increase in Class I
19 differential.

20 Given that all the federal orders
21 5, 6, and 7 are deficit areas, the USDA may have
22 felt that there was no alternative to raising
23 Class I prices. That is clearly not the case in
24 the Mideast order. There is an abundance of

1 milk in the marketing area, and raising Class I
2 differentials is unnecessary and would only lead
3 to more rapidly declining Class I sales.

4 In closing, we ask for
5 consideration by the Secretary to suspend this
6 hearing process until there is more time allowed
7 to better understand any and all proposals
8 regarding this matter.

9 Thank you.

10 Q. Mr. Meyer, in one point in your
11 testimony, you referenced June 1 price change,
12 but the price changes were May 1.

13 A. Excuse me. I stand corrected.

14 Q. But the weeks that were run were
15 June and July?

16 A. Yes.

17 Q. So the eight weeks were run from
18 June?

19 A. Yes.

20 Q. And that was comparing the eight
21 weeks for June 1's line for 2008 compared to
22 2007, correct?

23 A. That is correct.

24 Q. Now, the IRI data does not include

1 some data, does it?

2 A. That is correct.

3 Q. What data does it not include?

4 A. It does not include Wal-Mart.

5 Q. But even though it does not include
6 Wal-Mart, given the fact that you have compared
7 various markets, what did you conclude based
8 upon that?

9 A. Comparing the data in these
10 markets, and again it doesn't include Wal-Mart,
11 but it gives you a pretty good picture from the
12 South to this current area where we're at right
13 now into the north and Michigan what the impact
14 was more to the South when those differential
15 prices were changed on the consumption of fluid
16 milk.

17 Q. And have you, while preparing your
18 testimony and especially today, thought about
19 any other particular consequences of this
20 proposal that may not have been addressed yet?

21 A. Yeah. There was a couple things
22 that hit me. Truthfully, two things this
23 morning as I was on my way here to this hearing
24 in speaking to my sales manager, he updated me

1 on a school bid from last week. Actually, it
2 was two school bids. And we gained a school
3 system by the difference of .006 per half-pint.
4 Okay? We didn't gain a school system by a
5 difference of .0027 per half-pint. Okay?

6 So when you sit and say, in my
7 case -- I think Mr. Carson referred to this in
8 his testimony, pennies are beyond acceptable
9 with this type of change, and I cite those two
10 examples of what the impact is in our business.

11 I kind of took that thought and
12 followed that through this morning when I got
13 here. And if my competitive disadvantage, as an
14 example, was two cents a gallon, based on the
15 amount of school volume that we run on a weekly
16 basis during the school year over a 36-week
17 school period, that additional cost back to the
18 federal government -- and I say the federal
19 government because they are, in essence, who is
20 paying for the milk to the schools -- is almost
21 \$200,000 on an annual basis. Okay?

22 The other part that struck me this
23 morning, and Mr. Carson referred to it, a lot of
24 our business, we're not a supplier of Wal-Mart,

1 private label. We have our product in Wal-Mart
2 due to our brand recognition. We're not
3 providing Wal-Mart. A lot of our business is
4 independent business. And a lot of what -- in
5 many markets where our milk is sold is through
6 WIC vouchers.

7 So, again, this added cost where I
8 will be able to pass it on to, in essence, is
9 going to be reflected back to our federal
10 government. And you kind of sit here -- after
11 both of those things came up this morning, you
12 kind of sit and scratch your head, you know,
13 where does this thing wash out when it's all
14 said and done.

15 MR. ENGLISH: I have no further
16 questions of the witness.

17 I move admission of the exhibit,
18 and he's available for cross-examination.

19 THE JUDGE: Exhibit 23 will be
20 admitted.

21 (Deposition Exhibit 23 was
22 admitted.)

23 THE JUDGE: Cross-examination,
24 Mr. Beshore.

1 CROSS-EXAMINATION

2 BY MR. BESHORE:

3 Q. Good afternoon.

4 A. Good afternoon.

5 Q. With respect to the IRI data,
6 you're not prepared to provide any of the actual
7 data for this record, I take it?

8 A. No.

9 Q. IRI doesn't allow you to do that;
10 is that correct?

11 A. That's correct.

12 Q. So you've got to pay for that data,
13 right?

14 A. Uh-huh.

15 Q. Is that a "yes"?

16 A. Yes, that's correct.

17 Q. And you have given us some selected
18 locations and selected time periods, et cetera.
19 Does the data that you reviewed have data for
20 lots of other locations and time periods?

21 A. You know, when that data was
22 pooled, it was really pooled to try to reflect
23 larger markets or cities to use as examples. I
24 by no means am an expert on IRI data and how

1 it's pulled. You can pull it in many different
2 ways and different markets. This particular
3 data was pulled by those particular markets.

4 Q. Did you pull that data or did
5 somebody do it for you?

6 A. No, I had somebody do it for me.

7 Q. By the way, the difference in
8 Class I price, is this a price lag between the
9 time that in some cases at least between what
10 you charged for your product and what your raw
11 product costs are?

12 A. In my case, the far majority of it
13 is not. There is some lag in some cases. We do
14 not have much lag, if any. It would be less
15 than 10 percent of my business today.

16 Q. So is most of your business on,
17 let's say, bid business that goes over a period
18 of time, it is based on price escalator clauses?

19 A. Yes.

20 Q. And raw milk costs, the price
21 escalator is based on federal order price, I
22 take it?

23 A. That is correct. An example would
24 be this Friday, that price change will go into

1 effect September 1.

2 Q. So the schools you were bidding on
3 this year, you were bidding on a cost-plus basis
4 in the sense of raw milk cost as established by
5 the national milk administrator and then plus
6 some amount?

7 A. Yes.

8 Q. Okay. So regardless of what the --
9 what is established from this hearing, the
10 minimum federal order price is going to be
11 factored toward into those bids regardless?

12 A. I totally agree with you. The
13 challenge I'm going to have, though, if my
14 cost -- if I increase or have a greater
15 disadvantage over other competitors, we serve
16 schools in basically five states. If my
17 disadvantage is greater between them, granted
18 the price changes every month, but I'm going to
19 end up with a greater disadvantage than where I
20 stand.

21 Q. What are the five states that you
22 serve?

23 A. Ohio, Kentucky -- Ohio, Kentucky,
24 Indiana, Michigan, and a little bit of West

1 Virginia.

2 Q. When you're bidding on school
3 business in Kentucky, of course, you've had some
4 competitive gain with respect to your
5 competitors that are physically located down in
6 Kentucky by virtue of the recent decisions,
7 correct?

8 A. Well, less than 2 percent of my
9 business is to the south. Basically, I really
10 don't go any further by description than
11 northern Kentucky. Okay. It's just really not
12 advantageous to me, where to the north is where
13 the population and the growth is. So the South
14 really isn't -- I haven't really picked up any
15 type of benefit with the changes that were made
16 to the South.

17 Q. What portion of your school
18 business is in the state of Michigan?

19 A. Very small amount, very small
20 amount. A couple percent, maybe less than 2
21 percent.

22 Q. On whatever portion you have up
23 there, you're bidding against the Michigan
24 plants, I take it?

1 A. That would be correct.

2 Q. Which -- and you've been able to
3 get some business and keep some business, I
4 would assume?

5 A. It's one particular system.

6 Q. And in spite of the fact that you
7 are at a minimum price, what, presently how much
8 above the Michigan plants?

9 A. I don't know that off the top of my
10 head.

11 Q. Well, if their differential is 180,
12 what is your current differential, 220?

13 A. Yes.

14 Q. So you start 40 cents less and
15 start -- Cincinnati, how much -- what does it
16 cost to move your packaged product from your
17 plant in Cincinnati up to Michigan?

18 A. There's another party that does
19 that for us. I couldn't tell you off the top of
20 my head.

21 Q. Now, how about the state of
22 Indiana, what portion of your school business is
23 over there?

24 A. Our school business lies between

1 Cincinnati and Indianapolis, and I would say
2 that's maybe 5 percent of our school sales.

3 Q. And of course in -- you're
4 competing against dairies over there that are to
5 the north and probably some to the west of those
6 areas?

7 A. No. Most of my competition that
8 market is another dairy located right here.

9 Q. In Cincinnati?

10 A. Yes.

11 Q. So most of the suppliers to the
12 school districts in Indiana between Cincinnati
13 and Indianapolis are coming out of Cincinnati?

14 A. I would say there's -- I don't know
15 the markets real well, sir, but I would say
16 30-plus percent is.

17 Q. What portion of your school milk
18 sales are in Indiana?

19 A. Again, maybe 5 percent.

20 Q. What portion, then, are in the
21 state of Ohio?

22 A. The far majority, 80 -- 80 percent.

23 Q. Who are your primary competitors
24 for those bids in the state of Ohio?

1 A. It would be a Dean plant in
2 Springfield, Ohio; a Dean plant in Newport,
3 Kentucky; somewhat fringe a Dean plant over in
4 Marietta. And then we fringe with a dairy out
5 of Orville, Ohio.

6 Q. Now, with respect to your
7 competition for Dean plant in Springfield, Ohio,
8 you start at a higher raw milk cost under the
9 order, correct?

10 A. That is correct.

11 Q. And to the extent that you're in
12 the southern geographic order of Ohio, you got
13 to be moving all of your -- well, all those --
14 nearly all of those school districts that you're
15 bidding against Springfield are closer to
16 Springfield than Cincinnati, I guess?

17 A. No, not necessarily.

18 Q. Most of them just around
19 Cincinnati?

20 A. What is defined as the Greater
21 Cincinnati area and up to -- if you know where
22 the Dayton, Ohio, market is and the Columbus,
23 Ohio, market.

24 Q. How far are you from Dayton and

1 Columbus?

2 A. Dayton, 50 miles.

3 Q. Columbus?

4 A. 75, maybe.

5 Q. Do you know what the cost of moving
6 your product back to Columbus is?

7 A. I can't say.

8 Q. In any event, you've been
9 successful in serving those businesses on a
10 competitive bid basis?

11 A. Yes.

12 Q. Besides your school milk business,
13 do you supply stores throughout the same areas
14 in Ohio?

15 A. Yes, we do.

16 Q. Who are your competitors in
17 supplying stores?

18 A. Basically, the same competitors.

19 Q. The same competitors, the Dean
20 plant -- the three plants that you mentioned?

21 A. Yes, not broad as much, but
22 Springfield and Newport.

23 Q. Newport?

24 A. Kentucky.

1 Q. Newport, Kentucky. Where is
2 Newport, Kentucky?

3 A. Just right across the river from
4 here.

5 Q. So you have the present --
6 presently, you have the same minimum price as
7 the same plant in Newport, Kentucky, correct?

8 A. That's correct.

9 Q. And in the proposal, you'd have the
10 same minimum price?

11 A. Yes.

12 MR. BESHORE: I think that's all
13 the questions I have.

14 Thank you, Mr. Meyer.

15 THE WITNESS: Thank you.

16 THE JUDGE: Very well.

17 Mr. Meyer, it looks like you may
18 step down.

19 THE WITNESS: Thank you.

20 MR. ENGLISH: I would assist.

21 Could I --

22 THE JUDGE: Please be seated and
23 give us your name.

24 THE WITNESS: My name is Patricia

1 Stroup, S-t-r-o-u-p.

2 MR. ENGLISH: Could we have this
3 marked as Exhibit 24, please?

4 THE JUDGE: It will be Exhibit 24.
5 (Exhibit 24 was marked for
6 identification.)

7 PATRICIA D. STROUP

8 having been duly sworn, was
9 examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. ENGLISH:

12 Q. Good afternoon, Ms. Stroup.

13 A. Hello.

14 Q. You have a little history in the
15 dairy industry as well?

16 A. I do.

17 Q. When was the first time you were
18 involved in the dairy industry?

19 A. Well, technically speaking, I was
20 four, if you count feeding cats. I grew up in
21 dairy farm in southeastern Pennsylvania. I have
22 a graduate degree in communications with a minor
23 in dairy science from Virginia Tech and an MBA
24 in agribusiness in food and agribusiness from

1 Purdue University.

2 I've owned and operated a dairy
3 farm, and I've also worked for several dairy
4 cooperatives, a major cheese manufacturing
5 company. And now I work for Nestle USA.

6 Q. And one of the cooperatives that
7 you worked for was Hilmar Cheese Company in
8 California?

9 A. Yes. Hilmar Cheese Company is not
10 a cooperative, but I worked with them for 10
11 years as director of dairy procurement.

12 Q. I'm sorry. They're dairy farmer
13 owned?

14 A. Farmer owned, but noncooperative.
15 They will remind you of that.

16 Q. I apologize.

17 Is it fair to say that you appeared
18 in a number of marketing order proceedings,
19 whether they be in -- mostly in California you
20 appeared and testified?

21 A. Yes, I have.

22 Q. And you've also appeared at least
23 once before the federal proceeding?

24 A. Yes, more than once.

1 Q. Why don't you proceed with your
2 testimony?

3 A. Thank you.

4 My name is Patricia Stroup. I am
5 the group manager for dairy for Nestle Business
6 Services, NBS, and today, I'm representing
7 Nestle USA. In my role with NBS, I am
8 responsible for milk and dairy ingredients
9 procurement for Nestle brands in the United
10 States and Canada.

11 I testify today in opposition to
12 the cooperatives' proposal to increase Class I
13 differentials in Order 33.

14 Nestle operates a beverage facility
15 in Anderson, Indiana, where we make Nesquik,
16 ready-to-drink flavored-milk beverages.
17 Anderson, Indiana, is located in Madison County,
18 for which the cooperative is proposing a 15-cent
19 increase in differential. The proponents
20 indicated that these increases are necessary
21 because providing an adequate supply of milk for
22 Order 33 is difficult. This is not consistent
23 with what our supplier has indicated to us.

24 As we went through the process of

1 deciding where to site our Anderson facility, we
2 researched the current and potential milk supply
3 in the region. We discussed milk supply
4 availability and viability with many sources,
5 including some of the proponents of this
6 proposal.

7 Not only were we given assurance
8 that milk was readily available in the order,
9 but we were encouraged to site our plant in the
10 order. And when we asked our current supplier
11 if Madison County, Indiana, was a viable site
12 for milk supply, we were assured that there
13 would be no problem in serving that site, which
14 is why we decided to build a 350-, \$400 million
15 facility at that location that became operable
16 this spring.

17 In preliminary work on our new
18 facility in Anderson, Indiana, we had
19 discussions with five different milk suppliers
20 interested in servicing our plant. Four of
21 those contacts were unsolicited by us. In fact,
22 while our Anderson plant is currently supplied
23 by one of the proponents of this increase, we
24 have been approached again as recently as this

1 year by another one of the proponents asking to
2 submit a proposal to us to for supplying our
3 plant. We also have standing offers from other
4 cooperatives and individuals to supply our
5 Anderson plant.

6 In the proponent's Attachment 7,
7 "Hauling Costs Minus Location Adjustments," the
8 chart lists the average cost to supply Anderson,
9 Indiana, at \$1.60 and the meeting cost at \$1.44.
10 As part of our agreement with our supplier, our
11 average over-order premium for milk delivered
12 into Anderson is already in excess of this
13 amount and already includes a fuel surcharge for
14 delivering milk to our plant.

15 As we decide where to manufacture
16 our milk-based beverages, the cost of milk is
17 obviously a major consideration. Increasing our
18 costs by 15 cents per hundredweight in Anderson
19 would make us reexamine our investment and
20 capacity decisions.

21 The demand for flavored milk, which
22 is the bulk of our current production in
23 Anderson, is extremely sensitive to changes in
24 price. Nestle's attitude and usage study

1 indicates that the main competition for Nesquik
2 are not dairy-based beverages. The top
3 competition for flavored milk are, in this
4 order: soft drinks, bottle water, and
5 refrigerated, pre-mixed orange juice. Only
6 after those products do survey respondents lists
7 other milks.

8 In fact, even non-beverages compete
9 with flavored milks. Over half of the
10 respondents indicated they would place flavored
11 milks with fruit or vegetable snacks, salty
12 snacks, chocolate candy and snack bars.

13 One of the principals of price
14 elasticity is that products with few substitutes
15 generally have low price sensitivity.
16 Unfortunately, we have found that flavored milk
17 have many substitutes. Price becomes a major
18 factor for consumers in deciding how to satisfy
19 their snack cravings. And when we need to sell
20 in a price increase to retailers, we need to
21 consider that margins that those retailers will
22 likely make on the whole range of competing
23 products and not just other milks.

24 Our elasticity studies, using

1 current scanner data, finds that flavored milks
2 exhibit above-average price elasticity to price
3 changes compared to other refrigerated items.
4 Results indicate that price increases that we
5 try to pass through to retailers result in
6 volume decreases greater than price increases
7 elasticity of greater than -- that should be
8 1.0. Price elasticities are generally not
9 negatives.

10 In fact, July 2008 elasticities for
11 Nesquik calculated at over 2.5. Because we
12 market Nesquik nationwide, an increase in
13 differential at Anderson will put us at a
14 distinct competitive disadvantage to flavored
15 milks manufactured in counties that are not
16 facing an increase. This is one reason why we
17 believe differentials cannot be considered on an
18 order-by-order basis, but should instead be
19 dealt with on a nationwide basis.

20 As a total category, July 2008
21 elasticities for flavored milk come in at 2.0.
22 Coupled with what we know about consumer
23 preferences, we know that much of that decrease
24 in volume did not go to other dairy products.

1 Those consumer dollars have gone to non-dairy
2 beverages and snack foods.

3 An increase in cost to our Anderson
4 plant measured in cost of goods per unit, cost
5 in the net price impact to dairy farmers, and
6 cost in competitiveness of the industry on the
7 store shelf is not good for consumers,
8 processors, or even dairy farmers.

9 For these reasons because we are
10 not experiencing milk shortages and because a
11 price increase will result in decreased demand,
12 we oppose any increase to Class I differentials
13 in Order 33.

14 Thank you for your opportunity to
15 share Nestle's position in this matter.

16 Q. Mrs. Stroup, obviously, I don't
17 want you to go into proprietary information, but
18 you've discussed a little bit about your siting
19 decision for this plant. I think I know that
20 market just a little bit, and I'm wondering are
21 there other facilities in and around where your
22 plant is located?

23 A. That was actually one of our
24 concerns when we looked at the Anderson site.

1 There are other dairy plants in Anderson,
2 Indiana, in Madison County, so we specifically
3 asked our prospective supplier at the time
4 whether that would be an issue and whether
5 supplying those plants in addition to our
6 projected volume would be any problem. And we
7 were assured that there was, quote, more than
8 enough milk to supply all of the milk that was
9 needed in that area.

10 MR. ENGLISH: Your Honor, I have no
11 further questions and move the admission of
12 Exhibit 24.

13 THE JUDGE: Very well. Exhibit 24
14 will be admitted into evidence.

15 (Deposition Exhibit 24 was
16 admitted.)

17 THE JUDGE: Examination of this
18 witness, Mr. Beshore.

19 CROSS-EXAMINATION

20 BY MR. BESHORE:

21 Q. Good afternoon, Mrs. Stroup.

22 A. Good afternoon.

23 Q. Were you personally involved in the
24 siting decision for the Anderson plant?

1 A. I was not.

2 Q. Okay. So the information that you
3 have brought, which is -- you have purported to
4 quote statements by prospective suppliers that
5 weren't made to you then?

6 A. No. We have --

7 Q. They were made to other persons
8 within the company?

9 A. My department that reports to me,
10 they were made to the people in our department
11 and we have documents -- written information of
12 correspondence that went back and forth.

13 Q. Now, what other locations did --
14 well, with respect to the Anderson facility,
15 this is, correct me if I'm wrong, is this to
16 supply the Nesquik product on a national --
17 nationwide basis?

18 A. Anderson will produce a variety of
19 beverages, but one of those is Nesquik on a
20 nationwide basis.

21 Q. What other products are produced
22 there that are Class I products, will they be
23 distributed on a nationwide basis?

24 A. They will.

1 Q. Now, were there other locations
2 around the country with lower Class I prices
3 that were considered for the siting of the
4 facility?

5 A. Yes.

6 Q. And I take it, then, were there,
7 for instance, lower Class I prices -- milk
8 prices in the country are where, if you know?

9 A. Regulated cost point prices?

10 Q. Yes.

11 A. I couldn't tell you. I wouldn't be
12 able to tell you between different counties.

13 Q. Well, how about states?

14 A. Government request?

15 Q. Did you consider siting where you
16 had lower Class I costs?

17 A. We did.

18 Q. But you chose to site in Indiana?

19 A. Yes.

20 Q. And I take it, then, that Class I
21 cost wasn't the determinant, the single
22 determinant of where your plant was located?

23 A. There's no one single determinate
24 ever.

1 Q. The elasticity studies that you
2 referred to, did you perform those studies?

3 A. I do not.

4 Q. Who performed the studies?

5 A. Our marketing department collects
6 information from Nielsen, and we use that
7 information to calculate our elasticities.

8 Q. Okay. So the raw data where
9 Nielsen -- Nielsen reported the data?

10 A. Yes.

11 Q. So it's not data from your
12 company's sales?

13 A. It's both. The 2.5 elasticity that
14 I talked about is for Nesquik in particular,
15 meaning that we have more sensitivity to price
16 than the category as a whole. The category as a
17 whole is Nielsen data for the entire
18 flavored-milk category. So we are sensitive to
19 changes to other flavored milks. The
20 flavored-milk category as a whole is sensitive
21 to changes to non-dairy products.

22 Q. So at what level were the
23 elasticity studies calculated?

24 A. It's scanner data.

1 Q. Retail level?

2 A. Yes.

3 Q. Do you establish a retail price of
4 your products?

5 A. We recommend a retail price.

6 Q. Is the recommendation always
7 followed by the retailers?

8 A. It depends if there is any sort of
9 trade that goes with that. In other words
10 rebates, specials, sales, deals that are offered
11 to consumers.

12 Q. In those cases, the retail prices
13 are not followed is that the essence of what
14 you're saying?

15 A. So you could get a two-for-one
16 special or something like that. So in that
17 case, no, technically, the retail price would
18 not be charged.

19 Q. But setting aside the retail
20 specials, coupons, do the retailers that market
21 your product always market it at the price that
22 you suggest?

23 A. I don't have knowledge of that.

24 Q. So in essence, then, you don't

1 really know what price was being charged for the
2 products in the Nielsen study which showed --

3 A. Well, we do because we use scanner
4 data that gives us what price was charged.

5 Q. And that's part of the Nielsen
6 data?

7 A. Yes.

8 Q. Now, the 2.5 was July 2008; is that
9 it?

10 A. 52 rolling weeks ending July of
11 2008.

12 Q. Okay. So Nesquik sales have
13 declined?

14 A. Yes.

15 Q. What percentage of milk ingredients
16 is in Nesquik?

17 A. I don't know that off the top of my
18 head. It qualifies as a Class I product.

19 Q. Can you tell us what portion of the
20 manufacturing cost is represented by the dairy
21 ingredients?

22 A. That would be proprietary
23 information and I can't share.

24 Q. Can you tell us what portion of the

1 suggested retail price is represented by the
2 dairy ingredients?

3 A. That would be proprietary
4 information as well.

5 Q. Do you have costs -- when you set
6 your suggested retail prices, do they -- is the
7 cost of transporting the product from Anderson,
8 Indiana, to point of sale reflected in any way
9 in the suggested prices?

10 A. I don't have knowledge of that,
11 although I would assume that it is given
12 consideration.

13 Q. If the retailer, the distributor,
14 and manufacturer are going to make a profit,
15 those transportation costs are going to have to
16 be picked up somewhere along the line, correct?

17 A. Which is one of the reasons that
18 when we look at distributing nationwide, when
19 you asked if it was in real cost was it the sole
20 reason that we would site a plant, of course
21 it's not. But when you add up all the costs and
22 benefits of where you are, if any one of those
23 variables increases and makes the total cost go
24 up, all of a sudden that shifts your decision.

1 So if I'm now looking at Anderson, Madison
2 County, Indiana, and I add up all of those costs
3 and I say, okay, my milk cost has now gone up by
4 15 cents, all else being equal, I'm now
5 disadvantaged because I may have chosen another
6 spot to locate in if I would have known that the
7 price would be 15 cents higher than it was when
8 we were told that the milk would be plentiful in
9 that area.

10 Q. Well, the milks cost -- the cost
11 of -- the total cost of your milk ingredients
12 has increased just with general milk prices over
13 the 52 week -- past couple of years?

14 A. Correct, correct, correct. And
15 that's where the elasticity information --
16 that's where your price increase comes in.

17 Q. General price increase?

18 A. Correct. But regardless of where
19 it comes from, a price increase is a price
20 increase.

21 Q. And the cost increase in the
22 distribution is also a price increase, correct?

23 A. Correct, but I would assume that
24 the diesel cost is no different -- it's

1 substantially different in the Mideast than it
2 is in any other order? So why we would not
3 considered this on a nationwide basis and why we
4 only consider this on an order basis is -- I'm
5 not sure why we would do that.

6 MR. BESHORE: Thank you.

7 THE JUDGE: Further examination?

8 You may step down.

9 Mr. Stevens, housekeeping details?

10 MR. STEVENS: Well, we have a
11 proposal in the hearing notice. Let me get
12 that. Number 2 was prosed by dairy programs --
13 Garrett Stevens, Office of General Counsel, US
14 Department of Agriculture.

15 Proposal 2 was proposed by the
16 hearing program, the agricultural marketing
17 service. This is a proposal that appears in
18 formal rule making under the federal marketing
19 order system, and the proposal sets forth the
20 basis upon which the department will make
21 conforming changes with any amendments that are
22 proposed, technical changes, changes in order
23 due to comply with various requirements of the
24 department when issuing regulations. And we ask

1 that that just be made be part of the record,
2 that there is a proposal, and the department
3 will handle this in due course.

4 THE JUDGE: Comment, Mr. English?

5 MR. ENGLISH: That brings us to the
6 motion because I'm not sure there is anything
7 else pending except I suppose the hearing to
8 have a briefing schedule.

9 MR. BESHORE: I have a
10 couple other --

11 MR. ENGLISH: Housekeeping items?

12 MR. BESHORE: Housekeeping-type
13 items.

14 THE JUDGE: Do you want to --

15 MR. ENGLISH: I can defer to
16 Mr. Beshore or maybe I can make the motion --

17 MR. BESHORE: It was the same
18 motion that was already made?

19 MR. ENGLISH: It's the same motion
20 that has been made that we --

21 THE JUDGE: Sustained.

22 MR. ENGLISH: -- that we continue
23 or suspend the hearing to a date -- maybe we can
24 discuss what the date would be, to get

1 additional evidence in the record.

2 Our basis for that, Your Honor, is
3 that the witness has been following his own
4 testimony. And then in answer to a question
5 from Mr. Richmond, said that the changes in the
6 Southeast were a principal reason for coming,
7 and that changes in the market were a principal
8 reason for holding this hearing.

9 We don't have the most critical
10 piece of data, which is the May 2008 data
11 through the Order 32 market that gets put
12 together that will be published in September.
13 But moreover, we don't have additional months to
14 see how, as Mr. Kinser has testified, people
15 will actually react.

16 We have learned, according to
17 Mr. Kinser's testimony from federal reform that
18 handlers, producers, alter their behavior over a
19 period of time, not within a snapshot of one
20 month. These changes in the Southeast and the
21 Apalachia order that were quote/unquote so
22 critical to hosting this emergency hearing are
23 so fresh that we had to beg the market
24 administrator, and God bless him for getting

1 that information out there, they worked very
2 hard, but we have limited data.

3 There's a lot of data that we don't
4 have yet. And for that reason, even if we set a
5 date certain, Mr. Beshore said a year, I suspect
6 no one's going to wait a year, even it's a
7 couple of months, I think we should continue
8 this hearing to a date certain, hold it in
9 Washington, D.C., if necessary for a half-day,
10 couple of hours, get the data in, let's have a
11 complete record. Let's not make a decision
12 based on speculation; let's have data.

13 THE JUDGE: Mr. Beshore.

14 MR. BESHORE: We oppose the motion
15 to keep the record open for any further data
16 other than what might be appropriately financial
17 notice through the -- through the briefing --

18 THE JUDGE: Through the date of
19 brief?

20 MR. BESHORE: Right, through the
21 date of brief.

22 You know, we could -- the date is
23 generated on what happened in these orders
24 marked week after week, month after month. We

1 can wait. It's changed. It's changed. It's
2 changed. Key changes which are key to the
3 price -- to the hearing request and to the
4 testimony are the price changes that are -- that
5 were effective May 1 at the plants in -- by the
6 southern region of Order 33, and they are not
7 going to change. We know what they are, and
8 that's part of the record, and the record should
9 go forward.

10 THE JUDGE: Mr. Stevens.

11 MR. STEVENS: Your Honor, while we
12 appreciate and certainly understand the position
13 taken by the proponents of the proposal here, I
14 think for the record, we would recommend that
15 the hearing be closed at this time; that the
16 briefing schedule be set; that the proceeding
17 proceed; and that at some future time, based on
18 the filings that are made by the parties, some
19 decision may be made upon the motion -- the
20 motion should be denied at this time and that
21 some decision might be made in the future on a
22 motion of this type based on the briefings that
23 the parties make. And let this decision be made
24 by the Secretary, who is the entity charged by

1 Congress to make these determinations in terms
2 of what should happen as this hearing proceeds.
3 The hearing proceeds -- proceeds to where it
4 eventually will lead.

5 THE JUDGE: Mr. Yale.

6 MR. YALE: I would concur with
7 Mr. Stevens. I think if the data starts to show
8 what they fear may be the case, they have ample
9 opportunity to petition the department to reopen
10 the hearing. It's happened in the past, and
11 they could do so. But if it turns out it
12 doesn't, then the proceeding can continue.
13 Otherwise, we'll be having hearings forever.

14 THE JUDGE: Very well. The motion
15 to suspend or continue the hearing will be
16 denied. The hearing will be closed.

17 Having said that -- obviously, that
18 is my ruling. The Secretary does have the
19 authority to entertain other proposals.
20 Certainly it will be ill-advised for me to move
21 beyond what I've done at this point.

22 Mr. Stevens, do you have a
23 recommendation as to how long --

24 MR. BESHORE: Your Honor, I'm

1 sorry. I had two other housekeeping-type
2 issues, if I can.

3 MR. ENGLISH: I told you you should
4 go first.

5 MR. BESHORE: I think appropriately
6 they come before the briefing schedule, if I
7 might.

8 THE JUDGE: All right.

9 MR. BESHORE: First one is
10 Exhibit 12, which was my letter to Dana Cole,
11 deputy administrator, dated June 6, 2008, which
12 was marked for the record without the full
13 document which reflected, you know, on its face
14 attachments one through 11. I would like --
15 they have been on the Web site of the dairy
16 program since it was posted there shortly after
17 it was submitted. I would like the entire
18 submission to be made part of the record.

19 THE JUDGE: Very well. Will you
20 supplement the record, in other words, at the --
21 excuse me.

22 MR. ENGLISH: I just have one
23 comment on that. Whether or not it was posted
24 on the Web site, and I don't know whether it

1 was, I know for a fact that we couldn't find it.
2 And, frankly, I had that conversation with dairy
3 programs. Either the pointer was missing or
4 something, but -- and I don't think they are
5 going to dispute this. It isn't or wasn't, at
6 least until a couple weeks ago, findable by the
7 public.

8 So to say -- I'm not disagreeing
9 that it was there, Mr. Beshore, but I want to
10 correct the record; we didn't know it was there,
11 and I still don't know how to find it.

12 So I -- if you are going to take
13 official notice of this, we're going to have to
14 know how to find it, because I can't find it
15 yet.

16 THE JUDGE: Well, what I was asking
17 Mr. Beshore to do was to supplement the record
18 with the attachments.

19 MR. BESHORE: I will be happy to do
20 that. I will do that. I don't have -- I wasn't
21 prepared with the copies --

22 THE JUDGE: I'm well aware of that
23 possibility. If you will get that to dairy
24 programs to supplement, they will supplement the

1 record.

2 MR. BESHORE: Thank you. I will do
3 that.

4 And the other point was, and this
5 relates to briefing, I want to make a statement,
6 and maybe it's something almost in the nature of
7 a preemptory motion. I think Mr. English, I
8 think, yeah, Mr. English made the statement with
9 respect to Mr. -- some of Mr. Kinser's testimony
10 and exhibits that they would take the
11 opportunity for the brief to place, in essence,
12 new factual information into the record as a way
13 of calculations that were not proper by
14 Mr. Kinser. I object to that now in advance,
15 because the briefs are not the -- proper.

16 In fact, new factual information is
17 prohibited to be provided by the rules, and I
18 think that proposed information comes in that
19 category. We won't have any opportunity to know
20 what it is to respond to it in any way when it's
21 in a brief, something post hearing.

22 THE JUDGE: Mr. English.

23 MR. ENGLISH: I'd say two things.

24 First, about 12 minutes ago, we had a motion to

1 continue the hearing. One of the problems of
2 having a hearing like this when we didn't have
3 the information was the rush last night. We
4 admit there's an error in the document. It
5 would be fixable if the very party who is now
6 objecting to our fixing it had given us a chance
7 to continue the hearing. So I think there's a
8 little problem in having it both ways.

9 But secondly, all we're asking to
10 do and the only change we made is to put the
11 price in. It is nothing else. It will be
12 factually that price, and then formulas will
13 run. And that's the only thing we're asking to
14 do. And we think the objection is not well
15 taken, especially in light of the fact that, oh,
16 we're going to rush to a hearing; that we caused
17 the emergency because we're the ones that got
18 the differential changes in the Southeast, and
19 now we're going to rush to a hearing, we don't
20 have the data and we're not going to give your
21 opponents a chance to respond. And if we don't
22 have a chance to respond with due process, our
23 justice is delayed?

24 THE JUDGE: Briefs, of course, are

1 arguments of parties. They also periodically
2 set forth hypotheticals, and also contain other
3 things; in other words, not seeing exactly what
4 he's doing, I don't know that any ruling can be
5 made on your motion, Mr. Beshore, or your
6 objection.

7 MR. STEVENS: Your Honor, this is
8 Garrett Stevens from USDA. Let me just offer
9 this up, and then you can -- if it's possible to
10 get that information, spreadsheets, numbers,
11 whatever it is, okay, it could be put up on the
12 Web site before the briefs are filed. Would
13 that cause anyone a problem?

14 MR. BESHORE: Yeah.

15 MR. STEVENS: Well, then, please
16 tell us.

17 MR. ENGLISH: We will take you up
18 on that offer.

19 MR. YALE: Your Honor, I just -- I
20 can see it both ways. Let me just kind of -- I
21 feel like I'm in the middle here. I agree with
22 Mr. Beshore. The record closed today. The
23 record closed today. We have -- we're very
24 upset even now that official notice has been

1 taken in one proceeding after the record closed
2 because we had no opportunity to deal with that
3 information. So I think the record is closed.
4 But having said that, you can take the data that
5 has been put in here and take numbers here and
6 numbers there that are in the record and create
7 computations from those in the briefs. It
8 happens all the time.

9 The prices are in the record. His
10 numbers are in the record. Anybody could take
11 prices over here and multiply them by that in
12 the record would be consistent with what -- in
13 the briefing would be consistent with the
14 record. So that's kind of like both ways. But
15 I think in terms of a new exhibit or anything
16 like that, we would have an objection.

17 MR. ENGLISH: It would not be new
18 exhibit. It will not include new months, will
19 not do anything with November, and we will take
20 Mr. Stevens' offer and we will have it
21 available.

22 THE JUDGE: Very well.

23 Mr. Stevens, do you have a
24 suggestion as to corrections to the transcript

1 and also for filing deadline for the briefs?

2 MR. STEVENS: Your Honor, I've
3 consulted with my esteemed colleague from the
4 dairy programs, Ms. Taylor, and I think what we
5 would offer up is that as far as the transcript
6 is concerned, I think the contract the
7 transcript is supposed to be completed or well
8 along the way by the end of the week; that the
9 department may well get it by the end of the
10 week, but it won't be up on the Web site until
11 next week.

12 Am I correct in that?

13 And then beyond that, for the
14 certification of the transcript, we offer up for
15 consideration two weeks after that date.
16 Sometimes it's continuous with the filing of
17 briefs. And, again, we offer up the possibility
18 of certification of the transcript that the
19 request for certification be --

20 THE JUDGE: Request for correction
21 of the transcript?

22 MR. STEVENS: I misspoke.

23 Corrections to the transcript come in the
24 department within two weeks -- two weeks after

1 the transcript goes up on the Web site.

2 THE JUDGE: Post filing?

3 MR. STEVENS: And that then
4 subsequent to that, once the corrections are up
5 there and transcripts are up there, from the
6 date that the transcript goes up, 30 days for
7 briefing. That's our -- we offer that up, and
8 it's certainly up to the parties' desires and
9 requests of Your Honor.

10 Thank you.

11 THE JUDGE: Comments from -- is
12 that acceptable to you gentlemen?

13 MR. BESHORE: Yes.

14 MR. YALE: Your Honor, I'm not
15 going to object to it, but I do want to make a
16 statement for the record. I believe under the
17 new farm bill, that parties are entitled to
18 comments up to 90 days from the close of the
19 hearing.

20 THE JUDGE: It says not more than.

21 MR. YALE: It says "may." So we --
22 I think that it does entitle. I'm not going to
23 object to this. I'm going to beat this
24 deadline, but I just wanted you to correctly

1 know we still believe that's what it says.

2 THE JUDGE: All right.

3 MR. ENGLISH: Your Honor, I will
4 put some data in the record or whatever.

5 We are, as fairly well known in the
6 dairy industry, involved in a matter of dairy
7 label litigation about 75 miles north of here in
8 Columbus, Ohio, in which we -- my law firm is
9 representing the International Dairy Foods
10 Association, to the Secretary of Agriculture of
11 Ohio. And at the present time, as a result of
12 briefing schedule and deposition schedule, I
13 have a brief due on September 19th in that
14 proceeding as a reply and summary judgment.

15 In addition, in a proceeding
16 involving my esteemed colleague Mr. Beshore, in
17 Pennsylvania, we have just moved the schedule
18 for a number of reasons, but I think Mr. Beshore
19 would agree partly for his convenience, such
20 that my opposition will be due October 3rd. So
21 I would like those dates to be taken into
22 consideration. And I'm not going to push it too
23 far from that. I might say Friday, October
24 10th, which puts it ahead of the Columbus Day

1 weekend. That would accommodate my scheduling
2 briefs. Is that okay?

3 THE JUDGE: Mr. Beshore.

4 MR. BESHORE: May I have just a
5 second?

6 We have no objection to
7 October 10th.

8 MR. ENGLISH: Thank you,
9 Mr. Beshore.

10 MS. TAYLOR: Whatever.

11 THE JUDGE: Very well. I will hold
12 the request for corrections to the transcripts
13 to two weeks. The briefs will be due not later
14 than close of business on October 10.

15 Is there anything further that we
16 can dispose of here?

17 The hearing will be closed then.

18 (Thereupon, the deposition
19 concluded at 4:15.)

20

21

22

23

24