

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:	X DOCKET NO. AO-368-832,
	X AO-271-837, DA-03-04
	X HELD NOVEMBER 17, 2003
	X 8:30 A.M.
PACIFIC NORTHWEST AND	X DOUBLE TREE HOTEL
ARIZONA-LAS VEGAS	X 18740 PACIFIC HWY. SOUTH
MARKETING AREAS	X SEATTLE, WASHINGTON

VOLUME IV

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R & S TYPING SERVICE

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P R O C E E D I N G S

8:30 a.m.

1
2
3 THE COURT: Let's go on the record. Good
4 morning, everybody. I'm Marc Hillson, your Administrative
5 Law Judge for this proceeding. We're in Seattle. It's
6 November 17th, 2003, just after 8:30 a.m., and this is a
7 continuation of the hearing that was begun in Phoenix a
8 couple of months ago. And the docket numbers for this case
9 are AO-368-832, AO-271-837, DA-03-04.

10 I'm not going to go through the entire spiel I
11 went through at the start of the last hearing because this
12 is -- at the first session of the hearing, but -- because
13 it's a continuation.

14 Do want to say a couple little things in the
15 record. I want to direct the reporter, particularly, that
16 -- the typist who's going to be taking care of this. Treat
17 this as a continuation of the hearing that's already
18 started, and I'm going to ask that the pagination for
19 today's sessions, that this be Volume IV or day four of the
20 hearing, and that we start on page 985. We went through
21 984 pages in three long days in Phoenix, and I think we
22 have a few pages to go before we're going to be done with
23 this thing.

24 I'm going to just briefly just go around the room
25 to ask the people who are here in a representational

1 capacity to introduce themselves. Most of you were here at
2 the last hearing. For the reporter's benefit as well, and
3 also just to ask if people have business cards, that they
4 please give a copy of -- give one of them to the reporter.

5 And also that in the course -- I'll just remind
6 you. I noticed this works about three quarters of the
7 time, to remind you to, when you're making an objection or
8 interjecting or whatever, please say who you are just for
9 the record, so that it won't -- I won't interrupt you and
10 ask you that very, same question.

11 Let's do the introductions first for people here
12 in a representational capacity. I'll start over here and
13 go up this side.

14 MS. DESKINS: Yes, my name is Charlene Deskins.
15 I'm the attorney for the Office of General Counsel, United
16 States Department of Agriculture. My office address is
17 1400 Independence Avenue, Southwest, Washington, D.C. The
18 zip code is 20250, and I represent the Agricultural
19 Marketing Service in this proceeding.

20 MR. HILL: My name is Brian Hill, H-i-l-l, and I
21 am also from the United States Department of Agriculture's
22 Office of the General Counsel, at the same address as
23 Charlene Deskins, representing the Agricultural Marketing
24 Service, I think I said.

25 MR. ROWER: Jack Rower, R-o-w-e-r. I'm a

1 marketing specialist with the Agricultural Marketing
2 Service, USDA.

3 MR. TOSI: My name is Gino, G-i-n-o, Tosi, T-o-s-
4 i. I'm also with the Agricultural Marketing Service Dairy
5 Programs in Washington, D.C. Got the same address that Ms.
6 Deskins stated.

7 MR. CHERRY: Good morning. My name is Richard
8 Cherry (phon.), and I'm a marketing specialist with the
9 Agricultural Marketing Service with the USDA.

10 MR. UNIDENTIFIED: Go ahead, Mr. Yale (phon.).

11 MR. YALE: Would you like me to go to a mic?

12 THE COURT: No, I don't -- well.

13 MR. YALE: Can you hear me? Better? All right.

14 Benjamin F. Yale, Yale Law Office, P.O. Box 100,
15 Waynesfield, Ohio 45896. I'm here on behalf of Etteline
16 Dairy (phon.), Mallory's Dairy (phon.), and Smith Brothers
17 Farms.

18 MR. MILTNER: Ryan Miltner of Yale Law Office,
19 same address and same clients as Benjamin Yale.

20 MR. RICCIARDI: Good morning. I'm Al Ricciardi.

21 It's R-i-c-c-i-a-r-d-i, 1440 East Missouri Avenue in
22 Phoenix. The zip is 85014, and I represent Sarah Farms.

23 THE COURT: Is anyone else on the right side of
24 the room here in a representational capacity? Okay. Go
25 ahead, Mr. Marshall.

1 MR. MARSHALL: Doug Marshall with Northwest Dairy
2 Association.

3 MR. BESHORE: Marvin Beshore, B-e-s-h-o-r-e, 130
4 State Street, Harrisburg, Pennsylvania. I'm representing
5 Dairy Farmers of America.

6 MR. BURTON: Sydney Birdie (phon.), S-y-d-n-e-y,
7 representing United Dairywomen of Arizona.

8 MR. CONOVER: Carl Conover (phon.). I'm standing
9 in for Charles English until he gets here. He'll be an
10 hour or so late, and here representing Dean Foods and
11 Shamrock Foods.

12 THE COURT: Okay. Thank you. I guess I just --
13 I will repeat one or two things that I said before we
14 started the sessions in Arizona. One is that this is a
15 public hearing, and everyone is invited to participate. If
16 there are people who are here only for the day -- I have a
17 witness list of people who've told me they want to testify,
18 but there's anyone here whose working locally, who's here
19 for the day, who wants to -- who needs to speak today,
20 please let me know either now or at -- whenever we take our
21 first break.

22 I anticipate a break or two in the morning, and a
23 lunch break, and an afternoon break. And at this point,
24 I'm not sure how late we'll go on any given day. I think
25 we'll just see how things work out with that respect -- in

1 that respect.

2 I'm going to let the -- Ms. Deskins has a couple
3 of exhibits, couple of preliminary exhibits that I want to
4 get marked and admitted into evidence.

5 I'm going to start right where we left off. The
6 last exhibit we had in Phoenix, I think, was 27(a), (b),
7 and (c). So rather than go back and call this notice
8 exhibit, Exhibit Board (c) or (d), I'm going to just start
9 off with Exhibit 28, and we'll just take it from there. So
10 (indiscernible) couple exhibits for me?

11 MS. DESKINS: Yes, Judge Hillson, I have two
12 exhibits. One is -- it's the Notice of Reconvened Hearing
13 for today, and the other one is a notice of certificate of
14 mailing to interested persons, and I will hand one copy to
15 you and one to the court reporter.

16 THE COURT: Okay. I'm calling the Notice of
17 Reconvened Hearing as Exhibit 27 and the determination or
18 mailing I'm calling Exhibit 28, and without objection, I
19 presume I'm going to admit both of those.

20 Yes, Mr. Cherry? You objecting?

21 MR. CHERRY: 28 and 29? No.

22 THE COURT: Oh, 28 and 29. Thank you.

23 MR. CHERRY: Right.

24 THE COURT: Very good. You had a good point, 28
25 and 29. My mistake.

1 MR. UNIDENTIFIED: 28 is the notice?

2 THE COURT: Huh?

3 MR. UNIDENTIFIED: 28 is the notice?

4 THE COURT: 28 is the notice, and 29 is -- well,
5 28 is the Notice of Reconvened Hearing, and 29 is the
6 Determination of Mailing of the Notice of the Reconvened
7 Hearing.

8 (Exhibits 28 and 29, marked and received.)

9 THE COURT: Thanks, Mr. Cherry.

10 MR. CHERRY: You're welcome.

11 THE COURT: And I went over with most of the
12 representatives briefly this morning the list of
13 anticipated witnesses. I'm going to just go over them real
14 quickly for the record, in case some people missed that. I
15 guess that first is going to be recall of Mr. Mykrantz, who
16 has a bunch of documents that he -- statistics and tables
17 that he compiled at the request of various parties. Then
18 I'm going to have Elvin Hollon, Terry, Smith, van Dam,
19 McBride, Gearhart, and Polcrist. And that should be the
20 end of what I will call the proponents' testimony.

21 Then I'm going to start -- I don't know what day
22 this will be, but I'm going to have Highland, Kester, an
23 unnamed, independent distributor, Bransma -- Ed Bransma and
24 Duane Bransma, Pearspink, Flannagan, Routmel or Terry
25 Wilgess, Bea Gardner, two Heddingers, Backstrom, Swanson,

1 Albright.

2 Says on Wednesday is Morrison's going to be here
3 to testify on Wednesday. Knutson's going to testify on
4 Thursday, and that Van Treek (phon.) will testify Monday or
5 Tuesday. We'll squeeze that person in some time during the
6 day.

7 Does anyone else have any changes that I hadn't
8 --

9 MR. UNIDENTIFIED: (Indiscernible) just make sure
10 that the order of those are -- aren't necessarily the order
11 we may present --

12 THE COURT: Oh, no, this is just the order I have
13 them. I mean, there's plenty of flexibility here. I mean,
14 I assume if you have a witness that has to testify today or
15 tomorrow, and the proponents are still putting on their
16 case, we'll make an accommodation. And again, this is --
17 well, it is ink. It's not set in stone, and I'm perfectly
18 happy to be flexible on this.

19 Right now we're scheduled to go four full days
20 this week and a half a day on Friday, probably till 11:00
21 or 11:30, given when the flights back East are operating.
22 I think I'm on a 12:45 then or something like that, and I
23 plan to be on that flight. Otherwise I don't get home till
24 way late, and so, you know, maybe we'll get it all done
25 this weekend.

1 If not, if it looks like we're not going to be
2 getting it done, maybe on Tuesday or Wednesday, we'll
3 consider, for planning purposes, what ought to be done next
4 in terms of date and location, if we go to a third or --
5 third round of hearings. Okay?

6 So let Mr. Mykrantz come on up. Thank you. Mr.
7 Mykrantz, you've already been sworn in for this hearing, so
8 you don't have to be sworn in again. Even though it's in a
9 different state, it's still good, I think.

10 JOHN MYKRANTZ

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

13 THE COURT: So are you going to ask questions,
14 Ms. Deskins?

15 MS. DESKINS: Yes. Yes.

16 THE COURT: Go right ahead.

17 BY MS. DESKINS:

18 Q. Just for the record, could you spell your name?

19 A. My name is John Mykrantz . Last name is spelled
20 M-y-k-r-a-n-t-z.

21 Q. Okay. Mr. Mykrantz, you prepared some additional
22 material for this hearing, correct -- other than what
23 you've already presented, correct?

24 A. Correct.

25 Q. Can you -- could you please tell us what that is?

1 A. I guess I prepared, or they were prepared under
2 my supervision, two tables of information, one regarding
3 the number of producers, both members and non-members under
4 the Pacific Northwest order from January 2000 to, I
5 believe, July --

6 Q. 2003?

7 A. -- 2003. And a second table representing four
8 months' of data, April, May, June, and July of 2003
9 indicating other uses by producer/handlers in the Pacific
10 Northwest order, which includes animal feed, dumped milk,
11 and accidental loss.

12 Q. Okay. Now, just for the people here at the
13 hearing, those copies of those are available on the back
14 table?

15 A. Yes, they are.

16 MS. DESKINS: Okay. Let's start with the first
17 one about the number of members and non-member producers.
18 And, Your Honor, if we could have that marked as an
19 exhibit.

20 THE COURT: Okay. That'll be marked as Exhibit
21 30.

22 (Exhibit 30 is marked.)

23 BY MS. DESKINS:

24 Q. Do you recall who asked you to prepare that
25 exhibit?

1 A. No, I don't.

2 Q. Okay. But you were asked to prepare it during
3 the course of the hearing that was held in Arizona?

4 A. Correct.

5 Q. And have you had a chance to review Exhibit 30?

6 A. Yes, I have.

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

8 A. Yes, it is.

9 Q. Now, this particular exhibit, was it prepared by
10 you or someone under your supervision and control?

11 A. It was prepared under my supervision.

12 MS. DESKINS: Your Honor, I would move for the
13 admission of Exhibit 30?

14 THE COURT: Any objection?

15 MR. UNIDENTIFIED: Can we identify more
16 specifically, Your Honor?

17 THE COURT: It's the Pacific Northwest Federal
18 Order FL124, Number of Member and Non-Member Producers,
19 January 2000 to July 2003.

20 MR. UNIDENTIFIED: Okay.

21 THE COURT: Any objection? Okay.

22 MR. UNIDENTIFIED: I have no objection.

23 THE COURT: Okay.

24 MR. UNIDENTIFIED: I have questions
25 (indiscernible).

1 THE COURT: Okay. Exhibit 30 is admitted into
2 evidence.

3 (Exhibit 30 is received.)

4 BY MS. DESKINS:

5 Q. Mr. Mykrantz, the other document you have up
6 there, if we could have this marked as Exhibit 31. It's
7 captioned, "Pacific Northwest, FO124 in Arizona/Las Vegas,
8 FO131, Orders Producer/Handler Animal Feed, Dumped Milk and
9 Accidental Loss, April through July 2003."

10 Were you asked to prepare this as -- during the
11 proceedings in September in Arizona?

12 A. Yes, I was.

13 (Exhibit No. 31 is marked)

14 BY MS. DESKINS:

15 Q. Okay. Now, was this one prepared under your
16 supervision and control?

17 A. Yes, it was.

18 Q. And is it accurate to the best of your knowledge?

19 A. Yes, it is.

20 Q. There's something here that says "Restricted."
21 Can you tell us what that means?

22 A. Whenever a number that we collect represents
23 fewer than three handlers, we consider that restricted
24 data. And so there -- I believe there are two
25 producer/handlers under the Arizona/Las Vegas order, Sarah

1 Farms and Sunrise. And that -- that's two, so we would
2 restrict that number.

3 MS. DESKINS: Okay. At this time I move for the
4 admission of Exhibit 31.

5 THE COURT: Any objection to that?
6 (No response)

7 THE COURT: Exhibit 31 is admitted into evidence.
8 (Exhibit 31 is received.)

9 BY MS. DESKINS:

10 Q. Now, also, Mr. Mykrantz, you were asked a couple
11 of other questions during the hearing in Arizona. Do you
12 recall what those questions were?

13 A. Yes, I do.

14 Q. Okay. Could you please start with the first one,
15 and tell us what the question was, and what's the answer
16 you were able to find?

17 A. I can do that. On Exhibit 5, on page seven, the
18 name "Anderson Dairy, Inc." appears, and it's shown as a
19 partially regulated distributing plant in January 2001.
20 That is an error.

21 Q. Okay.

22 A. For Exhibit 5 on page seven, there is a handler
23 identified called Anderson Dairy, Inc. under the title
24 "Partially Regulated Distributing Plants in the Month of
25 January 2001." That is an error. It should not appear

1 there.

2 Q. So should that line just be moved -- removed from
3 Exhibit 5?

4 A. It should be removed.

5 Q. Okay. Do you recall what the next question was?

6 A. It was a similar question on Exhibit 6, page six.

7 Again, Anderson Dairy appears under the heading,
8 "Partially Regulated Distributing Plants." That is also an
9 error, and it should be removed.

10 Q. Okay. And do you happen to recall the next
11 question that you were asked in Arizona?

12 A. I guess for Exhibit 5, page 35, names of the
13 month shown on this page are July through December. The
14 correct month names are January through June. The data is
15 correct for January through June.

16 Q. Okay. So on that particular one on page 35,
17 where it says at the top, "January through June," that's
18 correct?

19 A. Correct.

20 Q. Okay. Thank you. Do you -- was there another
21 question that you were asked regarding the information in
22 Exhibit 5 and 6?

23 A. On Exhibit 6, page 26, I guess the volume of
24 class one, in-area sales by other plants in the early
25 months of 2000 do not match the data as originally

1 published in the bulletin. And it's the data in table 11,
2 represents revised data based on new information that was
3 not available at the time that the bulletins were
4 published.

5 Q. Are the bulletins still available on the -- on
6 your web page?

7 A. Yes, they are.

8 Q. Okay. So would the corrected -- would the
9 information be correct in those bulletins now, or it's
10 still --

11 A. No, it is still incorrect.

12 Q. Okay. Okay. But what's contained in here is the
13 correct information?

14 A. Yes, it is.

15 Q. Okay. Do you recall any other questions you were
16 asked?

17 A. On Exhibit 8, there was a question as to the
18 number of 7A plants in each of the categories of the
19 smallest, the middle, and the largest groupings. There's
20 18 7A plants represented in total. There are six plants in
21 each of those smallest, middle, and largest groupings, so
22 they're divided evenly.

23 Q. Okay. Thank you. And was there any other
24 questions?

25 A. Not that I'm aware of.

1 Q. Well, you're going to get some more now because I
2 have finished with you, so.

3 THE COURT: Okay. All right. Who has questions?

4 If you will, stand, Mr. Yale.

5 BY MR. YALE:

6 Q. Good morning. Benjamin F. Yale on behalf of
7 Etteline Dairy, Mallory's Dairy, and Smith Brothers Farm.

8 Very -- just a simple question. When you talk
9 about members and non-members, do producer/handlers enter
10 into these numbers at all?

11 A. They do not.

12 MR. YALE: All right. That's all I have.

13 THE COURT: Any other questions for Mr. Mykrantz?

14 (No response)

15 THE COURT: Okay. You may step down, Mr.

16 Mykrantz.

17 Okay. Mr. Holland is going to be called next; is
18 that correct?

19 MR. UNIDENTIFIED: Yes. (Indiscernible)

20 THE COURT: Would you please raise your right
21 hand, Mr. Holland?

22 ELVIN HOLLON

23 having been first duly sworn, was examined and testified as
24 follows:

25 THE COURT: Okay. If you could please state and

1 then spell your name for the record.

2 THE WITNESS: My name is Elvin, E-l-v-i-n,
3 Hollon, H-o-l-l-o-n. I've provided a business card to the
4 court reporter.

5 THE COURT: That's good.

6 MR. BESHORE: Your Honor, with -- before Mr.
7 Hollon begins his testimony --

8 THE COURT: Mr. Beshore, I need you to -- I'm
9 sorry, I need you to identify --

10 MR. BESHORE: Marvin Beshore.

11 I would like to ask that both his prepared
12 statement, which is available in the room and a set of
13 exhibits, which are also available, be marked as exhibits
14 for the record. And the reason for marking the prepared
15 statement, in particular, is that it -- which he's going to
16 read, but it has testimony with respect to proposed changes
17 in order language, which has cross-outs in the text as well
18 as additions, and it will help to have the document
19 actually part of the record as well as have him read it, I
20 think.

21 THE COURT: Okay. If you give them to me, I'll
22 mark them. Are -- does the reporter have a copy of them
23 (indiscernible)?

24 Okay. I'm going to mark the testimony as Exhibit
25 32, and this exhibit package as Exhibit 33. And they're

1 both marked.

2 (Respondent's Exhibit Nos. 32 and 33 were marked.)

3 MR. BESHORE: Okay. Thank you, Your Honor.

4 THE COURT: Okay.

5 BY MR. BESHORE:

6 Q. Now, Mr. Hollon, before we get into your
7 testimony and exhibits, would you -- I guess you've given
8 your name and address. Have you?

9 A. Correct.

10 Q. Okay. Would you please provide us with a brief
11 description of your professional education and background?

12 A. Have a bachelors degree in dairy science
13 manufacturing from Louisiana State University and a masters
14 degree in agricultural economics from Louisiana State
15 University.

16 I have worked for Dairy Farmers of America or its
17 predecessors since 1979. My job duties have encompassed
18 day-to-day fluid milk marketing activities, buying and
19 selling of raw milk, dealing with regulatory entities,
20 planning for business operations for best profit potential,
21 lease/loss potential.

22 I've dealt with federal milk marketing order
23 hearings since the early '80s. I have prepared testimony
24 for hearings. I'm a witness for hearings. I take
25 questions at hearings. I provide an interface between

1 Dairy Farmers of America and the regulatory system, both --
2 sometimes on a state level, on a regional level, on a
3 national level. I deal with milk pricing in all markets of
4 the country. Dairy Farmers of America is the nation's
5 largest dairy cooperative. We have operations in all
6 states are members in 40 -- I think it's 47 states, and we
7 have an interest in federal milk marketing orders.

8 MR. BESHORE: Your Honor, I would ask that Mr.
9 Hollon be recognized for his testimony is an expert in
10 agricultural economics and dairy marketing.

11 THE COURT: Well, I'll recognize that. I still
12 don't quite understand what it means in terms of this
13 proceeding. Everyone who's testified has been pretty much
14 -- has some expertise, and -- but the secretary can weigh
15 his testimony accordingly.

16 MR. BESHORE: And I'd be glad to offer the
17 opportunity to voir dire Mr. Hollon with respect to his
18 expertise.

19 THE COURT: I don't see anyone taking up that
20 offer, so please continue.

21 BY MR. BESHORE:

22 Q. Thank you. Now, Mr. Hollon, let's look at your
23 exhibits first, Exhibit 33. And if you would, Exhibit 33
24 is a 20 page document with a cover page and a number of
25 separate data sets internal to it, correct?

1 A. That is correct.

2 Q. Okay. Could you proceed through the exhibit and
3 describe the -- just briefly the data and how each one was
4 compiled as you'll be referring to them in your testimony.

5 A. Exhibit 33 tables A-1 and A-2 are a comparison of
6 the class one price and the blend price in Federal Order
7 131, the Arizona/Las Vegas order and Federal Order 124 of
8 the Pacific Northwest order. These data were simply lifted
9 from the monthly market administrator price announcements
10 and reports. The difference is a subtraction of two per
11 hundredweight prices and the per gallon difference is a
12 division of that difference by 11.61 to get a per gallon
13 difference. And tables A-1 and A-2 were constructed in the
14 same manner.

15 Q. And 11.61 is the number of gallons in a
16 hundredweight of milk; is that correct?

17 A. That's correct.

18 Q. Okay. Table B then in Exhibit 33?

19 A. Table B is a -- again a multiplication/division
20 assignment. It takes various, hypothetical plant sizes.
21 The largest plant size, 30 million, that would approximate
22 the largest fluid milk processing plant in the country,
23 down to a plant that might produce only 100,000 pounds of
24 milk per month. Converts that into pounds per day simply
25 by division. Converts that into gallons per day using an

1 8.61 factor, and then takes those gallons and converts them
2 into a trailer load per day using 4,500 gallons per
3 trailer.

4 We use that number quite often in other lines of
5 our business. We bounce it off our customers also, and
6 that's a reasonable approximately of how many gallons of
7 milk you would get on a trailer.

8 And a trailer -- semi-trailer, a refrigerated
9 refer is the most common delivery method from a processor
10 to a retail store.

11 Q. Okay. Thank you. Could you go to Table C then
12 of Exhibit 33?

13 A. Table C is composed of C(1), (2), (3), (4). All
14 are computed in the same manner. The intent of Table C is
15 to try to point out at the lowest class value what a
16 producer/handler might face for some element of his
17 balancing costs. The general theory is that the
18 producer/handler sells at a uniform skim fat price to the
19 class one market, so he's going to have some milk that's
20 sold into the class one market, and then some milk that's
21 excess.

22 Looks at two possible scenarios, and one is for
23 -- Table C(1) and C(2) are for using order 131 prices as
24 published by the market administrator, and Table C(3) and
25 C(4) uses Federal Order 124 data as published by the market

1 administrator.

2 The columns labeled "Butter fat" and "Producer
3 milk," butter fat in class one, uniform skim price, uniform
4 butter fat price, class three/four price, skim price class
5 three, class three butter fat price, class four skim price,
6 class four butter fat price are all data that are taken
7 from market administrator either publications or
8 information that they publish on request.

9 Q. Okay. And those are data that are in columns
10 reading from right to left on each of the tables in Exhibit
11 33-C, 1-4?

12 A. That is correct.

13 THE COURT: Right to left, or left to right
14 (indiscernible)

15 MR. BESHORE: I'm sorry, left to right.

16 THE COURT: Okay.

17 MR. BESHORE: Thank you, Your Honor. Left to
18 right, yes.

19 BY MR. BESHORE:

20 Q. Okay. Then the two right-hand columns on each
21 table are captioned "Lower." And what are they, Mr.
22 Hollon?

23 A. At the end of the month, one set of class prices
24 are going to be lowest, and so in order to try to get a
25 worst-case effect, we wanted to pick the lowest class three

1 or class four price to compare against. So again, that's
2 nothing more than a spreadsheet function that says what's
3 the lowest option, class three or four?

4 Q. So on the first line, January, '00 -- January of
5 2000, the lower number, \$7.0200 represents what?

6 A. The class three skim price for that month, which
7 would've been lower than a class four skim price for that
8 month.

9 Q. And then the final column of "Lower," 0.9366
10 represents what?

11 A. The class four butter price, which would've been
12 the lowest of the two alternatives for that particular
13 month.

14 Q. Okay. And the columns on --

15 A. Actually, in that case, it will always represent
16 either, because they have the same butter fat price. So
17 it'll be the same all the way through. It'll be the --
18 three and four butter fat is always the same.

19 Q. Okay. Now, if you continue with Table C(1) of
20 Exhibit 33, it has a second page to it, correct?

21 A. That's correct.

22 Q. Okay. And can you describe then what the
23 calculations are, the data set is on the second page of
24 Exhibit 33, Table C(1)?

25 A. The first column of numbers is simply the month

1 designation. The second block, which is two columns talks
2 -- starts out, if you have a ten million pound producer
3 milk and the whole table, you know, drives off percentages.

4 So you could have one pound or 100 million pounds. I've
5 just simply used ten million pounds for ease of
6 calculation, but you would get the same per hundredweight
7 result.

8 Q. Okay. Before you go to any more of the columns,
9 there are three lines above the columns.

10 A. Okay. The analysis was done on two levels. It
11 assumes that a produce/handler might have a 90 percent
12 class one use in their plant and a ten percent class four
13 or three or four surplus use, and ten million pounds of
14 producer milk.

15 We typically find that most fluid milk processing
16 plants are high in class one use, and you know, 90 percent
17 would not be an abnormal number, and we do -- this analysis
18 is done on the basis of 90 percent and 80 percent.

19 So if there are ten million pounds in the front
20 door and the orders average butter fat was 3.72 percent,
21 there'd be 372,000 pounds of butter fat available for sale
22 and 9,628,000 pounds of skim available for sale.

23 If this producer was a 90 percent -- this
24 producer/handler had a 90 percent utilization in the second
25 block of columns with five numbers on them, would say that

1 he would have so many pounds of milk, nine million pounds
2 of milk to supply to his class one customers. That would
3 be composed of so much skim and so much butter fat.

4 The class one butter fat is published by the
5 market administrators at 1.95 percent. That's -- reads
6 back from the first table. So 90 percent times ten million
7 times 1.95 percent says that we'd have 175,500 pounds of
8 butter fat. Subtract that out from the total. You have
9 that many pounds of skim.

10 The remainder would be the surplus that would
11 need to be marketed, sold, balanced, where we're trying to
12 configure the worst alternative under regulated prices. So
13 there'd be that many pounds of the lowest alternative left.

14 The values come from the skim fat and butter fat values as
15 published by the market administrator, multiplied out.

16 The next block of columns attempts to compute
17 these values. So how much was the class one skim worth?
18 How much was the class one butter fat worth? How much was
19 the lowest class skim worth? How much was the lowest
20 butter fat worth? You add them all up to get gross value
21 at test. So that's simply an extension of all of the
22 various multiplications.

23 That's, comes up with a uniform test, which would
24 be since the producer/handler's not a part of the pool,
25 that would be their uniform value, based on a 90 percent

1 class one utilization, 10 percent class four in this
2 particular case. Class three would be the driver for this
3 month, and they have \$11.32 in their hand.

4 The published uniform price at test for order 131
5 was \$11.44. So there was a 12 cents per hundredweight
6 difference between those two numbers in that month. If the
7 producer/handler had a 90-10 utilization and sold their ten
8 percent at the lowest possible value -- lowest possible,
9 regulated value, could've sold at a higher value, could've
10 sold at a non-regulated value somewhere else, but this
11 would be the lowest, regulated value.

12 Summed up for the year is an average of 10 cents
13 divided back on a per gallon gives a 9/10ths of a cent per
14 gallon for all of 2000. For '01 a penny a gallon. For '02
15 9/10th of a cent per gallon, and for the months that which
16 I had data in those three, 1.2 cents per gallon.

17 Q. And those per hundredweight per gallon figures
18 are the last two columns on the second page of Exhibit 33-
19 C(1)?

20 A. Correct.

21 Q. Okay. Now, --

22 A. So Table C(2), (3), and (4), all the arithmetic
23 is done the same way. The difference between C(1) and C(2)
24 is, you assume that there's an 80 percent class one
25 utilization instead of 90 percent.

1 Q. And C(3), the -- then moves to using order 124
2 data; is that correct?

3 A. That's correct.

4 Q. And --

5 A. And it set of prices, and it set of skim prices,
6 and its set of class one prices, and its set of uniform
7 skim and uniform butter fat prices.

8 Q. Okay. And C(4) again uses order 124 data,
9 assuming an 80 percent --

10 A. That is correct.

11 Q. -- class one utilization?

12 A. That's correct.

13 Q. Okay. Let's move on then to Table D of Exhibit
14 33. Could you tell us what that represents?

15 A. We attempted through our own competitive sources
16 to look in the two orders in question and, in fact, in all
17 federal orders for a list of producer/handlers, and made
18 some estimates of their volume. The lists -- the names are
19 published in market administrator data, as in they're
20 listed either as producer/handlers, and in some cases,
21 they're listed as exempt plants because of their size is
22 below 150,000 pounds, but nonetheless the names are
23 published.

24 And then we looked at our own competitive sources
25 to try to get an estimate of their volume. So Table D is

1 for Federal Order 131, and we found three names, and how
2 they were published and what we estimated those monthly
3 volumes to be. We used, again, our own competitive sources
4 to do that.

5 Table E is the similar analysis for Federal Order
6 124 where we again took the list of names from the market
7 administrator published data, went back to our own
8 competitive sources and made, you know, attempts to come up
9 with a monthly volume -- monthly production volume.

10 Q. Okay. And you did this because the production,
11 or the volume of these plants is not published information
12 anywhere, correct?

13 A. The individual volume is not published
14 information. Again, that represents our own competitive
15 analysis as to what we think they may be from our customers
16 in the marketplace, our field sources in the marketplace,
17 talking to individual dairymen in the marketplace, and
18 putting that information together. This information was
19 all put together by people in -- whose day-to-day business
20 operations are in the market.

21 Q. Okay. Would you go then to Table F of Exhibit
22 33, and is that a two page table?

23 A. Table F is a two page table. Table F, we
24 contacted all of the market administrator offices to ask
25 them the series of questions about producer/handler and

1 exempt plants, and this represents the data that we got
2 back from those phone calls, surveys and discussions. This
3 is a summation of, and it goes by order, so all of the
4 orders are listed. We asked the market administrator for
5 the number of producer/handlers in the market.

6 Each market administrator had some variation in
7 their own policies as to what information they would give
8 us and what they wouldn't. Some of their policies matched,
9 you know, those in discussion (phon.) by Mr. Mykrantz
10 earlier about confidentiality, and some didn't seem to
11 match that, but nonetheless, they were the keeper of that
12 information.

13 So you can see the number of producer/handlers in
14 the market that was given to us for Federal Order 1, for
15 example, was 45. Federal Order 5 was restricted. There
16 were fewer than three. On down the line, Federal Order 33
17 publishes the names of producer/handlers. I think there's
18 18 in the marketplace, but for whatever reason, they chose
19 not to give us the list -- give us the count.

20 So this is the list of all those
21 producer/handlers. We asked them for the percentage of the
22 market's class one, and you can see in cases where they
23 provided that. We asked for the average monthly class one
24 volume of all producer/handlers in the market. And again,
25 you can see where that data was provided.

1 Back up to the first column number,
2 producer/handlers in the marketplace, if you add up all of
3 those, you get 101. The average monthly class one volume
4 for all producer/handlers, if you average those numbers,
5 it's 587,721.

6 Average monthly class one volume for the median.
7 We asked them for the median sized producer/handler, and
8 again, there was variations in, you know, what each market
9 administrator was willing to provide, where they would
10 provide data. Those who did provide data, the average was
11 96,807 pounds, and that data encompassed the markets with
12 the largest number of producer/handlers and does represent
13 over half.

14 Q. Okay.

15 A. Table F, the second page then takes the list of
16 producer/handlers, and we ask each market administrator to
17 break down that number into the smallest third, the middle
18 third, the largest third. And if there were not enough
19 producer/handlers, then would they break it down into
20 halves, and give us some information.

21 And the average monthly class one volume for the
22 smallest third is listed by the orders that was -- were
23 able to provide data. I don't have a numeric average, but
24 an eyeball average would put it at below 100,000 pounds.

25 The average monthly class one volume for the

1 middle third, again, where they would provide data, and the
2 average monthly class one volume for the largest third
3 where there was data to provide. And again, I don't have a
4 number computed, but you know, looking up and down the
5 largest third, it's considerably larger than either of the
6 other groups.

7 We also asked for a percentage of markets class
8 one volume held by the various groups. In the case of the
9 smallest group, it's an extremely small number, and even
10 after the largest group in a couple of markets, the numbers
11 are a little bit larger.

12 Q. Okay. Could you go, then, to Table G? Again a
13 two page table, and the last table within Exhibit 33.

14 A. Table G we asked a similar type of question.
15 This time regarding the 7A or pool distributing plants. 7A
16 refers to the section of the order where distributing
17 plants are described. So we asked each market
18 administrator to tell us the number of 7A plants in the
19 market in May of 2003. And in both cases for Tables F and
20 G, that was the month that we asked them to provide data
21 for.

22 So there were 278 7A plants in all federal
23 orders. We asked them for the percentage of the markets
24 class one share. You can see what they provided, showing
25 that it's well above, I think. Even the smallest number is

1 84 percent of the numbers that are published, and it was 82
2 percent in 130 -- Order 135.

3 We asked for the average monthly volume of all
4 class -- of all 7A plants, average class one volume, and
5 that average is 14,849,743.

6 Q. Would you repeat that, Mr. Hollon?

7 A. 14,849,743.

8 Q. Thank you.

9 A. We asked for the median sized volume, and again,
10 some chose not to provide median information. While I
11 don't have an exact number, it's greater -- well, it's a
12 little -- I'm sorry, I haven't averaged that number out,
13 but it's about 12 million pounds, a little under for the
14 median sized 7A plant.

15 The last part of Table G, again, breaks those
16 plants down into the smallest one third, the middle one
17 third, size-wise, the largest one third, and the smallest
18 one third averages approximately 3.7 million pounds. The
19 middle grouping of all distributing plants in federal
20 orders is 11.4 million pounds, and the largest one third
21 grouping is 24.8 million pounds.

22 Those ranges on the largest size, can see that
23 Federal Order 1 has at least a third of their plants
24 slightly over 30 million, and I think the smallest grouping
25 is in Federal Order 32 -- no, Federal Order 124 has the

1 largest one third of those plants is just over or just
2 under 19 million.

3 Q. Okay. Now, would you -- with that introduction
4 to your exhibits, would you proceed with your prepared
5 testimony in Exhibit 32?

6 A. Do you want to do questions on the exhibits
7 first?

8 Q. You mean the noticed exhibits --

9 A. Yes.

10 Q. -- pick those up at the end.

11 A. At the end? Okay.

12 Document testimony's 31 pages of which of
13 approximately a third deal with language and proposed
14 language. Testimony of Dairy Farmers of America, Milk in
15 the Pacific Northwest and Arizona/Las Vegas Marketing
16 Areas, Document No. A0368A32, A0271A37, DA0304.

17 "Dairy Farmers of America, Inc., DFA, is a
18 qualified caprivolsted (phon.) cooperative that represents
19 14,329 farms located in 47 states. In 2002, DFA marketed
20 47.8 billion pounds of milk of its member owners, for other
21 cooperatives, and for non-member dairy farms. Our primary
22 market is to fluid milk bottlers.

23 "We support the federal order system because we
24 believe it is the most fair and equitable manner to market
25 dairy farmers' milk that will insure them of a reasonable

1 prices in common terms of trade. We pool milk on 10 of 11
2 federal orders. We do not pool milk on Order 131, but have
3 an extensive marketing arrangements with the dairy farmer
4 members of United Dairymen of Arizona, UDA, for the
5 purchase of supplemental milk supplies and to provide
6 seasonal balancing services to DFA. UDA markets and pools
7 milk on Order 131.

8 "We have members pool milk supplies and have
9 investments in processing in Federal Order 124. We are
10 appearing here in coordination with the other proponents,
11 UDA and the Northwest Dairyman Association, NDA.

12 "We have participated in seven federal order
13 hearings and several subsequent court proceedings since the
14 implementation of federal order reform in an effort to make
15 federal orders function best for dairy farmers. That's why
16 we're here today to participate in this hearing. We share
17 identical interests with United Dairymen of Arizona and the
18 Northwest Dairyman's Association on this proposal."

19 MR. BIRDIE: Your Honor?

20 THE COURT: Mr. Birdie?

21 MR. BIRDIE: Since this is not being recorded
22 here, but somebody's going to have to transcribe what
23 you're reading, I would suggest that the witness proceed a
24 little more slowly.

25 THE COURT: Fine.

1 THE WITNESS: "The issue of large, unregulated
2 producer/handlers is very serious. If not corrected, it
3 has the potential to completely undermine the federal order
4 system. Large, unregulated producer/handlers have a
5 distinct, competitive advantage that they will naturally
6 move to exploit unless the provisions we offer are adopted.

7 Regulated handlers will not be able to maintain market
8 share, and will force suppliers to reduce prices in order
9 to maintain the viability of their operations.

10 "The problems we will outline are not an industry
11 secret. The expansion of this loophole is growing rapidly.

12 In some cases, retailers have become sophisticated enough
13 to understand the advantage, and seem to be recruiting
14 producer/handlers for supply. Just as in the initial
15 hearing in Phoenix, there are likely some individual in
16 this room today who are here to get schooled on how to
17 exploit these provisions and to learn whether this loophole
18 will be there in the future for them to exploit.

19 "The issue has even led to discussions in some
20 portions of the U.S. Dairy marketplace to lower regulated
21 prices in order to provide some competitive equity. The
22 drive to exploit this loophole is, or will, create
23 organized disorderly marketing. There would be no
24 advantage to exploit without first an order, and then the
25 exemptions granted to producer/handlers. In this case, the

1 nature of the provisions are causing disorderly marketing.

2 "Legal authority to regulate producer/handlers:
3 There has been an undercurrent of discussion and activity
4 attempting to establish the position that the secretary has
5 no legal authority to regulate producer/handlers. The
6 simple fact that we are at a hearing announced by the
7 secretary and supported by the department's Office of
8 General Counsel should be reason enough to dismiss this
9 thought.

10 "It is our understanding that the department will
11 not go to a hearing without a determination that the
12 hearing proposals could legally be adopted. This issue has
13 been thoroughly reviewed and briefed in prior hearings and
14 decisions. Mr. Birdie has compiled a dossier on this
15 point, and we support his conclusion that the secretary has
16 any and all authority to regular producer/handlers in her
17 effort to provide for orderly marketing conditions.

18 "Basic position: Our reason for participating in
19 this hearing can be summed up by the secretary's comments
20 in 1989."

21 This is a quote. "The purpose of the Federal
22 Milk Order -- Milk Marketing Orders is to establish orderly
23 marketing conditions for producers who are the regular
24 suppliers of milk. In its simplest terms, this is
25 accomplished by establishing minimum prices for milk in

1 accordance with its use, and providing for the pooling or
2 equal sharing of the proceeds from the sale of milk in all
3 uses among all dairy farmers supplying the market.

4 "Any time that milk is sold within a federal
5 order marketing area and such milk is not priced by the
6 order, the ability of the order to maintain orderly and
7 stable marketing conditions for milk may be impaired. When
8 milk of a producer/handlers is sold in a federal milk
9 marketing area, such milk is not priced by the order. In
10 such case, the order does not provide uniform, regulated
11 pricing among competing handlers, since fully regulated
12 handlers must pay the minimum order class one price for
13 milk and fluid uses, while producer/handlers are not
14 required to do so.

15 "This raises the potential for competitive
16 inequities among handlers. Furthermore, there is not an
17 equal sharing among all dairy farmers in the market of the
18 returns from the sale of all milk in all uses, since
19 producers whose milk is being priced under the order do not
20 share in the class one sales of producer/handlers.

21 This cite is 54 Federal Register 27182, June
22 28th, 1989.

23 "The key point is, there are circumstances where
24 the activity of producer/handlers can thwart the operations
25 and intent of federal orders. For DFA members, federal

1 order provisions are a key component of their total
2 marketing plans, and when the order's ability to function
3 as intended is impaired, we are concerned.

4 "We intend to demonstrate in support of our
5 proposals that the operation of large producer/handlers in
6 both Order 124 and Order 131, (1) draw sizeable dollars out
7 of the Order 31 blent price pool, thus, not allowing for an
8 equal sharing of the class one revenues generated by the
9 operation of the order for all regular suppliers to the
10 market; (2) have series competitive impacts on handler
11 equity causing a loss of sales to fully regulated handlers;
12 (3) have the ability to service multiple retail accounts,
13 thus impacting competitive pricing in the market; (4) have
14 balancing costs that are a small percentage of the
15 advantage offered by avoiding class prices; (5) are larger
16 in some cases in many of the regulated handlers in the
17 federal order system; (6) are statistical outlines (phon.)
18 in terms of size in the federal order system, and that our
19 proposal will have no impact on the current operational
20 ability of nearly all of the producer/handler operations in
21 the federal order system; and (7) have economies of scale
22 on the fluid milk processing portion of their business, and
23 in the area of cost of milk production that have the
24 potential to generate significant revenue streams that can
25 be used to capture market share from other regulated

1 handlers.

2 "Impacts to the producer blent pool. When
3 producer/handler class one revenues are not shared with the
4 market-wide pool, dollars are lost to the remaining
5 producers in the order. Since exact producer/handler data
6 is restricted from publication by Federal Order 131 for
7 confidentiality reasons, we can only make inferences to
8 their exact volume. But in a published table by the Order
9 131 market administrator, titled 'Class One In-Area Routes
10 by Pool Plants, Producer/Handlers and Other Plants,
11 Arizona/Las Vegas Order, Federal Order 131, January 2000
12 through June 2003, Exhibit 6, Table 11,' there is enough
13 detail to make a reasoned estimate that producer/handlers
14 account for 12.1 to 19.1 million pounds of class one in-
15 area route sales. That is the last number published
16 without producer/handlers subtracted from the high-low
17 month with producer/handlers.

18 "The difference between the monthly totals for
19 February and March of 2001 represents the volume of
20 producer/handlers in the marketplace and from other order
21 plants. Based on our knowledge of market conditions and
22 the producer/handler operations in the market, we believe
23 that large producer/handlers represent the majority of the
24 volume difference.

25 "The revenue from sales, to the extent they are

1 from producer/handlers are not shared with other producers
2 in the pool. When these sales are priced on a component
3 basis and adjusted for location, they result in a reduction
4 in producer funds from 5 cents to 29 cents per
5 hundredweight. For the 43 month period measured, the
6 average reduction is approximately 12.5 cents or based on
7 an average monthly pool of 254 million pounds, \$317,000 per
8 month.

9 "We consider that sum significant. It seems
10 unreasonable that the actions of primarily a single entity
11 could cause all producers in the market-wide pool \$317,000
12 per month. Exhibit 9, Federal Order Estimated 131 Blent
13 Price Calculation, possible effective an additional 18
14 million pounds of producer milk in class one at market
15 average class one butter fat at test, and \$2.10 class one
16 location adjustment.

17 "Impact of the competitive relationship between
18 processors and retailers. The starting point for the
19 measure of impact is the comparison that the regulated
20 handler plays -- pays class prices for milk used in his
21 plant, but the producer/handler accounts for their
22 operation at the blent price. The table comparison of
23 class one and blent price, Federal Order 131, calendar year
24 2000 through 2003, Exhibit" -- what was that exhibit marked
25 as?

1 MR. UNIDENTIFIED: 33.

2 THE WITNESS: 33.

3 THE COURT: Yeah, 33 was the tables.

4 THE WITNESS: "33, A-1, Table A-2 shows similar
5 comparisons for Order 124, detail-less difference (phon.).
6 The annual averages when expressed in cents per
7 hundredweight range from \$1.84 to \$2.12 or on a per-gallon
8 basis, from 15.9 cents to 18.3 cents. Calendar year 2000
9 to-date data is slightly lower and somewhat influenced by
10 the extreme price inversion of July.

11 "For business that makes bids based on multiple
12 decimal points, this difference equates to a sizeable and
13 significant, competitive advantage. Testimony by various
14 processor here will further detail the competitive strains
15 caused by this sizeable price difference. However, the
16 point to remember is that order provisions that allow large
17 size producer/handlers to avoid regulations but still
18 compete with regulated handlers in the marketplace, cause
19 disorderly marketing issues.

20 "Processors face competitive challenges on
21 several fronts. Testimony from processors will provide
22 further detail, but I would like to characterize several
23 from my own experience in marketing bulk milk to
24 processors.

25 "Milk marketing and pricing is a process of

1 continual negotiation. Day-to-day changes in market
2 conditions always call for a new look at prices. If my
3 processing customer faces new competition from their
4 competitor, they will always ask about the price and how
5 they can get a lower one.

6 "Milk from producer/handlers can be and is used
7 by retailers to leverage their supplier for a lower price,
8 and to stay competitive themselves. Usually the lowest
9 price puts pressure on every other price.

10 "To get some idea of the pervasiveness of the
11 ability to put downward pressure on prices, we have
12 developed two tables. Exhibit 33(b), 'Ability to Service
13 Retail Accounts by Size of Processor,' uses several
14 calculations to arrive at relating the volume of milk
15 packaged by a handler to the common unit of delivery, a
16 trailer load. We show this calculation for a variety of
17 sizes from 30 million pounds per month, a processing
18 capacity down to 100,000 pounds. The top end of our table
19 would encompass the largest processing plants in the U.S.,
20 and the smaller end would encompass the majority of
21 producer/handlers in operation today.

22 "The volume limitation measure we have proposed,
23 three million pounds per month is still sizeable. It would
24 allow the producer/handler to deliver 2.5 trailer loads of
25 gallon jugs of milk to a single or combination of retail

1 accounts per day. This volume would be enough to cause a
2 significant, competitive reaction in the marketplace.

3 "A retail chain of several stores in a nearby
4 suburb market with pricing driven by the gap in the
5 producer/handler price versus the regulated handler price
6 would get the attention of the remaining retailers in the
7 market. They would be sophisticated enough to know whether
8 the marketing strategy of that store or chain was driven by
9 every day low price or by -- or a random promotion as the
10 loss leader. If the strategy was not a very temporary loss
11 leader, they would press their milk supplier for a reduced
12 milk price in order to compete.

13 "Milk is a major category for retail sales
14 because it is a rapid turnover item. A retailer must be
15 competitive on milk prices in order to stay in business.

16 "We have attempted to quantify the number of
17 stores that might be serviced by a three million pound per
18 month producer/handler by contracting with Institutional
19 Resources, Incorporated to provide us data on milk sales
20 per store. They have a store universe of 12,800 stores
21 representing approximately 80 to 90 percent of the universe
22 of U.S. grocery stores.

23 "This population does not include superstores or
24 club stores, drug stores selling food or convenience
25 stores. From this population they provided data on 3,200

1 stores that represented the smallest 25 percent of their
2 store sample.

3 "Stores are stratified based on total sales
4 receipts of all commodities. The average store in this
5 subset, the smallest, 25 percent, sold 1,070 gallons of
6 white milk per week. At the ratio of 4,500 gallons per
7 trailer, the three million pound per month producer/handler
8 could service 74 stores per week with gallons. I got
9 calculation is 4,500 divided by 1,070 times 2.5 times 7.

10 "Using the remainder of the universe of stores in
11 this case, the largest 75 percent of the population, the
12 average store sold 4,425 gallons per week. The 3,000 (sic)
13 pound per month producer/handler could service 18 stores of
14 this size per week. The store that make up this subset
15 could easily be a metropolitan grocery chain with a
16 reasonable market share.

17 "In both cases, a competitive problem is caused
18 by exploiting the price difference allowed by the lack of
19 regulation of the large producer/handler. In our
20 experience, when this occurs, the bottling plants which we
21 sell raw milk to face tremendous bottom line pressure, and
22 ask us for price reductions. This situation is quantified
23 by Mr. Herbine's (phon.) exhibits.

24 "One rationale given for not regulating
25 producer/handlers is that they have costs that absorb any

1 potential gain from not paying regulated prices. This
2 argument has been offered extensively in previous hearings.

3 The cost argument seem to be premised on two points, that
4 operational costs and balancing costs to producer/handlers
5 are greater than for regulated handlers, and that this
6 justifies ignoring what would otherwise be a significant,
7 competitive advantage. There will be evidence in this
8 hearing that producer/handlers over three million pounds
9 per month do not suffer significantly lower operations or
10 balancing costs than the regulated handlers of the same or
11 larger size.

12 "Mr. Herbine's exhibits detail the fallacy of
13 these arguments from the standpoint of operational costs.
14 In Exhibit 25-A through 25-E, "Cost Structure of Fluid Milk
15 Plants of Various Sizes," he detailed the costs for
16 operating plants of various sizes, where the size plant
17 that most approximates the majority of producer/handlers,
18 the 90,000 pound per month monthly volume, the argument
19 that costs absorb the benefits seems to hold true. That
20 plant size details an operating only cost of \$1.008 per
21 gallon, or approximately 40 cents more per gallon than the
22 cost for the plants within the range that we propose ending
23 the producer/handler exemption. The price per gallon gains
24 between the blend and class one prices, as noted
25 previously, is more than eliminated by the cost difference

1 between the normal size producer/handler and the next
2 closest, smallest size larger processor.

3 "As shown in the Herbine data, the cost spread
4 between what Mr. Herbine identifies as a" -- typographical
5 error that should be the 'D' -- "plant, which most closely
6 approximates the average fluid milk processing plant in the
7 U.S. and a" -- and this should be 'E' "plant, which
8 approximates the expected size of the Sarah Farm -- nor,
9 should a smaller size producer/handler between our proposed
10 three million pound per month limit and the average size
11 federal order plant, as shown in the exhibit, need an
12 exemption to complete (sic) with smaller regulated plants.

13 "Furthermore, in keeping with marginal economic
14 principals, the cost curve flattens out as volumes -- as
15 volume grows. So the larger plant can add volume at
16 little, additional cost. A large producer/handler who does
17 not pay regulated prices would easily be able to gain
18 market share at will.

19 "This seems to describe the retail market
20 scenario in Order 131, and is a concern in Order 124 as
21 well. This would be an example of disorderly marketing as
22 I will discuss further in my testimony.

23 "Mr. Herbine's exhibits further develop the
24 principal that a regulated handler cannot service a segment
25 of the market known to be regularly supplied by

1 producer/handlers if he must pay the full, regulated price.

2 Exhibit 25-E, titled 'Comparative Analysis of Returns to
3 Producer/Handlers and Regulated Distributing Plants
4 Supplying a Warehouse Store,' demonstrates that for the
5 superstore, club store category using industry derived
6 data, a handler paying minimum regulated prices cannot
7 service the store with any return or with a return so
8 minimal that he could not remain in business.

9 "This exhibit does not allow any profit for the
10 processor and still does not show a viable return. Equally
11 concerning is that the return for the producer/handler is
12 substantial and viable. Certain this data speaks to the
13 issue of inequity of handler prices.

14 "Additionally, this exhibit contains no values
15 for premiums, fact which DFA members have an interest in.
16 With no premium value, the producer pays for all of the
17 market servicing costs and further depresses producer
18 returns. If our customers can't be profitable, then
19 neither can DFA members.

20 "The remaining five exhibits, Exhibit 25-G
21 through K, detail similar comparisons for the five size
22 range processors we reviewed earlier. All would lose money
23 paying regulated prices in servicing this type of account
24 at the prevailing prices in the retail market. In fact, it
25 would take a producer/handler bigger than" -- this should

1 be 'D' instead of 'C,' "to perhaps break even for the
2 business. But if the large producer/handler can earn a
3 return and grow his business, pressure to terminate the
4 orders will be impossible to resist. The processor will
5 either demand a lower price until he bumps into the minimum
6 price or seek a similar producer/handler arrangements.

7 "Processors will see a smaller and smaller share
8 of the class one sales in the pool and conclude that the
9 concept is no longer working and seek to terminate orders
10 to preserve some level of market share. Once the order is
11 terminated, the advantage to the producer/handler's
12 eliminated, all market participants are at lower prices,
13 and the benefits of the order are gone.

14 "The line of argument for defending the
15 producer/handler exemption from either the position of
16 additional and excessive balancing costs does not bear up
17 either. Exhibit C-1 through C-4 -- I'm sorry, Exhibit 33-
18 C(1) through C(4) titled, 'Estimated Impact of Balancing
19 Surplus Milk for a Producer/Handler at Varying Utilization
20 Percentage, Order 131,' depicts the alternative returns
21 from balancing the producer/handler's supply at a plant
22 utilization of 90 percent class one and 80 percent class
23 one.

24 "The exhibit computes a producer/handler blend, a
25 full description of the table was given when the exhibit

1 was introduced, taking into account the producer butter fat
2 test, the class one butter fat test, pricing the handler
3 components sold to class one at the uniform component
4 prices, and the volume to be balanced at the lower of class
5 three or four, and comparing the resulting value to the
6 announced uniform test -- uniform price at test.

7 "At a 90 percent class one utilization, the
8 comparison of the producer/handler blend to uniform blend
9 resulted in a lower return of 10 to 11 cents per
10 hundredweight, or about a penny per gallon. At the 80
11 percent utilization rate, the return comparison was lower
12 by 20 to 30 cents per hundredweight, or two to three cents
13 per gallon. The balancing cost still allows for the
14 producer/handler to take significant advantage of the
15 difference between the blend price and the class one price.

16 "A regulated handler has premium charges
17 reflecting the cost of balancing. Additionally, most
18 producer/handlers have their processing plant very near or
19 at the farm supply so they do not have the cost to assemble
20 and transport milk to the market. Furthermore, a portion
21 of the producer/handler's balancing costs can be shifted to
22 the entire pool when they sell surplus to regulated
23 handlers, and when the retail outlets they serve order
24 additional or reduced orders of packaged product.

25 "The order of allocation for provisions attempt

1 to reduce the effective producer/handler balancing on sales
2 to distributing plants by down-allocating the receipt, and
3 a proportion of the supply gets allocated to class one, a
4 compensatory payment is charged. However, there is no
5 compensation for lost premium dollars or reduced return
6 when regular suppliers' milk is pushed into manufacturing
7 plants that result in lower returns. Typically see Exhibit
8 7, Table 6, 'Utilization of Surplus Milk by
9 Producer/Handler, Pacific Northwest Order.'

10 "The producer/handler surplus follows the typical
11 market patterns, and would surge milk into the pool in the
12 lowest return period for the market's balancing plants and
13 pull supplies away from the period when their returns are
14 the greatest. Additionally, retailers will fluctuate their
15 orders to keep shelf space stable and add volumes from the
16 non-producer handler processors that are supplied by the
17 pooled producers. NDA will supply additional data to
18 support this point.

19 "To summarize this point, the producer/handler
20 has balancing costs. They are a given in the milk
21 business, but from our example, the difference between
22 producer/handlers uniform price, which takes into account
23 his utilization and the market-wide uniform price is
24 minimal when compared to the advantage gained by not --
25 gained from not paying the class price. Secondly, the cost

1 he may have are offset by the very tangible premiums paid
2 by regulated handlers, and the real, but difficult to
3 estimate savings of pushing surplus back to the market-wide
4 pools' regular suppliers by selling surplus to regulated
5 handlers and balancing supplied by retail customers.

6 "Also, the producer/handler has operational cost,
7 but only the very small, but more typically sized
8 producer/handler has costs that are above the range of the
9 market. The larger sized producer/handler has operational
10 costs that are lower than the average sized Federal Order
11 regulated plant. No valid argument can be made that an
12 exemption from the regulated price is warranted from either
13 of these two arguments.

14 "The relative size of large producer/handlers has
15 processors and farms. A common defense for -- of the
16 existing treatment for producer/handlers under the order is
17 that they are small businesses that need the additional
18 benefit that the current provisions offer them and that
19 they are small enough not to be an impact in the market,
20 and that the cost of regulation would be greater than the
21 gain from regulation. However, the particular
22 circumstances in Order 131 in the pending future
23 implications, if the current order provisions are not
24 altered, do not support this concept.

25 "There are only a few producer/handlers in the

1 whole country larger than the limit we propose for change
2 and regulation. Data from both Order 131 and all orders
3 strongly support this conclusion.

4 "Exhibit 33-D, data relative to producer/handlers
5 in Order 131 shows our estimate of the volumes of milk
6 associated with producer/handlers in Order 131. We derive
7 these estimates from our own sources. Clearly the Sarah
8 Farm's operation, at an estimated 20 million pound month
9 volume is well beyond the small label. Our estimate
10 corroborates those made by United Dairymen of Arizona in
11 its testimony.

12 "Exhibit 33-F, 'Recap of Producer/Handlers and
13 Exempt Data Plants -- and Exempt Plants' Data, all Federal
14 Orders, May 2003,' summarizes information relative to class
15 one volume at producer/handlers and exempt plants from all
16 federal orders for the month of May 2003. For the purposes
17 of discussing this exhibit, all references will be made to
18 both producer/handlers and exempt plants.

19 "Based on the information we obtained, there are
20 at least 101 producer/handlers in the federal order system.
21 Account of the names published in other statistical
22 summaries would add 17 more to the total.

23 "The average class one volume for which we have
24 data is 587,721 pounds per month. From what we know of, at
25 least two of the markets with restricted data, the Order 5

1 producer/handlers are very small, and two of the three
2 Order 131 plants are also small. DFA's competitive
3 information about 6 of the 13 Order 33 producer/handler
4 plants would also be below this average.

5 "The median size of producer/handlers, for which
6 we have data, is 96,807 pounds per month. While only three
7 orders available to provide this data, they represent the
8 majority of the producer/handler plants. The information
9 we have from other orders not able to publish data would
10 substantiate this figure.

11 "The detail that is available, relative to size
12 by grouping, continues to support the conclusion that large
13 producer/handlers are not the norm for the system. For
14 those orders that reported size groupings, the largest one
15 third or one half in the case of Order 126 was consistently
16 very much larger than the remainder, giving quietus (phon.)
17 to the thought that the largest group was, indeed, very
18 large. The same tendency is displayed of the percentage of
19 the market's class one sales were the largest group to wash
20 the smaller group's market share.

21 "Exhibit 33-G, 'Recap of All 7A Plant Data, All
22 Federal Orders, May 2003, Detail and Identical Table as
23 Above For the Class One Volume at 7A Federal Order
24 Distributing Plants.' The 278 listed Federal Order
25 regulated plants have an average volume of 14,849,743

1 pounds. The median size plant volume is just below 12
2 million pounds. In the two smaller sized groupings, the
3 average plant volume is 3.7 and 11.4 million pounds per
4 month respectively. The estimated size for the Sarah Farms
5 plant is larger than the average sized plant in either of
6 the two smaller sized groupings, which would contain more
7 than two thirds of all Federal Order plants. From DFA's
8 investigation, it is the largest producer/handler in the
9 United States. Quite likely, it is at least double the
10 size of every other producer/handler, except one, and in
11 several cases would be larger than the collective
12 production of all producer\handlers of some orders.

13 "It seems invalid to make the argument that a
14 plant of this size needs the exemption granted to
15 producer/handlers. There can be no reasonable argument why
16 two thirds of all Federal Order plants should pay regulated
17 prices, and plants of this size should not. Furthermore,
18 the regulated plants in the two third -- in the smaller two
19 thirds grouping would face the same unfair and difficult,
20 competitive situation when trying to compete with
21 producer/handlers larger than the typical size, but smaller
22 than the Sarah Farms -- than Sarah Farms. All of the
23 arguments we have offered would support this conclusion.

24 "The size versus competition factor helps us in
25 selecting the three million pound per month limit for

1 granting the exemption from paying regulated prices. In
2 addition to being a statistical outlier in terms of plant
3 operation, the large size producer/handler would be an
4 outlier in terms of farm size.

5 "According to producer structure in Federal Milk
6 Orders, May 2001, a document which we would like to take
7 official notice of, farms of over 2.5 million pounds
8 comprise -- compose six tenths of one percent of all farms
9 pooled on federal orders. Whether these operations are
10 family farms or some other type of corporate ownership, it
11 does not seem reasonable that they be granted special
12 exemption from the order's pricing provisions.

13 "Finally, large farms have significant economies
14 of scale with regard to the costs of milk production. The
15 significance of this factor is that they have resources
16 available to them that they may be able to use to affect
17 the marketplace that smaller producers or producer/handlers
18 would not have.

19 "According to the agriculture income and finance
20 outlook September 2002, and we would request official
21 notice of this publication, ERS Report AIS79, page 39,
22 'Industrial, large scale dairy farms, those with 500 cows
23 or more, have an average cost of operating and ownership of
24 \$10.46 per hundredweight versus \$15.81 with a small, less
25 than 50 cows, and medium size, \$13.47 per hundredweight for

1 medium size operations.' This difference \$3.01 per
2 hundredweight to \$5.35 per hundredweight is larger than
3 even the cost of avoiding minimum order prices, and could
4 be used to gain market share. This is another reason to
5 limit the producer/handling pricing exemptions to farms
6 with less than three million pounds of milk per month.

7 "Order Language. The three proponents offer the
8 following order language and comments on our intentions for
9 the language to support the changes we wish to make to the
10 producer/handler definition. This language and comments
11 are intended for both the Pacific Northwest and Arizona/Las
12 Vegas marketing areas. As part of this commentary, we will
13 make some modification to our original submission."

14 I would note that this document was made
15 available at the Phoenix hearing location. I think the
16 record would demonstrate that it was made available to
17 anyone there who wanted to look at it, and we've not made
18 any changes to it since then.

19 "Wording noted with a strike-through indicates
20 language we wish to delete from original submission.
21 Wording noted by a bold text and underlined indicates
22 language we wish to insert into our original submission.

23 "Amend the producer/handler definition of the
24 Arizona/Las Vegas milk marketing order by revision Section
25 131.10 to read as follows: 'Section 131.10

1 Producer/Handler: Producer/handler means a person who
2 operates a dairy farm or farms and a distributing plant or
3 plants from which there is route. Strike words
4 'distribution within the marketing area during the month
5 not.' Add the word, 'disposition in the marketing area and
6 the total route disposition and transfers in the form of
7 package fluid milk products to other distributing plants
8 during the month, does not exceed three million pounds, and
9 who.' Strike the word -- words, 'the market administrator
10 has designated a producer/handler after determining that
11 all of the requirements of this section have been met.'
12 Insert the words, 'meets all of the requirements of this
13 section.'

14 "From the outset our intention is that if a
15 person desires to be a producer/handler and gain exemption
16 from the pricing provisions of the order, this standards
17 they must meet must be strict and clear. We have strived
18 to make our wording and intent as clear as possible.

19 "In this section, we intend that a
20 producer/handler may encompass a farm or multiple farms,
21 and a plant or multiple plants, or a combination of both.
22 Having route disposition in the marketing area gets a
23 producer/handler regulated, if he has route dispositions or
24 transfers of fluid milk products to other distributing
25 plants anywhere in excess of three million pounds.

1 "We do not want to see a scenario where someone
2 attempts to gain producer/handler status by splitting their
3 sales into several markets to avoid having some determining
4 percentage in Order 131. Additionally, the
5 producer/handler must meet all of the additional
6 requirements.

7 "It is up to the producer/handler to prepare and
8 present all of the evidence and records that he compiles.
9 The market administrator is responsible to verify what is
10 presented. Inadequate data would result in no status being
11 granted.

12 "A. Requirements for designation. Designation of
13 any person as a producer/handler by the market
14 administrator shall be contingent upon meeting all," insert
15 the word 'all,' "of the conditions set forth in paragraphs
16 A-1 through," strike (5), add '(6),' "of this section."
17 Following the cancellation of a previous producer/handler
18 designation, a person seeking to have their
19 producer/handler designation reinstated must demonstrate
20 that these conditions have been met for the preceding
21 month.

22 "The care and management of the dairy animals and
23 the other resources and facilities designated in paragraph
24 (B) (1) of this section, necessary to produce all class one
25 milk handled, excluding receipts from handlers fully

1 regulated under any federal order, are under the complete
2 and exclusive control," strike the word 'ownership,' " and
3 management of the producer/handler, and are operated as the
4 producer/handler's own enterprises and at its,' strike the
5 word 'own,' insert the word 'sole,' "risk.

6 "2. The plant operation designated in paragraph
7 (B) (2) of this section, at which the producer/handler
8 processes and packages, and from which it distributes its
9 own milk production, it's under the complete and exclusive
10 control," strike the word, 'ownership,' "and management of
11 the producer/handler and is operated as the
12 producer/handler's own enterprise, and at its sole risk.

13 "Our comments on this section. Our intention in
14 the (A) (1) and (2) section is to designate what
15 responsibility the producer/handler has for the items
16 described in Section (B). First the applied
17 producer/handler must meet all the requirements initially
18 and continually before the status -- before status can be
19 granted, and in order for it to be maintained. Secondly,
20 the producer/handler solely and singly must bear all the
21 risks in the enterprise and have control over all of the
22 enterprise.

23 "We chose to delete our original wording of
24 ownership because we concluded there are many methods of
25 risk and control in force today that would be allowable

1 other than ownership, but the producer/handler must bear
2 the total risk for whatever form the ownership takes. We
3 also felt that many businesses, farm or plant, leased part
4 of their operations, and we did not want to foreclose that
5 possibility."

6 Back order language. 3., strike the words, 'the
7 plant operation designated in paragraphs (B)(2) of this
8 section, at which the producer/handler processes and
9 packages, and from which it.' Insert the words, 'the
10 producer/handler neither receives at its designation milk
11 production resources and facilities, nor receives, handles,
12 processes or, distributes at/or through any of its
13 designated milk handling, processing, or distributing
14 resources and facilities, other source milk products, for
15 reconstitution into fluid milk products, or fluid milk
16 derived from any source other than (i) its designated milk
17 production resources and facilities own farm production,
18 (ii) pool handlers in plants regulated under any federal
19 order within the limitations specified in paragraph (C)(2)
20 of this section, or (iii) non-fat milk solids, which are
21 used to fortify fluid milk products.

22 "Our comments on this section. 'This section was
23 printed incorrectly in the notice, and later revised to the
24 form printed here, which was our original submission and
25 what we desire to have in place. It defines the source of

1 what packaged at the producer/handler's plant.'

2 "Order language section, or paragraph four. 'The
3 producer/handler is neither directly nor indirectly
4 associated with the business control or management of, nor
5 has financial interest in another handler's operation, nor
6 is in any other handler" -- scratch -- "nor is any other
7 handler so associated with the producer/handler's
8 operation.'

9 "Our intention here is that the producer/handler
10 cannot have business interests in another farm or plant,
11 pooled or not pooled, and receive the designation of
12 producer/handler. This limit is nation-wide. The market
13 administrator has limited ability to sort out what is or
14 out of the producer/handler's control, so we chose to have
15 a clear all or none standard, rather than a fuzzy some or
16 part standard.

17 "Back to order language, paragraph five. 'No
18 milk produced by the herds or on the farms that supply milk
19 to the producer/handler's plant operation is, (i) subject
20 to inclusion and participation in a market-wide
21 equalization pool under a milk classification and pricing
22 program under the authority of a state government
23 maintaining market-wide pooling of returns, or our
24 commentary here, if you want to be a producer/handler, you
25 cannot pool or receive benefit on any of your milk supply

1 in a state pool with market-wide equalization.'

2 "This in is concert with the double-dipping rules
3 that had been enacted in four current federal orders and
4 proposed for two additional ones since Federal Order
5 reform. We see no reason to delve any deeper than to say
6 the same issues are at stake here, and if necessary,
7 request the secretary take notice of the hearings and
8 decisions issued in Federal Orders 30, 32, 33, 124, and
9 proposed for on 135, on the dual pooling issue. We ask
10 that the same limitations be placed in Order 131 and 124,
11 and have the affect we outlined on a producer/handler.

12 "Back to order language of (2)(i)(ii). 'Marketed
13 in any part' -- strike 'as class one milk to the non-pool
14 distributing plant of any other handler.' Insert 'to a
15 non-pool distributing plant.' Furthermore, if
16 producer/handler cannot market his surplus milk to a non-
17 pool distributing plant and maintain producer/handler
18 status. A producer/handler can market his surplus to a
19 non-pool manufacturing plant without disqualification.

20 "Order language paragraph six. 'The
21 producer/handler does not distribute fluid milk products to
22 a wholesale customer who is served by a plant described in
23 131-7(a), (b), or (e), or handler described in 1000, part
24 8(c) that supplied the same product in the same size
25 package with a similar handler to a wholesale customer

1 during the month.' This language is --

2 MR. UNIDENTIFIED: I --

3 MR. BESHORE: Can you -- could you read with a
4 similar handler or similar label?

5 THE WITNESS: Should be, "with a similar label to
6 a wholesale customer during the month."

7 "This language is currently a part of Order 131,
8 and we would propose it for Order 124 as well. It prevents
9 the producer/handler from striking a deal with or through a
10 retailer to provide balancing by packaging product in the
11 producer/handler's label in the same size container when
12 the producer/handler is unable to do so. If this were to
13 occur, the pool's regular suppliers would ultimately
14 balance the surplus of the producer/handler.

15 "Back to order language, paragraph (b),
16 Designation of resources and facilities. Designation of a
17 person as a producer/handler shall include the
18 determination of what shall constitute" -- insert the words
19 'the persons,' "milk production, handling, processing, and
20 distribution resources and facilities, all of which shall
21 be considered an integrated operation," strike 'under the
22 sole and exclusive ownership of the producer/handler.'

23 "Paragraph one. Milk production, resources, and
24 facilities shall include all resources and facilities,
25 milking herd/herds, building/housing such herd or herds,

1 and the land on which such buildings are located, used for
2 the production of milk," strike the words 'which are solely
3 owned, operated, and', "which the producer/handler has
4 designated as a source of milk supply for the
5 producer/handler's plant operation. Strike the words
6 'however, for purposes of this paragraph, any such milk
7 production, resources, and facilities which do not
8 constitute an actual or potential source of milk supply for
9 the producer/handlers' operation, shall not be considered a
10 part of the producer/handler's milk production, resources,
11 and facilities.

12 "Paragraph two. Milk handling, processing, and
13 distribution resources and facilities shall include all
14 resources, facilities, including store outlets used for
15 handling, processing, and distributing fluid milk products
16 which are solely," -- insert the words 'or partially,' --
17 "owned by and directly," -- insert the words 'or
18 indirectly,' "operated or controlled by the
19 producer/handler, or in which the producer/handler in any
20 way has an interest, including any contractual arrangement,
21 or over which the producer/handler directly or indirectly
22 exercises any degree of management" -- insert the word
23 'or,' "control.

24 "Paragraph three. All designations shall remain
25 in effect until canceled, pursuant to paragraph (C) of this

1 section.

2 "Our commentary. The (B) section describes what
3 facilities the producer/handler has designated to the
4 market administrator in Section (A). We have deleted the
5 references to ownership, control, solely, risk, and
6 enterprise, since we consider that language and intent
7 covered in Section (a). We intend that all the operations
8 of the producer/handler, farm, and plant be an integrated,
9 business unit.

10 "We have deleted the option for a
11 producer/handler to declare parts of his operation as
12 included or excluded, insisting that it be all or none.
13 That is, if he has a risk interest in a farm, as noted in
14 Section (a), it is included. We cannot conclude how the
15 market administrator can enforce a partial standard.
16 Resources, especially cows, can easily be moved to the
17 excluded operation, and thus, transfer balancing cost to
18 the pool's regular suppliers all too easily.

19 "Part two is to make clear that the plant
20 operation is inclusive of all facilities. The intent is to
21 cover all of the operational parts from the intake to the
22 loading dock, and to the end of the distribution network.
23 They can be solely or partially owned or leased, or any
24 other form of ownership. They may be directly controlled
25 or indirectly, by if the producer/handler exercises any

1 degree of control, management, or influence over them, they
2 must be considered part of the operation.

3 "Paragraph (C), cancellation. The designation as
4 a producer/handler shall be canceled upon determination by
5 the market administrator that any of the requirements of
6 paragraph (A) (1) through" -- scratch '(5),' insert '(6),' "
7 of this section are not" -- scratch 'continuing to be,'
8 "met, or under any of the conditions described in
9 paragraphs (C) (1), (2) or (3) of this section.
10 Cancellation of a producer/handler status, pursuant to this
11 paragraph shall be effective on the first day of the
12 month," -- scratch the word, 'following the month' -- "in
13 which the" -- scratch the words 'requirements were not met
14 or the conditions for cancellation occurred,' insert the
15 words 'conditions were not met.'

16 "Our commentary here. Our intention here is to
17 be clear that if conditions are not met, the status is
18 removed, and that a single violation is all that is
19 necessary.

20 "The language continuing to be met implied to us
21 that an ongoing violation was necessary before any
22 corrective action could be taken. Also, the time that the
23 status is removed is concurrent with the offense, and thus
24 aligns with all current work practice. For example, if a
25 mistake is discovered in an audit, then the correction is

1 enforced from that point and not a later point.

2 "Continuing with order language (C) (1). Milk
3 from the designation production resources and facilities of
4 the producer/handler designated in paragraph (B) (1) of this
5 section is delivered in the name of another person as
6 producer milk to another handler.

7 "(2) The producer/handler handles fluid milk
8 products derived from sources other than the milk
9 production facilities and resources designated in paragraph
10 (B) (1) of this section, except that it may receive at its
11 plant or acquire for route disposition fluid milk products
12 from fully regulated plants and handlers under any federal
13 order if such receipts do not exceed 150,000 pounds
14 monthly. This limitation shall not apply if the
15 producer/handler's own farm production is less than 150,000
16 pounds during the month.

17 "Milk from the producer -- (3) Milk from the milk
18 production resources and facilities of the producer/handler
19 is subject to inclusion and participation in a market-wide
20 equalization pool under a milk classification and pricing
21 plan operating under the authority of a state government.
22 Our commentary here, in addition to not meeting the
23 requirements spelled out in Sections (A) (1) through (6), a
24 producer/handler may lose his status if he attempts to sell
25 milk to another handler under another name, if except his

1 own farm production is less than 150,000 pounds per month,
2 he supplements his product line with more than 150,000
3 pounds of fluid milk product purchases in a month from
4 another federal order handler, or if any of his milk supply
5 becomes pooled in a state order pool with market-wide
6 equalization."

7 Back to order language Section (D) Public
8 Announcement. "The market administrator so publicly
9 announce, (1) the name, plant locations, farm
10 location/locations of persons designated as
11 producer/handlers. The names of those persons whose
12 designations have been canceled, and (3) the effective
13 dates of producer/handler status or loss of
14 producer/handler status for each. Strike the words 'Such
15 announcement shall be controlling with respect to the
16 accounting at plants of other handlers for fluid milk
17 products received from any producer/handler.'

18 "The language again reflects our -- or, our
19 commentary here, the language strike again reflects our
20 understanding that no other pricing provision adjustment or
21 audit adjustment implemented with a delay or is forgiven.
22 If a pooling mistake is discovered and a pricing difference
23 is owed or due, payments are enforced. Any
24 producer/handler transaction should be subject to the same
25 treatment."

1 Back to order language paragraph (E). "Burden of
2 establishing and maintaining producer/handler status. The
3 burden rests upon the handler who is designed as a
4 producer/handler to establish through records required,
5 pursuant to section 1000, part -- 1000.27 that the
6 requirements set forth in paragraph (A) of this section
7 have been," scratch the words 'and are continuing to be,'
8 -- "met and that the conditions set forth in paragraph (C)
9 of this section for cancellations of the designation do not
10 exist.

11 "We continue to support the position that the
12 full burden of establishing the proof that a person can be
13 granted exemption from paying regulated prices, must be
14 born by the applicant, and only verified by the market
15 administrator. Such information and conclusions must
16 always be reached and remain in force in order that
17 producer/handler status must be maintained.

18 "Summary. The competitive situation described in
19 this hearing paints a picture of disorderly marketing
20 conditions. What started out as an exemption to
21 producer/handlers because they were not a competitive
22 factor in the market, has evolved into a new competitive
23 situation that threatens to undermine the entire Federal
24 Order system. For these reasons, DFA in conjunction with
25 NDA and UDA have proposed to limit the producer/handler

1 exemption for producer/handlers who are larger than three
2 million pounds of class one sales per month.

3 "Testimony has detailed that producer/handlers
4 larger than this size draw considerable sums of money out
5 of the blend pool, thus creating an equity between them and
6 the regular suppliers of the pool. They have a cost
7 advantage to exploit, the difference between the blend
8 price and the class one price, and testimony from
9 processors and retailers indicate they do so aggressively.

10 "The traditional argument supporting the
11 exemption have been shown -- have shown -- have been shown
12 to be faulty. They do not suffer a disadvantage in the
13 area of competitive, operational costs. They do not suffer
14 a disadvantage of significant proportion in balancing their
15 operation, and have some ability to push those costs over
16 to others in the pool. They are of significant size, and
17 as such are statistical outliers in the overall population
18 of producers and handlers in the Orders 124 and 130 -- 131,
19 and have sizeable share of class one sales in both markets.

20 "They cause market disruption to the extent that
21 both processors and producers could be ultimately forced to
22 seek relief by the elimination of the order. These factors
23 are surely signs of disorderly marketing.

24 "The language we proposed will maintain the
25 producer/handler option for over 99 percent of the

1 producers in the order system, far from a total elimination
2 of the exemption. It continues to allow for a start-up if
3 a dairy farmer wishes to become a producer/handler. It
4 allows for that avenue of enterprise to continue up to the
5 point where the producer/handler should face competition in
6 the marketplace on the same terms as other handlers. It
7 helps assure that all regulated handlers, both large,
8 medium size, and small face the same medium -- same minimum
9 costs, and it provides some language changes to make the
10 regulation of producer/handlers more clear.

11 "It is not possible to justify the continued
12 exemption in its current form. The producer/handler
13 exemption threshold should be based not on how inefficient
14 the producer/handler operation is, thus needing a price
15 break, but rather, how disruptive they are in the
16 marketplace, and how much they contribute to disorderly
17 marketing.

18 "The three million pound limit we propose is (1),
19 consistent -- (1) is consistent with the limits set by
20 Congress when establishing the process or promotion payment
21 program when it decided that threshold was sufficient for a
22 processor to afford the costs and realize benefits from the
23 program. Is a point -- (2) Is a point on an operational
24 cost curve with a higher costs, due to small scale, become
25 absorbed by larger volumes, and any competitive

1 disadvantage of the producer/handler evaporates. (3) is a
2 point based on actual, retail sales data where a processor
3 can service enough retail accounts to have an impact on
4 competitive factors in the marketplace. (4) is a point
5 where significant advantages and the cost of producing milk
6 can achieved and used to subsidize the gain of market share
7 in the retail food business, and (5) is a point where
8 economies of scale in fluid milk processing are clearly
9 evident.

10 "We request timely and decisive action by the
11 secretary in response to our proposal."

12 BY MR. BESHORE:

13 Q. Now, Mr. Hollon, I'd like to just go back and
14 identify clearly the documents for which you have requested
15 official notice at page 15 of your testimony, Exhibit 32.
16 The first one is a document called, "Producer Structure in
17 Federal Milk Orders, May 2001;" is that correct?

18 A. That is correct.

19 Q. And can you tell us the source of that document?

20 A. The source of that document is an FMMO
21 publication. It is available on the web site. It is about
22 a dozen pages. Don't have one in front of me, but I think
23 it was published in 2001.

24 Q. The date is for 2001.

25 A. 2001.

1 Q. May 2001.

2 A. And it has been available on their web site for a
3 period of time.

4 Q. Okay. And that's on the dairy program's web
5 site, --

6 A. That's correct.

7 Q. -- market information page?

8 A. Correct.

9 Q. Okay. And the second document for which you have
10 requested official notice is also a USDA publication from
11 the Economic Research Service, identified as AIS79,
12 September 26th, 2002; is that correct?

13 A. That is correct. It is available on the ERS web
14 site. It is, in its entirety, is 70 pages long. It covers
15 a multitude of commodities and there are two specific
16 pages, page 39 and --

17 Q. 38 and 39, I think.

18 A. Yes, 39, and it's a later table. Just one
19 second. Page 39 and page 62 are the only pages that
20 contain dairy information, --

21 Q. Okay.

22 A. -- so this

23 Q. And those are the pages that you've specifically
24 cited in that full document?

25 A. That is correct. The graphics and the cost data

1 were visually presented on page 39, and then the cost
2 format is on page 60 -- what did I say, 62?

3 MR. BESHORE: Okay. We would request official
4 notice be taken of those documents, Your Honor.

5 THE COURT: Okay. Any objection?

6 (No response)

7 THE COURT: Okay. We'll take -- I'll take
8 official notice of those two documents.

9 MR. BESHORE: Okay. Thank you. And with that,
10 Mr. Hollon's direct testimony is concluded, and --

11 THE COURT: Okay. This would be a logical time
12 for a break.

13 MR. BESHORE: It would be an excellent time.

14 THE COURT: Were you going to move the documents
15 in now, or are you going to wait?

16 MR. BESHORE: I would move Exhibits 32 and 33
17 into evidence.

18 THE COURT: Any objection to their being moved
19 into -- any objection to them being moved into evidence? I
20 know there'll be questions on the weight of them, but --
21 okay. I don't have any objections. I'm going to admit
22 Exhibits 32 and 33 into evidence.

23 (Respondent's Exhibit Nos. 32 and 33 were received.)

24 THE COURT: And we will take a break till 10:30.

25 (Off the record and reconvened.)

1 THE COURT: On the record.

2 Mr. Marshall, are you going to ask some
3 questions?

4 MR. MARSHALL: I'm prepared to ask as soon as Mr.
5 Hollon is ready for cross-examination.

6 THE COURT: He's as ready as he's ever going to
7 be. So go ahead.

8 MR. MARSHALL: Thank you, Your Honor. I
9 appreciate that.

10 BY MR. MARSHALL:

11 Q. Good morning, Elvin.

12 A. Good morning, Doug.

13 Q. A couple of clarifying questions about your
14 testimony. Could you take a look, please, at page five,
15 and particularly the bottom paragraph, --

16 A. Correct.

17 Q. -- an analysis you've done. You've not done a
18 similar analysis for the Pacific Northwest order, which, of
19 course, is all -- when you first asked, I take it from the
20 way this is presented, that this applies to Order 131 only,
21 does it not?

22 A. These specific numbers do. There's a table from
23 which these conclusions were drawn in my exhibit. And in
24 discussions with Mr. Van Dam, I'd understood that he was
25 going to make some similar. So rather than do it twice,

1 however, the arithmetic is there and the similar
2 conclusions, if not, could be drawn on brief pretty easily.

3 Q. Okay. Right. So you're -- in fact, you didn't
4 discuss it as nothing to do with your opinion about where
5 124 by itself, --

6 A. No. Does not -- the same concerns and the same
7 conclusions I withdraw from that part, Table A(2) of the
8 exhibit.

9 Q. On page 10 and 11 -- I'm sorry, page 12, in the
10 summary paragraph towards the bottom of the page, you refer
11 to premiums paid by regulated handlers in the context that
12 trying to compare balancing costs of producer/handlers. O
13 I understand that correctly?

14 A. Correct.

15 Q. In this Order 124 market area, I think the term
16 "service charge" is more commonly used than premiums. Do
17 you mean them to be the same concepts as --

18 A. Yes.

19 Q. And in our parlance, service charges include the
20 cost of balancing. Is that your understanding about
21 premiums as used in your testimony?

22 A. That is true. In most markets, premiums or
23 service charges usually are earmarked, in many cases, for
24 certain, specific obligations, and balancing costs, you
25 know, would be one of those, and there's a -- there are

1 different ways that those service charges are put together,
2 but yes, that was the intent.

3 Q. In your experience -- you've been qualified as an
4 expert. In your experience around the country then, is it
5 typically the case that balancing charges are recovered
6 from regulated handlers through over-order charges?

7 A. That is correct.

8 Q. And they're not incorporated into the pricing
9 structure of the class one price then, are they?

10 A. No, they are not.

11 Q. Now, there may be some exceptions to that in the
12 Northeast. As I understand it, there was proposed a
13 hearing to address balancing costs or certain kinds of
14 balancing costs?

15 A. That is correct. That decision has not been
16 released yet, but there was a proposal at a hearing to deal
17 with market-wide service payments.

18 Q. As I understand, in the Southeast there are some
19 transportation costs which might be considered a balancing
20 costs that are built into the order structure?

21 A. That is correct.

22 Q. But other than that, are you --

23 A. In Order 30, there are also some assembly costs
24 that was part of assembling milk, where you have facilities
25 that handle, you know, milk supplies for a time. So it

1 could be there, too, but they are not uniformly in every
2 order.

3 Q. So in orders that don't have those explicit
4 service charge, as far as you know, those -- the general
5 concept of market service are recovered over and above the
6 class one minimum price --

7 A. Yes, that is correct.

8 Q. Is that --

9 A. Yes -- yes.

10 Q. Finally, on page 29 of your prepared testimony,
11 you are concluding that point your arguments regarding
12 producer/handlers larger than three million pounds, the
13 last sentence of that paragraph begins, "The traditional
14 argument supporting the exemption have shown -- been shown
15 to be faulty." Do I understand correctly that you're
16 referring to the argument supporting exemption for
17 producer/handlers over three million, or are you talking
18 more generally about all?

19 A. Would you point to the page again?

20 Q. I'm sorry. Page 29 --

21 A. Okay.

22 Q. -- of your prepared testimony, Exhibit 32.

23 A. Okay.

24 Q. There's a paragraph that begins -- that covers
25 the bottom half of the page, and introduces the arguments

1 that are numbered at the bottom of the page. And that
2 introductory sentence begins, "The traditional arguments
3 supporting the exemption have been shown to be faulty."

4 A. Okay.

5 Q. And that might be implied to say that -- it might
6 be read to imply that the entire producer/handler exemption
7 is faulty. Is that your intent?

8 A. No, it -- we're pointing out that at the three
9 million pound limit that we propose, these traditional
10 arguments appear to be faulty.

11 Q. Thank you. You did an excellent job, Mr. Hollon.
12 I appreciate it.

13 A. Thank you.

14 THE COURT: Anyone else like to question Mr.
15 Hollon? Mr. Yale, go right ahead.

16 BY MR. YALE:

17 Q. Good morning.

18 A. Good morning, Ben.

19 Q. Benjamin F. Yale on behalf of Smith Brothers
20 Dairy, Mallory's Dairies, and Etteline Dairy.

21 Mr. Hollon, in your -- beginning of your
22 testimony, you talked about the size of DFA. I've got some
23 questions I want to ask you about that. First off, you --
24 down at the bottom you indicated you have investments in
25 processing in Federal Order 24 (sic). What is the nature

1 of the investment in processing in Order 124?

2 A. We have a joint venture with a bottler --
3 bottling company in Federal Order 124.

4 Q. Okay. And what is DFA's ownership in that?

5 A. I don't know the exact percentage. I can tell
6 you that all of the joint ventures that we have is less
7 than 50 percent.

8 Q. And by that joint venture, has producer money
9 been used to purchase those plants --

10 A. Yes.

11 Q. -- and provide capital?

12 A. Yes.

13 Q. Okay. And are -- is a joint venture or is the
14 producers or DFA obligated to cover losses that occur at
15 that plant?

16 A. Again, I don't know the exact details of that
17 venture, but certainly there are provisions made to share
18 gains and losses from the resulting business.

19 Q. And what is the name of that joint venture?

20 A. I don't know the legal name, but it's with the
21 Wilcox Dairy Group.

22 Q. Okay. And how many plants are there under that
23 umbrella?

24 A. More than one. I -- again, I don't know the
25 exact number.

1 Q. Okay. This is -- this order is about 124, right?
2 This order includes 124? I mean, this hearing --
3 proceeding --

4 A. Yes.

5 Q. We're talking about 124?

6 And you're from DFA, and you don't know how many
7 plants you have a joint venture with in 124?

8 A. I don't know the exact business nature. In some
9 cases they're, you know, even under one roof, there might
10 be considered more than one facility.

11 Q. Do you know how many bottling facilities are in
12 total in 124?

13 A. There are 18 7A plants in May of 2003.

14 Q. Okay. And you have a list of plant there, or
15 just the numbers?

16 A. I just have the number.

17 Q. All right. Why don't you say what exhibit you're
18 referring to. I know it's your Exhibit 33 --

19 A. Exhibit 33, Table G.

20 Q. Do you know what percentage that Wilcox has of
21 the class one market in Order 124?

22 A. That would be proprietary information.

23 Q. Is it more than the three producer/handlers that
24 I represent, Etteline, Smith, and Mallory's combined?

25 A. I do not know.

1 Q. Does Wilcox Dairy compete with Etteline Dairy?

2 A. If they're in the same order, I presume there are
3 some -- they compete on some places, the same ones.

4 Q. And the same situation with Smith Farms?

5 A. Again, if they're in the order, I would assume
6 that they have some competition.

7 Q. And what about Mallory's?

8 A. Again, I would only have to assume that they have
9 some competition if they're in the same order.

10 Q. I take it you're not speaking on behalf of Wilcox
11 Dairy?

12 A. No, I'm not.

13 Q. Is there a representative from Wilcox Dairies
14 here?

15 A. To my knowledge, there is not.

16 Q. And do you know if they're going to testify?

17 A. To my knowledge, they are not.

18 Q. Is it to your knowledge that they're not
19 concerned about the producer/handler situation in the
20 Northwest?

21 A. To my knowledge, they are not testifying.

22 Q. It is your -- how many hearings have you been to
23 over the years in your various capacities with the various
24 organizations?

25 A. 30/40.

1 Q. If we start counting, it'll make us look older
2 than we want to be, Elvin, so we won't go into that, but I
3 --

4 A. My birthday was yesterday so --

5 Q. Huh?

6 A. My birthday was yesterday. I'm not interested in
7 any counts.

8 Q. I -- well, I wish I was 35 again.

9 We -- but isn't your experience that if there's
10 an interest of a handler in an ongoing hearing that they
11 will show up and participate in that hearing?

12 A. Yes, many times that is true. Not always true,
13 but many times that is true.

14 Q. Now, in Order 124 -- well, let me take the next
15 step. You mentioned that you have -- I'm trying to find
16 this here. That you -- billions of pounds of its member
17 owners for other cooperatives and for non-member dairy
18 farmers, right?

19 A. Correct.

20 Q. Okay. What other cooperatives did you -- do you
21 market milk for?

22 A. I know that -- I don't know that from memory. I
23 can do an exclusive list, but in the Northeast through
24 marketing agencies, there are probably more than a dozen in
25 Federal Order 1. In Federal Order 6, the Florida order,

1 there is at least one. In Federal Orders 5 and 7,
2 Appalachian and Southeastern orders, there's probably six
3 or seven. In the Central order -- in Order 33, the Mideast
4 order, I would say there'd be perhaps half a dozen. In the
5 Central order, again perhaps half a dozen. In Southwest
6 order, I think all the cooperatives in the Southwest order,
7 DFA's the marketing agent through the Great Southwest
8 Agency. Order 131, none, and -- well, to the extent we
9 market supplemental milk on behalf of United Dairymen of
10 Arizona, we purchase from them. You might consider that.
11 In the Western Federal Order, at least two, and in the
12 Pacific Northwest Order, I think there may be one or two
13 that we market of the smaller cooperates, that we do market
14 some of their milk.

15 Q. Do you know what the names of those coops are the
16 -- in Order 124, I'm sorry, the --

17 A. Not off the top of my head.

18 Q. Is it NDA --

19 A. It is not NDA.

20 Q. Now, you indicated out of Order 126 that the
21 Southeast Agency in this 47.8 billion pounds, does that
22 include all of the volume that's in the Southwest Agency?

23 A. I don't think it would include all of the volume
24 to the extent that we purchase milk from other cooperatives
25 and sell to some customers that would be included. I think

1 there are probably some customers for which it is not
2 included.

3 Q. Now, you indicate that you represent non-member
4 dairy farmers. You're aware of a thing called Dairy Market
5 Services -- Dairy Marketing Services?

6 A. I'm aware of --

7 Q. And what is Dairy Marketing Services?

8 A. It is a marketing agency that is owned by Dairy
9 Farmers of America and Dairy Lee (phon.), and it markets
10 milk of other cooperatives and of non-member dairy farmers
11 in many markets in the country.

12 Q. Do any of those markets include any of the orders
13 involved here?

14 A. There are producers in Order 131 whose -- that
15 are physically in Order 131. I don't know if they're
16 pooled in Order 131, but are marketed under Dairy Marketing
17 Services. I don't think there are any 124 producers who
18 are marketed by DMS.

19 Q. Does DFA or Dean Foods have an exclusive
20 agreement to supply milk with -- I mean, DFA or DMS have an
21 exclusive agreement with Dean Foods to supply their milk?

22 A. I think that's a proprietary information
23 question. I'm sorry. Suffice to say we sell milk to Dean
24 Foods.

25 Q. In Order 124, the -- well, let me ask you this.

1 Does DFA supply any milk to the Wilcox plants?

2 A. Yes.

3 Q. Are you the exclusive supplier of milk to the
4 Wilcox plants?

5 A. No.

6 Q. Who else supplies that milk.

7 A. I don't know all of the suppliers to the Wilcox
8 plant.

9 Q. Are there independents?

10 A. I don't know the answer to that either. Yes,
11 there's at least one that I know of, and there may be
12 others.

13 Q. Does DFA supply any other 7A plants in Order 124?

14 A. If we do, it would only be on a spot supplemental
15 basis, and I suspect that would be rare.

16 Q. You have no supplies to Safeway?

17 A. Not to my knowledge.

18 Q. Coming back to Wilcox, do you know if Wilcox
19 supplies Starbucks?

20 A. I do not know.

21 Q. Can you state what -- you've indicated nation-
22 wide. What is your percentage of participation percentage
23 of milk in Order 124 that DFA markets?

24 A. I would say it's in the double digit range, but
25 low.

1 Q. Is it more than 25 percent?

2 A. In Order 124?

3 Q. Yes.

4 A. No.

5 Q. Is it more than 15 percent?

6 A. It's double digit, but low.

7 Q. Is the volume of milk that DFA represents in
8 Order 124 more or less than the total producer/handler milk
9 in Order 124?

10 A. I would only guess, but I would venture it to be
11 less.

12 Q. What is National Dairy holdings?

13 A. National Dairy holdings is a business entity
14 owned by Dairy Farmers of America and some other investors
15 that operate fluid milk balancing plants throughout the
16 country.

17 Q. I want to bring your attention to see if you
18 considered some issues involving PDs. You recognize, I
19 think, by your testimony that some -- there are some
20 producer/handlers operating in the United States today that
21 are -- and these markets, the 124 and 131, let's be a
22 little more specific, that have production that exceeds the
23 proposed three million cap; is that right?

24 A. Yes.

25 Q. And I think based on your exhibit, I think maybe

1 it's G or something, one of those, it would suggest that at
2 least Mallory's, Etteline, and Smith Brothers all exceed
3 that three million, right?

4 A. If that's what that exhibit shows based on our
5 estimates, I will agree with you.

6 Q. All right. Now, would you please explain what
7 you understand your proposal would do as regards these
8 individual producers if the secretary adopts your proposal?

9 A. If a business today is operating as a
10 producer/handler and has the exemptions provided by the
11 order, and their volume of class one sales was greater than
12 three million pounds, they would become entirely regulated
13 like any other 7A distributing plant, if they had sales
14 larger than three million pounds.

15 Q. And what does that entail? What would that
16 entail for them that's different than what they have today?

17 A. They would be, in the simplest form, accountable
18 to the pools or the class prices, and settle through the
19 pools equalization, like any other fully regulated handler.

20 Q. Would they sell their milk to the pool?

21 A. Would they sell their milk to the pool? What do
22 you mean?

23 Q. Well, I'm just asking. I mean, are they selling
24 their milk to the pool, or are they selling it to
25 customers?

1 A. I think from their sales to customers, I don't
2 know that that would change.

3 Q. And they would pay then the minimum class prices
4 into the pool?

5 A. Yes.

6 Q. All right. And then they would receive all that
7 money back?

8 A. They again would function like any other 7A
9 regulated plant. They would pay classified prices into the
10 pool, to the extent that if their utilization dictated a
11 draw, they would get a draw. If it didn't dictate a draw,
12 they would not. They would compete like every other
13 handler.

14 Q. Okay. Based upon your analysis of the percentage
15 of blends and the like in these orders, is it your
16 expectation that they would receive a draw, or that they
17 would be paying money into the pool that they would not get
18 back?

19 A. I would anticipate that they would pay money into
20 the pool and would probably not draw money out of the pool.

21 Q. And have you done any analysis as to how much
22 that money would be?

23 A. Only to the extent of, in Order 131, there was
24 some data that was published, and I think my statement
25 talked about an example of \$317,000 per month for a multi-

1 month period. I've not done a similar computation for
2 Order 124. It probably could be done.

3 Q. I think -- well, now, in your preparation for
4 this testimony, did you do -- have you seen any income or
5 financial statements of any producer/handler?

6 A. I have not.

7 Q. Have you done any research to determine what
8 their actual costs of operation are and their actual prices
9 at which they sell milk?

10 A. I heard they -- the testimony of Mr. Herbine and,
11 for example, Mr. Kruger, Mr. Hitchell (phon.), and they
12 talked about cost data, price data, marketplace data,
13 things -- cost -- pressure -- sales pressures that they
14 face. Those were the testimonies that I heard. I did not
15 do anything, for example, like, Mr. Herbine did. I did not
16 do anything myself. The types of testimony presented by
17 Mr. Hitchell, by Mr. Yates, by Mr. Kruger, I did not do
18 those myself.

19 Q. Is there any -- but did any of them talk about
20 what the costs were associated with the operation of a
21 producer/handler?

22 A. I think Mr. Herbine had some data that was
23 specifically drawn from a sample size of producer/handlers.

24 Q. Okay. Any producer/handlers of the size of the
25 three dairies in the northwest -- the three largest dairies

1 in the northwest?

2 A. No.

3 Q. Okay. And are you privy to who other witnesses
4 are going to be on behalf of DFA through the rest of this
5 hearing?

6 A. Yes.

7 Q. All right. Are you aware of their testimony, the
8 general nature of their testimony?

9 A. Yes.

10 Q. Are any of those going to testify as to the
11 actual costs of operating a producer/handler in the
12 northwest?

13 A. No, they will not.

14 Q. Is any one of those witnesses going to testify in
15 terms of actual prices in which they have sold milk in the
16 marketplace?

17 A. You need to rework your question a little bit.

18 Q. All right. Are they going to testify -- is
19 anybody going to testify in terms of the actual price at
20 which producer/handlers sell milk in the Pacific Northwest?

21 A. You mean, what they sell to retail?

22 Q. Retail or however they market.

23 A. I think there were two witnesses in Phoenix that
24 talked about that in part of their testimony. It was Mr.
25 -- from Vitamilk, and then Mr. Arbuthnot (phon.) (sic), I

1 think was his name. But there were two witnesses in
2 Phoenix representing handlers who talked about their
3 competition in this market with producer/handlers.

4 Q. Did they mention all of the sales of the producer
5 handlers?

6 A. All meaning?

7 Q. All the sales of the producer/handlers. I mean,
8 every sale that the producer/handler made.

9 A. They mentioned their interaction with
10 producer/handlers in the retail marketplace.

11 Q. On every, single interaction they had?

12 A. Probably not on every, single one. They probably
13 left out a few.

14 Q. -- was it not?

15 A. What"

16 Q. Anecdotal, was it not?

17 A. They both had day-to-day experience in the
18 marketplace by sale, bottom line P&L responsibilities, and
19 they discussed -- their testimony was based on that. So
20 I'm not sure if that would be considered anecdotal or not.

21 Q. But we can say that based upon the testimony that
22 has been given today and the testimony that you expect is
23 going to come from the proponents, or at least from DFA,
24 that there is nothing in the record that identifies in
25 total the financial aspects of a producer -- a large

1 producer/handler in the Pacific Northwest in 2003; is that
2 correct?

3 A. There was data given and supplied both on
4 operational costs of handlers of various sizes that was
5 drawn from producers -- handlers all over the country.
6 That was very explicit and detailed, was cross-examined in
7 great, minute, you know, parameter, and there was detail
8 from at least two witnesses in the Pacific Northwest and
9 more witnesses in Order 131. I had three witnesses in the
10 Pacific Northwest. I think Krogers's in this marketplace,
11 where they discussed competitive factors, including
12 competition from producer/handlers. So I think you'd have
13 to consider their testimony as being in the record and part
14 of the record.

15 Q. Is it -- well, I won't go there.

16 You indicated there was data, I think, from your
17 referencing Carl Herbine involving processing costs; is
18 that right?

19 A. Correct.

20 Q. Were there any of the processors that he had in
21 his database, did any of those come from producer/handlers
22 that would be in the top one third in the Pacific
23 Northwest?

24 A. No.

25 Q. And --

1 A. I think he did the state as a part of his
2 analysis that he had analyzed some 200 different firms, and
3 expected the data that he was referring to, would be pre-
4 representative.

5 Q. Do you know if his data referenced the product
6 mix for the skews that come out of producer/handlers in the
7 Pacific Northwest?

8 A. I do not know.

9 Q. Do you know what the skews are for -- do you know
10 what I mean by a skew?

11 A. I do.

12 Q. And what is a skew?

13 A. Like a product code identification number.

14 Q. Okay. And for the producer/handlers in the
15 Pacific Northwest, do you know what the skews are from each
16 of those three plants?

17 A. I do not.

18 Q. You would agree, would you not that there's
19 different types of competition for different skews?

20 A. Come again.

21 Q. The competition for different skews has different
22 profiles?

23 A. I think both Mr. Arbuthnot (sic) and Mr.
24 Vanderpool (phon.) talked about the competition that they
25 faced on a multi-levels of products, and competition with

1 producer/handlers.

2 Q. I think it's Arbuthnot (phon.), by the way, --

3 A. Arbuthnot. Okay. Thank you. Your memory's
4 better than mine.

5 Q. It has nothing to do with my memory, I
6 (indiscernible)

7 A. Oh. Okay.

8 Q. Besides, he's ordered it to be that way.

9 A. Yes, that's correct. That's fine with me. If
10 you get it right in the question, I'll get it right in the
11 answer, so.

12 Q. I didn't know, so I didn't even ask. Okay.

13 Can a -- are you familiar with the membership
14 agreements that DFA has with its members?

15 A. In general, I am.

16 Q. Okay. Can a person be a member of DFA and still
17 be a PD?

18 A. No.

19 Q. That's because they have to give exclusive
20 control of all the milk they produce to DFA; is that right?

21 A. They have to market all of the milk that they
22 produce on their farm through the organization.

23 Q. Okay. And --

24 A. They're supposed to anyway.

25 Q. They're supposed to. Except for what they use on

1 home consumption, I think, is the --

2 A. That's what they're supposed to do anyway. We're
3 working on one of those, though.

4 Q. Now, in exchange for giving them all that milk,
5 DFA markets the milk for them?

6 A. No, the membership agreement says that we would
7 market all the milk that's produced on their farm, and
8 obviously, on their -- in their behalf.

9 Q. And what other services do you provide them?

10 A. Well, we certainly -- I don't know that I can
11 give you the full range, but we have a field service
12 representative who deals with them on quality issues, helps
13 put them in contact with folks who, if they have management
14 issue questions, we provide them a return for their market.

15 Their milk is always is sold somewhere, so they have a
16 guaranteed market.

17 We provide -- if they choose to participate, a
18 forward (phon.) contracting service for members. We have
19 -- we provide representation for members in various
20 regulatory areas, such as this one. We're in the political
21 arena or in the various state regulatory issues, provide a
22 wide range of data through our web site and services, and
23 in different parts of the country, if some of those levels
24 of service are different. There, for example, are some
25 abilities in the northeast to contract for electric power

1 that maybe is not true in other parts of the country.

2 Q. What -- with these services you also have, you --
3 producers have to pay for those, right, through various
4 means, --

5 A. Correct.

6 Q. -- right?

7 A. That's correct.

8 Q. I mean, you reblend the costs at some point
9 before you pay the producers. You may charge them dues or
10 a membership fee, right?

11 A. Yes.

12 Q. And you also -- they have to provide capital?

13 A. Correct.

14 Q. And it's also true, is it not, with DFA that
15 they're not allowed to encumber their milk with any loans
16 -- liens on their milk and --

17 A. You're getting -- I suspect that's true, but
18 you're getting further afield, and I'm --

19 Q. Okay.

20 A. -- day-to-day knowledge --

21 Q. Now, in Order 124, who are the -- do you know who
22 the cooperatives are in 124?

23 A. Farmers Cooperative Creamery, WestFarm Foods,
24 Tilly McCreamery Association (phon.), Dairy Farmers of
25 America, Portland Independent Producers. I think that may

1 be all.

2 Q. Do you have any marketing arrangements with any
3 of those? I mean, DFA have any marketing arrangements with
4 any of those?

5 A. I think that's a proprietary question. I'm not
6 sure that I'm prepared to answer that.

7 Q. Okay. I want to take a -- talk about another
8 topic. In your statement you use the word "large" a lot,
9 right? I mean, you talk about large unregulated
10 producer/handlers, --

11 A. Yes.

12 Q. -- right? Okay.

13 Is size, being large, that is -- that's the
14 issue?

15 A. I think the key issue is the competitive impact
16 in the marketplace.

17 Q. Are you proposing that at some point, the
18 secretary can consider the size of producers to determine
19 their benefits under the Federal Order?

20 A. I think that that's a debate in another arena
21 that I'm not that interested in getting into.

22 Q. Well, I mean you're suggesting the
23 producer/handler's based on size, should have a different
24 view --

25 A. Uh-huh.

1 Q. -- based on size. I mean, is it --

2 A. Well, certainly we're talking about regulating,
3 you know, handlers in this case, --

4 Q. Okay.

5 A. -- and --

6 Q. Is it possible -- let's take the next thing,
7 plants. Is it possible for plants to become too large and
8 become disorderly within a market?

9 A. I think you'd need some more definition before I
10 could come to any conclusions.

11 Q. More definition in terms of what?

12 A. That's kind of where -- what I'm asking.

13 Q. Well, I mean, is there a point that a plant can
14 become so large that -- in a marketplace and such a large
15 percentage that it controls the class one sales, and
16 therefore denies some producers the opportunity to
17 participate in the pool because it won't buy their milk?

18 A. I suppose you could theoretically come up with a
19 construct that perhaps would get that far, but you know,
20 size alone is, you know, not our measure. We've attempted
21 to point out reasons why at a certain size we think there's
22 competitive issues in the marketplace, and we tried to
23 point those out to the secretary.

24 Q. And then --

25 A. Obviously in a hearing, you have a hearing to

1 draw a line, and so its, you know, it's our position that
2 the line should be drawn here for these reasons.

3 Q. But it is your position that the secretary should
4 consider limiting or limiting the size of plants if it
5 could be shown that that size was contributing to
6 disorderly marketing conditions?

7 A. You know, our position is that producer/handlers
8 who have three million pounds or more of class one sales,
9 should be regulated like all other handlers in the
10 marketplace. If they have less than that, than the current
11 regulations and exemptions should be allowed to continue.
12 If they have that level or greater, they should face the
13 same regulatory constraints of every other handler.

14 Q. But are they like every other plant in the
15 marketing area?

16 A. Are they like -- meaning?

17 Q. Huh?

18 A. Meaning?

19 A. Are they really like the others? Are they like
20 Safeway. Is -- are the producers/handlers in the Northwest
21 like Safeway?

22 A. Well, I suppose if you define "like" as do they
23 process milk for fluid consumption and cultured products
24 and ice-cream, and do they sell them to consumers in
25 various distribution channels. Do they compete in similar

1 distribution channels when a number of questions begin to
2 get yes, then I think you have to say yes, they're like
3 other handlers or other plants, and should be regulated
4 similarly.

5 Q. Do integrated -- Safeway's an integrated
6 operation, right? It has stores as well as a bottling
7 facility, to your knowledge?

8 A. Yes.

9 Q. All right.

10 A. Yes.

11 Q. Doesn't that create a competitive advantage in
12 the marketplace?

13 A. That's a debatable question. Certainly if you
14 look at the universe of supermarkets throughout the
15 country, there are those who would say, absolutely a dozen
16 -- that's why we organize this way, and we want to be that
17 way, and there are others who would say, absolutely, it
18 does not. That's why we don't do that, and that's why
19 compete the way we do.

20 You know, some business entities conclude that's
21 the good thing, and some conclude, you know, for their own
22 reasons, it's not.

23 Q. They made a decision based upon looking at what
24 was available? I mean, there's nothing in the federal
25 order that prohibits them from integrated with the store,

1 right?

2 A. That's correct.

3 Q. All right. And they made a business decision
4 that the benefits and the costs just didn't work, right?

5 A. Correct.

6 Q. All right. Now, you testify in there that
7 there's a growing -- a growth of producer/handlers in the
8 federal orders, right?

9 A. That there is an interest in becoming a
10 producer/handler, and that's what's growing.

11 Q. But this interest, the opportunity to be a PD has
12 existed for 70 years, right?

13 A. Yes, it has.

14 Q. All right. And the ability -- the existence of
15 large producers has been a factory in many of these
16 marketing orders for at least the last ten years, has it
17 not?

18 A. It has.

19 Q. All right. And in the last five years, since
20 1998, how many new producer/handlers have come into the
21 market?

22 A. I don't have an exact count. I would guess a
23 few.

24 Q. Well, you've done an analysis out through your
25 competitive knowledge throughout all the markets. How

1 many?

2 A. Again, I don't have an exact count. I would
3 guess a few.

4 Q. How many in 124?

5 A. I do not know.

6 Q. Doesn't the record reflect that there's fewer PDs
7 in the last five years, rather than more?

8 A. I think that may be true. The testimony reflects
9 the competitive nature and the growing concerns have been
10 gotten much bigger though.

11 Q. And what is the change in the competitive
12 structure today from 2000?

13 A. Meaning --

14 Q. Well, the producer -- I mean, we have large
15 producers like we did in 2000, right?

16 A. Yes.

17 Q. And we had large stores in 2000 like we do today,
18 right?

19 A. Large stores?

20 Q. Large marketing. I mean, the -- retail stores
21 and operations. I mean, Wal-Mart existed three years,
22 didn't it?

23 A. In this market, I don't know if they did or they
24 didn't, but there was certainly retailers in this --

25 Q. There were certainly retailers in this market?

1 A. Yeah.

2 Q. Large retails in this market?

3 A. Yes -- well, yes.

4 Q. And what makes today the market any different
5 than it was three years ago?

6 A. It appears to be the difference is the growing,
7 exploitation of the loophole --

8 Q. Okay.

9 A. -- that creates a competitive imbalance in the
10 marketplace. I think, for, example, Mr. Kruger provided
11 some just intense detail of the growth, almost on a
12 customer-by-customer, store-by-store _____, and he
13 provided, you know, sales games, sales lost. You know ,
14 with their experience , price comparisons. Again, Mr.
15 Vanderpool and Mr. --

16 Q. Arbuthnot.

17 A. -- provided, you know, detail of customers that
18 changed hands, perceived reasons in their communication
19 with their customer, and they seemed to boil that back to a
20 competitive price advantage that the producer/handler had
21 that Shamrock did not have or, Mr. Hitchell said, Kroger
22 did not have, or Mr. Yates said Dean did not have, or the
23 two handler representatives in Order 124 said there
24 businesses did not have.

25 They didn't seem to complain about, you know, did

1 they have better trucks, did they have better filler
2 machines? Did they have smarter packaging designs? Did
3 they have better relationships with customers? Those
4 didn't seem to be the avenues of complaint.

5 Q. But that's the purpose of this hearing, isn't it,
6 to talk about better trucks and better fillers. It's to
7 talk about competitors -- to assess competitors the
8 difference between class uniform price, right?

9 A. I think the purpose of the hearing is to point
10 out that there appears to be a loophole in the price
11 regulations that, from our point of view, needs to be
12 corrected.

13 Q. All right. Total sales since 2000 -- class one
14 sales, Order 124. What increase in class one sales has
15 moved from other handlers to producer/handles in order 124?

16 A. I don't have the detail to be able to answer that
17 question.

18 Q. Well, you've answered it in your testimony that
19 you say that there's this growing exploitation of it. So
20 where's the exploitation? Or maybe I don't understand.
21 What do you mean by exploitation?

22 A. Again, the -- so far the two witnesses that have
23 testified for Order 124 from the processor standpoint
24 directly, and Mr. Hitchell, I think, indirectly,
25 representing Kroger, pointed out they had lost business

1 that -- through every avenue that they could determine
2 dealt with price. There will also be witnesses from
3 Northwest Dairy Association who'll provide some additional
4 detail on sales and competitive relationships in the
5 marketplace and Order 124.

6 Q. But we have total volumes, don't we, in the
7 record in terms of class one sales and Order 124? It's not
8 restricted. We know how much PD milk was sold in Order
9 124, right, in class one?

10 A. Yes.

11 Q. And then since 2000, do we have more or less
12 going through PD?

13 A. We may have more, or we may have less, but I
14 don't know that we have the individual ins and outs, nor do
15 we have the businesses that may have been gained or lost,
16 or the margins gained or lost as a result of pricing
17 negotiations.

18 I think I attempted to point out that frequently
19 if a retailer comes back to a processor, I've got a deal,
20 or somebody's offered me a price, or my competitor has a
21 price, why can't you do it? And when you move to match
22 that -- those kind of arrangements will never be disclosed
23 in the total amount of class one in the market and what it
24 was five years ago versus now. It's just not that kind of
25 data. You have to rely on the testimony of individual

1 processor to retailer relationships, and those have been --
2 you know, thus far, there have been several of those, and
3 there will be some more.

4 Q. But those have all been anecdotal. They haven't
5 been on every single sale out of Krogers, right? Mr.
6 Hitchell did not testify that we have the following pounds
7 of milk that were sold out of Kroger in 2000, 2001, 2002,
8 2003, and it has been reduced by this amount because of
9 producer/handlers. Do we have that number?

10 A. Mr. Hitchell did not, but I think that Mr. Kruger
11 had some pretty specific --

12 Q. Well, I'm talking about 124. I'm not talking
13 about 130 now, I'm talking about 124.

14 A. I think Mr. Arbuthnot and Mr. --

15 Q. And how much -- what was the total class --

16 THE COURT: Let's do one at a time --

17 THE WITNESS: I think both of those witnesses
18 testified to various accounts and various levels of
19 competition that they experienced.

20 BY MR. YALE:

21 Q. What was the total class one sales from Sunshine
22 Dairy in 2000, is that --

23 A. I do not --

24 Q. -- in the record?

25 A. I don't know.

1 Q. Did you hear it?

2 A. I don't know.

3 Q. Did you hear it in the testimony? Did you see
4 it?

5 A. If he said it, I heard it. I don't know. I
6 don't remember if he said it or not.

7 Q. Okay. What about 2003?

8 A. Don't have it.

9 Q. So we don't know how much milk moved from
10 Sunshine to producer/handlers. We got some anecdotal
11 stories of some sales, right, but we don't know the total
12 amount that moved from one to the other, do we?

13 A. No.

14 Q. And we don't know how much moved from
15 producer/handlers to Sunshine, do we?

16 A. Unless that was testified to at -- by the two
17 witnesses, no.

18 Q. Now, is it DFA's position that the secretary
19 should guarantee that any handler under this order should
20 not lose a sale to any other handler?

21 A. No, it's not, but it is DFA's position that the
22 difference between the producer/handler loophole and what
23 that dollar value is, is an unreasonable amount per larger
24 size handlers, and should be changed.

25 Q. But is there -- have you seen anything in the

1 record that identifies for Order 124 --

2 A. Uh-huh.

3 Q. -- a specific example that shows, this is the
4 price that we pay -- offered, and this is the price that
5 they offered, and we lost this sale, that reflects all of
6 the sales and the transfer and changes of PD class one in
7 Order 124?

8 A. Are you discounting the testimony of the two
9 handler representatives who talked about those things?

10 Q. Well, I mean -- I think you would have to agree,
11 would you not, that they had anecdotes of a few sales, but
12 they didn't represent their whole sales, did it?

13 A. No, did not, but it represented their view of
14 their business and the competitive factors that they faced.

15 Q. You're -- you indicate that you're a -- you've
16 got your education in dairy economics?

17 A. Yes.

18 Q. So as I understand it, in dairy economics, if
19 there's no growth and decline, that means there's an
20 exploitation?

21 A. Come again.

22 Q. If there's no growth or decline in
23 producer/handler milk, then there's an exploitation of the
24 loophole. Is that what -- how you translate that?

25 A. Don't know if I would say it that way or not.

1 First make some attempt to quantify what the difference
2 might be, and then look to see if there's, you know,
3 growing opportunity to take advantage of that, and that's
4 what we seem to be able to indicate.

5 Q. All right. How would we have a growing
6 opportunity to take advantage to that?

7 A. The growing opportunity would be measured by the
8 business entities who seem to be taking advantage of it now
9 who didn't seem to be before.

10 Q. Okay. And Order 124, what business entities are
11 taking advantage of it that weren't doing it in 2000?

12 A. That weren't -- I'm not sure if there were any
13 that weren't doing it in 2000.

14 Q. So there's no growth in that exploitation of
15 Order 124, right?

16 A. Again, you know, seems as though you should've
17 asked these questions of Mr. Vanderpool and Mr. Arbuthnot,
18 because they were -- they had the most one-on-one, if you
19 will, exposure, but they spoke in their testimony of
20 competitive situations that they faced, changes in them,
21 new ones. I think Mr. Vanderpool talked about a particular
22 piece of school milk business as an example. He detailed
23 pretty extensively, you know, the bid process, how it all
24 been the same, and all of a sudden, there was a new player,
25 and that the size of the bid difference, the only thing

1 that he and his staff could come up with was that the
2 competitive bidder was not having to pay regulated prices.

3 Again, I think --

4 Q. But that was their assumption. They didn't
5 figure that out, they just assumed that, right?

6 A. Well, I think you have to go -- again, go back to
7 the -- you know, people have the day-to-day, hands-on
8 business, and you know, you have to assess the weight of
9 their knowledge of market conditions and the knowledge of,
10 you know, the intimacies and intricacies of their business.

11 And I guess you can draw the conclusion that they just
12 made it up as they went along, or they had a pretty good
13 knowledge of their business, and that was their assessment
14 of it.

15 Q. But a producer/handler -- what is the cost of the
16 milk of a producer/handler?

17 A. What is the cost of the milk --

18 Q. What is the -- if I'm a producer/handler, assume
19 that I am, what's the -- what's my cost of milk?

20 A. I assume your cost of milk is what it costs you
21 to produce it.

22 Q. All right. So when these people were doing their
23 knowledge, did they have knowledge of what the cost of
24 production was at these plants or these farms?

25 A. I do not know.

1 Q. Do they know whether these plants or stores were
2 wanting to do something to discount below their cost in
3 order to obtain a new market?

4 A. Come again.

5 Q. You understand that there's times -- there's a
6 cost of entrance into a market, right?

7 A. Uh-huh.

8 Q. You understand what I mean by that?

9 A. Yes.

10 Q. That sometimes to get the market, you got to be
11 cheap or even it's cheaper than what you can afford just to
12 get into the market, right?

13 A. I think that that was, again, one of the points
14 that brought out was that the cost that was portrayed by
15 the competitor was cheaper than theirs. They didn't -- and
16 as they analyzed it from the standpoint, and I think Mr.
17 Herbine pointed this out in his analysis, that when you
18 start out with the openers as a regulated price, there's no
19 way you can explain, you know, the end result, that there's
20 -- that someone wouldn't deliberately set out to lose that
21 much money.

22 Q. On a particular sale, that's your position that a
23 -- nobody would ever reduce and sell milk at less than cost
24 to get a new customer?

25 A. You're talking about one pound or all of your

1 pounds?

2 Q. I'm talking about a customer.

3 A. Talking about one pound or all your pounds?

4 Q. I'm talking about a customer's pounds. I mean,
5 not all -- the testimony was a producer/handler, this was
6 all their milk that went to this school?

7 A. No one would discount their entire volume to gain
8 business.

9 Q. Okay. All right. Do you have --

10 A. But someone may discount a small portion of their
11 volume to get --

12 Q. All right. In this record, identify anybody
13 who's testified producer/handlers in Order 124 have
14 discounted all of their milk to all of their customers.

15 A. I don't know that anybody has done that.

16 Q. Now, I want to take a different topic I want to
17 talk about. You used the term "regulated." The
18 producer/handlers are unregulated, right?

19 A. Correct.

20 Q. Isn't it true that under the Federal Order
21 program, the producer/handlers are more regulated than
22 regular handlers, because they're limited in the sales that
23 they can make, and who they can make them to, and how much
24 milk they can buy?

25 A. I suppose you could take that view. I think, you

1 know, that the main thrust of that comment deals with the
2 pricing of milk and how they account to or don't account to
3 the pool, but certainly you can say, yes, that if they have
4 some limits on, you know, their own milk production and on
5 what they can buy from others. So in that view, that would
6 be a -- an avenue of regulation that they choose to abide
7 by.

8 Q. So the whole issue here is the minimum prices,
9 right?

10 A. That's a key issue if --

11 Q. And it's your understanding the secretary has the
12 authority to assess minimum prices to plants, is that your
13 -- under the AMAA? Is that --

14 A. The orders regulate handlers, is that what --

15 Q. Yeah.

16 A. -- you're asking?

17 Q. Yes.

18 A. Yes.

19 Q. And you're not aware of any other authority she
20 has other than what's in the AMAA, right?

21 A. I'm not aware that there's not any more. There
22 may be some that I'm not aware of.

23 Q. Now, how do you define disorderly marketing?

24 A. Disorderly marketing is a condition that -- first
25 of all, it has to exist in a regulated marketplace,

1 disorderly -- for the definition to fit. The regulations
2 provide for a certain outcome. For example, in Federal
3 Orders, one of the outcomes is that handlers have price
4 equality, some sort that producers share in returns of --
5 from the marketplace, would be another example. So in a
6 regulated market where there are predetermined outcome, and
7 disorderly market would be some -- disorderly market
8 conditions would be something that results in the -- those
9 outcomes being thwarted.

10 Q. Have you ever heard of the concept that it's to
11 deliver a good and wholesome product to a consuming public
12 at sufficient quantity as a reasonable price? I haven't
13 gotten it exactly right, but have you heard that concept?

14 A. I've heard that concept. I don't think that's a
15 sole mark, but that could be a concept.

16 Q. Okay. Can you identify any producer in Order 124
17 that has terminated its operation -- terminated being a
18 farmer, producer that's going out of business because there
19 were producer/handlers in the market?

20 A. Well, if you draw the definition in that
21 direction, I would have a hard time coming up with an
22 answer to, is there one? There have been producers who
23 have gone out of business in Order 124. Certainly if you
24 were to ask them, they would say, because my, you know,
25 returns were negative, my prices weren't, you know, good

1 enough.

2 That may or may not be the sole reason, and to
3 the extent that producer/handlers have class one revenues
4 from their business and aren't share in the market-wide
5 pool, you could work your way around to, if those revenues
6 were in the pool, the blent price would be higher, and the
7 producer may not have gone out of business.

8 Q. Are you aware of any producer who has been unable
9 to survive on the basis of 4 or 5 or 6 cents a
10 hundredweight difference?

11 A. I've had some tell me that.

12 Q. Well, we always have the nickel jumpers, right?

13 A. Well, that could well be true. I've had some
14 tell me that.

15 Q. What about, are you aware of any school that has
16 not received its full supply of milk in Order 124 in the
17 last three years?

18 A. I am not.

19 Q. And what about any stores? Are you aware of any
20 stores that have not had a full, sufficient supply of milk
21 available for their stores in Order 120 --

22 A. I am -- I personally am not aware.

23 Q. And has there been any cooperatives that has
24 terminated its operation in the last three or four years in
25 Order 124?

1 A. I don't know of any.

2 Q. Like to take your -- just kind of go through
3 another question on one of your statements you made. At
4 page three of your testimony, you make this comment about
5 multiple retail accounts. I think I got that right, or is
6 that point three? That may be point three of your summary.

7 I'm sorry. On page four. Is it your position that
8 producer/handlers should not have more than one account?

9 A. No, it's not our position.

10 Q. So what's the impact of multiple retail accounts?
11 Why -- if they can handle more than one, why is that the
12 problem?

13 A. The concern is, again, the competitive impact in
14 the marketplace. That's the -- I think earlier we had a
15 discourse about, you know, three million versus 2-9, what
16 -- 2-9-9-9-9 versus 3.001. The issue is competitive impact
17 in the marketplace, and so there should be -- there would
18 be, I suspect, a number of ways to measure the competitive
19 impact in the marketplace.

20 So one of the ways that that would be measurable
21 is how many retail outlets could be served by a
22 distributing plant. And so on the surface, you know,
23 without any evidence, you would tend to think that someone
24 who served a single, retail outlet would be much less of a
25 competitive factor. So if they had an -- a loophole to

1 exploit, but they only were able to exploit it at one
2 retail store in the Federal Order, that would probably not
3 be as big a competitive factor as if they were able to use
4 that in 2 stores or 20 stores or 100 stores.

5 So then, you know, it becomes a matter of what is
6 a measure, and so we've attempted to provide some
7 quantification of that to point out to the secretary that
8 at a certain size, this many retail stores can be served
9 based on this, you know, amount of evidence. And so that
10 should be some guideline for the three million pound
11 threshold we propose.

12 Q. So it's your understanding that the secretary
13 should begin to allocate retail sales to different entities
14 and have some with some rights and others without those
15 rights, based on the --

16 A. If that's what you understood my answer was, that
17 was an incorrect understanding.

18 Q. Now, you talk about multiple retail. What about
19 milk that is sold straight to consumers?

20 A. That's not included in this measure.

21 Q. Straight distribution right to the door of the
22 consumer, that's not considered --

23 A. That's not considered in this measure of multiple
24 retail accounts. I did not have any data on direct
25 consumer, route delivery (phon.).

1 Q. Is that competitive -- if that -- is that
2 disruptive of the competitive marketplace?

3 A. I don't have a, you know -- I haven't considered
4 that directly in our analysis and the types of things that
5 we've attempted to point out, we did not consider that --
6 are you talking about door-to-door route --

7 Q. Door-to-door sales.

8 A. -- delivery? I don't have an answer.

9 Q. How big do you have to be before you become
10 disruptive on door-to-door sales -- so you don't have an
11 answer to that question --

12 A. I do not. I do not.

13 Q. Now, in item five of your statement there. While
14 we're still on that same page, we might as well go down a
15 couple of questions on some of those lists.

16 You say -- are -- they are larger, I assume, PDs
17 of the subject of that verb (phon.) are larger in some
18 cases than many of the regulated handlers in the Federal
19 Order system, right?

20 A. Correct.

21 Q. We've already agreed the producer/handlers have
22 regulation. It's a question of minimum pricing, right?

23 A. Correct. That's an issue, minimum pricing.

24 Q. All right. Now, in Order 124, how does that
25 stick up? What's the relationship?

1 A. Well, there are 18 7A plants in the marketplace,
2 and the --

3 Q. What's the average size of the smallest one third
4 of the -- of them?

5 A. That's what I was looking to see. A
6 million/five, it looks like.

7 Q. Of the regulated?

8 A. Of the -- no, sorry. That's incorrect. 3.9
9 million.

10 Q. Okay. And what's the average size of
11 producer/handlers -- the largest producer/handlers?

12 A. 4.7 million.

13 Q. And in your analysis are you saying that the 3.9
14 and 4.7 are not approximately the same size operations --

15 A. I would say that they're not far from the same
16 size. I think that, you know, the point of item number
17 five is that it -- I can't come up with a reason why two
18 plants of the same size, one should be exempt from the
19 pricing provisions, the order, and another one should be
20 subject to the pricing provisions of the order.

21 Q. But those regulated 7A plants that are in that
22 table have the same right to go out and acquire their own
23 milk supply and be producer/handlers themselves, right?

24 A. They could choose to be that exactly in the same
25 way that those producer/handlers could choose to not be a

1 producer --

2 Q. So they have the exact, same opportunity that the
3 producer/handlers have, right?

4 A. Yes.

5 Q. And they made it a business decision that it's
6 not in their interest to do so?

7 A. Yes.

8 Q. The market works.

9 A. They made a business decision not to do so. In
10 our opinion, producers -- or handlers of a certain size
11 should be subject to the same regulations.

12 Q. So --

13 A. So that's our point here.

14 Q. So why should the secretary come in and make that
15 decision for them?

16 A. Well, I think we have tried to outline a number
17 of reasons as to -- the purpose of our testimony was to
18 outline a number of reasons why.

19 Q. Okay. Is there any reason that a handler in --
20 any 7A handler in Order 124 cannot acquire its own supply
21 of milk?

22 A. Any reason -- I'm not aware of any.

23 Q. So if it was really a competitive disadvantage,
24 they would have the opportunity to match those regulated --
25 those producer/handlers, right?

1 A. I think that perhaps that was some of the
2 testimony that was presented in Phoenix, is that several
3 handlers said, if this exemption doesn't change, you know,
4 we may be forced to do the same thing, and that would, in
5 essence, eliminate the order, and we view orders to be a
6 good thing for producers.

7 Q. But they've had that opportunity to do that for
8 years, right? I mean, there's nothing new about the
9 regulation. I mean, the exemption for producer/handlers
10 has been around a long time, right?

11 A. The difference is, again, the growing interest
12 and the opportunities where we see that it's taking place
13 of a certain size.

14 Q. Do you know what I mean by the term -- and maybe
15 I'm using the incorrect term. Bear with me one second.

16 (Pause)

17 BY MR. YALE:

18 Q. I was just told my word wasn't a good word, so --

19 A. Okay.

20 Q. I'm going to have to try this differently.

21 You indicated in your testimony about you're an
22 economist and -- AG economist. Isn't in a free market that
23 -- in an efficient market, that items will move to the most
24 profitable thing at some point. I mean, if somebody has an
25 advantage, others will move to that advantage, right, or

1 they will negate that advantage in some way?

2 A. Yes.

3 Q. And an equilibrium will come into the
4 marketplace, --

5 A. Yes.

6 Q. -- right?

7 A. Yes.

8 Q. All right. So isn't that really -- I mean,
9 that's really the biggest problem you have with your
10 argument is, you don't see this massive movement over the
11 years of producers going to producer/handlers or handlers
12 becoming producer/handlers if it was such an advantage,
13 right?

14 A. We've had inquiries in the last year from
15 producers asking questions about being a producer/handler,
16 and we see that as, at a certain size, not a good thing for
17 the majority of DFA members or the majority of dairy
18 farmers. We've had people knock on our door and ask that
19 question. We --

20 Q. But after due diligence, they may make another
21 decision, right?

22 A. They may or may not. One of the pieces of due
23 diligence is the outcome of this hearing. We've had
24 people, you know, who are, as we speak, opposing this --
25 opposing not only the hearing, but other, you know, venues

1 to deal with producer/handlers mainly on the avenue that
2 they would like to be one.

3 Q. Is that they would like to be one, or they would
4 like to have the opportunity to be one?

5 A. They have the opportunity to be one. Up to 2.99
6 million pounds a month of class one sales, they can be one.
7 99 plus percent of all producers in Federal Orders could be
8 one under our proposal. Doesn't limit them in any way.

9 Q. What percentage in Pacific Northwest?

10 A. If that -- you know, I think that's -- might --
11 maybe in that table. I don't know that answer, but it may
12 be in the table --

13 Q. What about New Mexico as an example?

14 A. Again, in -- I don't know about New Mexico
15 specifically, but in Federal Order 126, I think it may
16 point out that producers by size may be in there.

17 Q. What -- you know two, three --

18 A. But, you know, that point, I mean, if there's a
19 producer in New Mexico who's five million pounds and they
20 really want to be a producer/handler, they -- under our
21 proposal, they could reduce the size of their operation to
22 2.99 million pounds -- I mean just under three million and
23 be a producer/handler if that's what they chose to be. But
24 once they reach a threshold for a wide number of reasons,
25 we think they should be regulated like other handlers.

1 Q. Are you aware of the growth of new farms in that
2 southwest, in the New Mexico and the panhandle of Texas?

3 A. Yes, I am.

4 Q. All right. And what is the approximate size
5 range of those new operations?

6 A. Seems to be, you know, 1.5 to 2.5 million pounds
7 maybe as a start-up and, you know, good size. No debate.

8 Q. At one point, how many cows? What's the typical
9 size start-up for cows? You don't know?

10 A. You know better than I, so if you say, I'll agree
11 with you.

12 Q. Are they bigger or smaller than the average New
13 Mexico farms as it stands today?

14 A. Probably bigger than the average New Mexico farm.

15 Q. And doesn't your table indicate there's about
16 1,500 cows in the average, New Mexico farm, your testimony,
17 in your -- one of your exhibits?

18 (Pause)

19 BY MR. YALE:

20 Q. You don't know?

21 A. I don't know. I don't know there's any exhibit
22 about -- specifically about New Mexico.

23 Q. The point is -- well, we'll deal with that
24 subject.

25 A. I think the point is, is that there does exist

1 the ability to be a producer/handler if that's what someone
2 wants to be. We're not eliminating completely the
3 opportunity to be one.

4 Q. But you have no testimony that in today's market
5 that in a commercial dairy, that it is profitable to build
6 a dairy at only three million pounds per month?

7 A. I have knowledge that there's been producers who
8 have become producer/handlers at far less than that volume
9 in the last year.

10 Q. In what markets?

11 A. The Central Federal Order. Just so happens I
12 know one, but I know that there's one there.

13 Q. And how big is that market?

14 A. How big is?

15 Q. How big is that PD?

16 A. Oh, maybe 200 cows.

17 Q. Where's it located?

18 A. About 50 miles east of Kansas City, can't think
19 of the town.

20 Q. Going back again to number five in terms of -- I
21 want to talk about Order 124. What percentage of the milk
22 in class one comes from 7A plants that are larger than the
23 PD plants in Order 124, do you know?

24 A. I don't.

25 Q. Now, is it your position that economies of scale

1 is something that creates disorderly marketing?

2 A. Probably not on its own right.

3 Q. So is it your position, though -- I mean, as I
4 read your testimony, it gives me the impression that
5 farmers who want to be producer/handlers or handlers who
6 want to be producer/handlers are going to be discouraged
7 from economies of scale, that you want the secretary to
8 issue a decision that once you get to a certain point in
9 our economies of scale, you're not allowed to benefit by
10 that. You need to share that with the market. Is that
11 your position?

12 A. Once you reach a certain size, three million
13 pounds of class one sales or greater, you should become a
14 regulated handler. That's our position.

15 Q. And has that ever occurred in the Federal Order
16 before?

17 A. That --

18 Q. Have you ever had a cap like that, that once you
19 reach a certain -- of that size, I mean, other than the
20 deminimus (phon.), you know, 100,000 or 200,000 exempt
21 plant provisions, but?

22 A. Well, if you read back in the history of
23 producer/handlers, you read quite a bit of detail that
24 tends to point out that there was not more exacting
25 regulation applied because of the small size. There's a,

1 you know, many pages of detail on that.

2 Q. But there's also history out there that where PDs
3 had as much as 50 percent of the market, right?

4 A. I'm not aware of that.

5 Q. Or that a single PD in the El Paso market had 16
6 percent of the market?

7 A. I'm -- that could be true.

8 Q. Isn't it true, though, Mr. Hollon, that at some
9 point the economies of scale and the costs and the risks
10 associated with the PD will -- creates its own cap?

11 A. I don't know if I can agree or disagree with
12 that. It seems to be in the case of Mr. Hettinga's (phon.)
13 operation that he seems to be pretty good at running that
14 operation, and I don't think he's reached his cap -- hasn't
15 appeared to reach it yet.

16 Q. Has there been a growth of that operation in the
17 PD's standing in the last two years? I'm just asking. I
18 --

19 A. Now, I relate to Mr. Kruger's testimony that they
20 seem to have lost, you know, some business.

21 Q. Want to draw your attention to Exhibit A in your
22 testimony, if I can get my hands on it. Table A, I'm
23 sorry, Exhibit -- what is that number?

24 MR. UNIDENTIFIED: 33.

25 THE WITNESS: 33.

1 BY MR. YALE:

2 Q. 33. Thank you.

3 In your cost per hundredweight, I just got some
4 clarification that I wanted to point out on Table A-1, and
5 I think it would apply to the others of that --

6 A. Okay.

7 Q. -- type. Are you looking at full fat, or are you
8 looking at the average class one butter fat in that market?

9 A. I think these are the class one prices that --
10 and blent prices that announce, so I assume they're at 3-5.

11 I think that's correct.

12 Q. Want to turn you over to Table B.

13 A. Table B?

14 Q. Yes.

15 A. Okay. Okay.

16 Q. And you have at your left-most column 30 million
17 pounds.

18 A. Yes.

19 Q. And I think -- if I understood your testimony,
20 and I'm not -- I mean, if I'm incorrect, let me know, but
21 you indicate that that represents the largest bottlers in
22 the country?

23 A. That would be pretty representative of some of
24 the largest fluid milk processing plants.

25 Q. Now, what do you mean by representative?

1 A. Well, go back, for example, to Table -- and I
2 would say that, you know, that was just a random number. I
3 could've picked 40; I could've picked 20. So I mean, my --
4 the 30 million wasn't designed to be anything more than a
5 number out of the air to show the number of loads per day.

6 But it just so happens that I could go back to Table, I
7 think it's, G, be the very last page. And Table G is the
8 recap of 7A plants, data all federal orders, May of 2003.
9 You can see that the largest one third grouping of plants
10 in Federal Order 1 is 31,549,168 plants to -- so there is a
11 block of plants, and I think those particular plants are in
12 New York City, who are 30 million pounds per day, plus.

13 Q. And being an average, that indicates you don't
14 know what the range -- I mean, the size could be quite, for
15 maybe a million pounds to 50 or 60 million, right?

16 A. Well, yeah, I guess if you had 1 and 61, you
17 could average 30, but I think if it was in the largest one
18 third grouping, that's going to narrow the distribution
19 around that average some. So it's probably, you know, much
20 closer to 30, and then otherwise, it would've fallen into
21 the middle or the smaller. But nonetheless, there are some
22 plants in that market -- we service some plants in that
23 market who are 30 million pounds class one.

24 Q. Want to move over to Table C and C-1. Well, I
25 see one with one quarter 131 (phon.). I think that the

1 concept really applies to the remaining ones on --

2 A. It does.

3 Q. -- the others. So I'm not trying to pick on that
4 order. This is assuming that the surplus milk is sold at
5 the minimum manufacturing prices in that order --

6 A. That's right, the lower class three or class
7 four.

8 Q. Did you do any research to see what
9 producer/handlers sell their excess milk for?

10 A. The information there I did discuss with some
11 folks in Order 131, and in Order 124 we buy milk
12 occasionally from producer/handlers in the marketplace.
13 Can't say that we bought from every, single one, but we've
14 bought from many, and actually our -- I can only speak to
15 our, you know, purchasing arrangements, but that's what we
16 pay, the lower class three or four.

17 Q. You don't discount it --

18 A. Only to the extent of the promotion assessment,
19 because the -- that's a screwy law, and we're -- you guys
20 listen to that --

21 Q. (Indiscernible)

22 A. That's a screwy law, and we have to account to
23 the promotion funds for the monies we buy -- milk we buy
24 from producer/handlers that we discount. That's what we
25 do, we discount it by the --

1 Q. You don't discount it by a \$1 or \$1.50 or \$2?

2 A. We do not, and I'm not saying that others may or
3 may not do that. The -- primarily the uses that we
4 purchase it for, we pay that amount. There are also some
5 cases where producer/handlers sell their surplus into
6 California, and so I did take a look at that as a
7 possibility, and look at 40 plus months and the Federal
8 Order values were the lower options were 25 of those 43
9 months. And again, this would be the lower -- lowest
10 value, so you would assume, you know, any rational business
11 would try to sell for higher -- a higher value than this if
12 they could.

13 Q. Which comes back -- I think right. A rational
14 business wants to sell at the highest price, right?

15 A. That's correct.

16 Q. So if a producer/handler is out there, and they
17 -- and there's a handler that are 7A plants, and they pay
18 the minimum price, I think the assumption is, the
19 producer/handler's going to know approximately what that
20 price is, right, with that minimum handler (phon.). So
21 he's going to know what that cost is. Why would a
22 producer/handler sell for anything significantly less than
23 that?

24 A. I suppose to gain market share. There appeared
25 to be ample evidence that there were lots of sales in the

1 market at less than, you know, what the regulated handler
2 could --

3 Q. On a long term basis?

4 A. There appeared to be evidence again that long-
5 term basis --

6 Q. Is that rational?

7 A. If you had -- you have to know the full range of
8 costs, and it appears that when you don't have to account
9 to the pool for the minimum class prices, you can do that.
10 That I think is our chief concern. Seems like pretty
11 rational if I don't have to put that cost into my equation,
12 and I can discount my product and sell more. That's a
13 pretty rational decision.

14 Q. But also you wouldn't have to sell them as cheap
15 as you're suggesting either, right?

16 A. It appears again, from, you know, evidence that's
17 been entered and people that we've talked to that many
18 producer/handlers' price lists bounces up and down with the
19 Federal Order, but at a value that approximates this
20 difference. That's also probably a pretty good business
21 strategy because the price moves up and down each month.

22 Q. Now, I want to -- back here on this Exhibit C.
23 If, in fact, their actual costs were less than class, that
24 would change that blend equation, right?

25 A. You mean, if their surplus return was something

1 less than class --

2 Q. Yes.

3 A. -- three or class four?

4 Yes, it would.

5 Q. And nothing in your tables reflect that, right?

6 A. It does not in my statement or in my testimony.

7 I did indicate that also this -- these tables do not
8 include any premium values that regulated handler may pay
9 for balancing, and that would be some offset to the values
10 that you're talking about.

11 Q. Then I want to move on to your table to get some
12 clarifying questions (phon.) that we had. You mentioned
13 the number of 101 producer/handlers. Is that the sum of
14 all the numbers here; is that adding in the -- you estimate
15 of what the situation is in these --

16 A. No, that's the sum of all those on the page. And
17 then -- in cases of, for example, in Order 5 where they did
18 not give me a number, but you can go to their published,
19 you know, data, and they -- once a year, there's a list of
20 names. And so I was able to get those numbers, and the
21 same with Order 33 for whatever their reason --

22 Q. Right. But does that 101 reflect --

23 A. No.

24 Q. So it's more than that?

25 A. It's more than 101, and I indicated what that

1 number was. I think it's 17 more.

2 Q. Okay. And so the rest of these numbers are the
3 same way; is that correct?

4 A. With regard to restricted and non-restricted?

5 Q. Yeah, they don't factor into your computation?

6 A. That is correct, and in no other case, in terms
7 of the number of producers/handlers, I added 17 more. In
8 no other case did I make any other additions or
9 subtractions.

10 Q. Do you know if Braums (phon.) was pooled on Order
11 32 in May, or was there a producer/handler --

12 A. I think Mr. DuPey (phon.) testified in Phoenix
13 that Braums had not been a pooled handler for well -- well,
14 I think for a number of years.

15 Q. Okay. Why we were talking about surplus (phon.),
16 I want to move on to something else.

17 Is Alaska part of the marketing area of Order
18 124?

19 A. I don't think so.

20 Q. Your proposal would regulate sales from a PD to
21 Alaska?

22 A. Yes.

23 Q. It went to a bottler?

24 A. Would.

25 Q. Even though that bottler's not sharing its

1 proceeds with any other, and it has not minimum prices?

2 A. I think our -- you know, the language in our
3 proposal says if you have Class 1 sales in an area, it
4 counts towards your three million. Certainly if a
5 producer/handler paid regulated prices on their sales that
6 ultimately ended up in Alaska, those values would get into
7 the pool.

8 Q. In other words --

9 A. So I think -- I think there was testimony from a
10 regulated handler. I think Mr. Vanderpool, part of his
11 testimony said that he used to have sales in Alaska that
12 were pooled and lost that business, I think, to a
13 producer/distributor over a price concern.

14 Q. I want to move to another topic. You talked
15 about your experience in marketing milk, and bottlers would
16 call up and say, hey, I just got a call from my customer,
17 and they're getting an offer to buy, sell milk or whatever
18 at some other price, and I need help. Isn't it true, Mr.
19 Hollon, that that's just kind of the game that's being
20 played by buyers all the time now --

21 A. Absolutely. This is -- so it's part of, you
22 know, our job to try to interrogate those claims and see if
23 they're reasonable to the best extent that we can.

24 Q. And, you know, the other part of it is that with
25 the producer/handler, you can't purchase more than 150,000

1 pounds from a, you know, from other sources, right?

2 A. That's correct.

3 Q. So there's a -- the order has imposed a limit on
4 how much milk they can sell as a producer/handler, right,
5 because they can only sell --

6 A. They can sell all the milk they can --

7 Q. -- produce?

8 A. They can sell all the milk that they can produce,
9 --

10 Q. All they can produce, but you can't turn that
11 production over --

12 (Tape changed)

13 BY MR. YALE:

14 Q. -- point that comes up that doesn't, the fact
15 that a -- the fact that they are a limited in their size.
16 Shouldn't that factor into that decision of how viable that
17 they're going to be able to supply all the milk at those
18 prices?

19 A. I think our -- you know, like I said, our answer
20 to that would be, up to three million pounds and have quite
21 a bit of latitude. Over three million pounds, they should
22 have the same latitude or regulator exposure that every
23 other handler has.

24 Q. Q. Now, at page seven you talk about a
25 temporary loss leader. It's true, is it not, Mr. Hollon,

1 that there are grocery chains and other retailers that will
2 consistently sell milk below cost as a permanent loss
3 leader?

4 A. Yes.

5 Q. And would you -- you would agree, would you not,
6 that those prices should -- would not be one to reflect
7 what milk is actually being sold by processor to those
8 stores, because you don't know how much of a hit that
9 store's willing to take on their milk, right?

10 A. For the most part, I'll agree with you, not 100
11 percent, but for the most part, I agree with your
12 assessment.

13 Q. Now, you have --

14 A. I would add, Mr. Yale, that in most cases that
15 retail strategy is well-known in the marketplace, and so in
16 the Columbus market, if there's five different retailers,
17 most of the retailers know, you know, have a good idea of
18 the marketing strategy of their competitors. And so if it
19 changes, then that's where this question would come in.

20 If somebody had been a, for example, another
21 retail strategist, same price every day, you know, I think
22 HEB Grocers in Texas, for example, that's part of their
23 marketing strategy. Gallon of milk is going to cost \$3 or
24 \$2, 362 days a year. So if all of a sudden, gallons of
25 milk in HEB started costing a \$1, then Kroger would say,

1 well, something has changed here. So then they would begin
2 this process of interrogation.

3 Q. You mentioned on page seven that you had a
4 contract with Institutional Resources, Incorporated, right?

5 A. Yes.

6 Q. Did they prepare a report?

7 A. They did.

8 Q. Is that report an exhibit in this hearing?

9 A. Conclusions from that report are. We contracting
10 with them to do some research for us, and they provided us
11 some sales and, --

12 Q. Is that --

13 A. -- sales information --

14 Q. Is that --

15 A. -- on their store database.

16 Q. Is anybody from that -- that prepared that report
17 going to be available for examination?

18 A. They will not.

19 Q. And will that report itself be made available as
20 an exhibit?

21 A. Only to the extent of what's in Exhibit -- oh,
22 no, only -- what's in our -- what's in our testimony. We
23 reported on the smallest universe, the smallest 25 percent
24 of their store base and the remaining 75 percent of their
25 store base, what -- how many gallons of milk those stores

1 sold per week.

2 Q. As I understand it, that this -- this study
3 rejected all of the Wal-Mart?

4 A. Rejected?

5 Q. Well, I mean, it doesn't include -- I shouldn't
6 say "rejected." It doesn't include the Wal-Mart sales?

7 A. It does not.

8 Q. Does not include Sam's Club?

9 A. It does not.

10 Q. Cosco?

11 A. Does not -- oh, well, I don't know specifically
12 about Cosco. Can't tell you.

13 Q. And it doesn't include Starbucks?

14 A. I don't think so.

15 Q. Do you know if you ever heard what the percentage
16 of retail milk is sold through Wal-Mart and other
17 superstores nation-wide today?

18 A. Not the substantial percent.

19 Q. You had -- have you heard -- you don't know any
20 number?

21 A. No. One less glass of milk.

22 Q. Pardon?

23 A. The kitchen just dropped a glass, so it's one
24 less glass of milk.

25 Q. Oh. Now, this study was done nation-wide?

1 A. Yes, it reflected their store base nation-wide.

2 Q. So it doesn't reflect the store base in Order
3 124?

4 A. It does not.

5 Q. Are you aware of -- you're talking about this
6 bottom 25 -- smallest 25 percent. First of all, that
7 doesn't include door-to-door sales, right?

8 A. No, it does not.

9 Q. All right. And of this smallest 25 percent, do
10 you know how many stores are in Order 124 that fit that
11 standard?

12 A. No.

13 Q. Do you know --

14 A. We asked them to do a nation-wide cut of their
15 data, and that's what -- that was the data that we asked
16 for and we got.

17 Q. So if it were to show that the ratio for that
18 smallest percentage was much higher, then your three
19 million would have to be different in Order 124, right?

20 A. Uh-huh. That would be true. We portrayed it as
21 a national average. We didn't attempt to portray it as
22 just Order 131 or just Order 124.

23 Q. And this hearing for 120 -- this -- for 124 is --
24 this isn't a national hearing, right?

25 A. It is not, but it does give the secretary an

1 indication of the ability of a various sized retailer --
2 I'm sorry, various sizes of processor to service various
3 sizes of retailers.

4 Q. On a national average, but not in Order 124?

5 A. On a national average, but would be typical --
6 again, a national average would be typical of various
7 segments of the country.

8 Q. And is an average size typical of producers
9 nationwide? Is the nationwide average typical of the size
10 of producers in the Pacific Northwest?

11 A. You mean is the average size --

12 Q. Of a producer nationwide average or size of
13 producer, is that typical of the producer in the Pacific
14 Northwest?

15 A. I would -- haven't looked, but I would guess that
16 the Pacific Northwest producers are perhaps a little larger
17 than the nation average, but I don't have a, you know, it
18 wouldn't be too hard to go determine --

19 Q. It's a different market, right? The secretaries
20 determine that the Pacific Northwest is a different market
21 than the rest of the country, right?

22 A. Well, that's a different marketing order, and --

23 Q. Different marketing order, different marketing
24 area --

25 A. There are different characteristics, but

1 noneththeless, of a pool of retailers, this is an impact in a
2 -- a reason to determine the three million pound threshold.

3 One of the reasons we offer is the ability to impact
4 retail markets by processors of a certain size.

5 Q. So to summarize it, do you propose to the
6 secretary to change and impose a limit in Order 124 based
7 upon a national average, that you do not know whether or
8 not it actually represent what's available in Order 124,
9 right?

10 A. Correct.

11 Q. And I take it by your knowledge of not knowing
12 what's here, you cannot indicate how many -- I think down
13 here you made a comment, if I can find the term. You have
14 the statement right in the middle of the paragraph there on
15 page 80 -- you have a statement that says, "The stores that
16 make up this subset could easily be a metropolitan, retail
17 grocery chain with a reasonable market share."

18 A. Yep. Yes.

19 Q. What's a reasonable market share?

20 A. That statement was predicated on, you know,
21 knowledge of markets. For example, where I live in Kansas
22 City, the Cosentino's Price Choppers chain has about -- has
23 nine to ten stores. If you go -- they advertise in the
24 papers. They're well-known on media outlets. If you, you
25 know, if people shop -- so they're not regional. They're

1 not, you know, national. They're not in ten different
2 states, but in the Kansas City market, they have a market
3 share that may be, you know, five to ten percent.

4 Q. So we establish a three million cap in Order 124
5 because there's eight or nine stores of a chain in Kansas
6 City?

7 A. No, you would establish a cap of three million
8 because that size can service a retail chain of that size
9 that could have an impact in the marketplace. And that
10 retail chain could go to -- and force other processors to
11 request a reduction in price or seek a producer/handler
12 supply.

13 Q. How many metropolitan retail grocery chains of
14 that reasonable market share exists in the Pacific
15 Northwest --

16 A. I do not know.

17 THE COURT: Mr. Yale, just for scheduling
18 purposes, do you have a sense of how much longer your cross
19 is going to be?

20 MR. YALE: Well, I'm not done. I mean, I -- and
21 it's going to be a little while longer, not nearly as much
22 as --

23 THE COURT: I'm thinking that's -- it's --

24 MR. YALE: I mean, this would be good -- it's
25 fine. I'm at a break.

1 THE COURT: Okay. Let's -- it's six minutes
2 after 12:00 by my watch. Why don't we just reconvene at
3 1:15; would that work out okay?

4 MR. UNIDENTIFIED: Yes.

5 THE COURT: We'll be back at 1:15. Off the
6 record.

7 (Off the record and reconvened.)

8 THE COURT: On the record.

9 Mr. Yale, you can get back in your position
10 behind the rostrum over there, and we can go on.

11 MR. YALE: Very good. Thank you, Your Honor.

12 BY MR. YALE:

13 Q. Mr. Hollon, I -- we were kind of talking about
14 this metropolitan retail grocery chains. I want to take
15 you -- you know, you indicated that the size of three
16 million could absorb or handle, I guess, you know, this
17 reasonably sized metropolitan retail chain. I think that's
18 your testimony, right?

19 A. Yes.

20 Q. Now, would that be -- if all their milk went to
21 there, they wouldn't have any other markets; they'd be
22 relying strictly on that market?

23 A. Yes, in -- for the purposes of the analogy, yes,
24 the entirety of 2.5 trailer loads per day would go to a
25 particular customer that could effect that.

1 Q. And then if that grocery chain added another
2 store, then they would -- or two, then they would be put
3 over the limit, and they would have to be fully regulated,
4 or they'd lose that customer; is that right?

5 A. Unless they expanded, or if, in case of our
6 proposal and went through, and they reached the three
7 million pound threshold.

8 Q. That's my point. If they meet your three million
9 pound threshold as part of the issue, --

10 A. Yep.

11 Q. -- and this -- they have a single store, they
12 have all their eggs in one basket, which isn't a very good
13 analogy for dairy, but we'll try it, --

14 A. A good point.

15 Q. Oh, there -- curds in the whey. I don't know.
16 But if they have all of theirs with one customer, and that
17 customer grows, then they lose the PD position, right?

18 A. Under the constraint -- the scenario you're
19 setting up, yes. They would have to make a decision then
20 to either become fully regulated and compete that way, or
21 give up the customer, or diversify their sales based some
22 other way.

23 Q. Now, this report you received, did it talk about
24 any trends and the size of retail markets for milk?

25 A. No.

1 Q. Do you have knowledge of --

2 A. We did not ask them for that. We strictly asked
3 them for, you know, sales by store size.

4 Q. Do you have any sense of whether the discounters,
5 big box stores, club stores are getting a larger or smaller
6 share of the bottled retail market?

7 A. That actually moves from market to market to
8 market. The general trend is that the box stores have a
9 bigger percentage of the market, but that's not true in
10 every, single market. There's a report called the "Shelby
11 Report," for example, that displays retail market share.
12 There's a publication called Supermarket News that provides
13 some data about a variety of commodities in -- it's not
14 true that in every case the only person that's growing is a
15 box store.

16 Q. Now, under your scenario, the box stores would
17 not be available to a three million pound? The large
18 discounters would not be available to this three million
19 pound producer/handler? They wouldn't --

20 A. I'm not following that line of thinking.

21 Q. Well, I mean, are box stores -- are their sales
22 in excess of the three million pounds per month?

23 A. I don't have any -- they were not in the data set
24 from IRI. So I can't tell you, you know, exactly what
25 their sales levels are, but I would say that a

1 producer/handler could certainly have a slice of the retail
2 shelf space in a box store.

3 Q. Assuming that they only purchase for one store or
4 two stores, and break it up, right? I mean, are you --
5 you're not familiar with box store sales or Coscos or Sam's
6 Club or anything in terms of dealing for dairy -- bottled
7 dairy sales. Do you have any knowledge --

8 A. I don't do that line of business directly, but I
9 mean, it is -- you know, most stores have one or two, or
10 occasionally three different milk labels in their shelves.

11 The stores I'm familiar with in Kansas City just as a
12 consumer generally have two or three retail labels in their
13 store.

14 Q. The -- you also testify in page eight that you
15 rely on Carl Herbine's exhibits.

16 A. Yes.

17 Q. To the extent that his testimony is rejected by
18 the secretary, would yours also be rejected on that issue?

19 A. Guess we'd have to ask the secretary that.

20 Q. Looking at page eight, you make this statement.
21 "One rationale given for not regulating producers/handlers
22 is that they have costs that absorb any potential gain for
23 not paying regulated prices." Is that really what the
24 rationale is that's being expressed?

25 A. As I have looked in other decisions, that line of

1 thinking has been expressed, not the sole -- you know,
2 there would've been more than one reason for denying other
3 proposals and other hearings to regulate producer/handlers.

4 That's been one of the reasons.

5 Q. But isn't it really saying that the "advantage"
6 between the class one and the uniform price isn't as great
7 as you would say or others, because there are some other
8 costs that would influence that number and make it narrower
9 number? It's not a policy justification for the exemption,
10 it's just that the statement that they have this advantage
11 isn't accurate; isn't that really what's being said?

12 A. I don't think I would characterize it that way.

13 Q. And also you talked repeatedly through the --
14 your testimony about the idea that the producer/handlers
15 need this exemption to compete, and is it your
16 understanding that the exemption is created for the
17 purposes allowing them to compete, that that's its
18 fundamental policy rationale?

19 A. Need to rephrase your question.

20 Q. Is it the department's policy -- is the policy
21 that drives the producer/handler exemption because the
22 department desires the producer/handlers be able to
23 compete?

24 A. I'm not sure I can answer that question directly.
25 In some of the historical data that you read, you come

1 across, you know, a variety of reasons for why the
2 exemption is in place. You know, one of them, like,
3 clearly in the early days was that of sheer volume, that
4 there were quite a large number of producer/handlers that
5 were small, did not appear to have an impact on the
6 marketplace. The cost of regulating them would be greater
7 than cost of gain.

8 There was actually a cap put on. You asked me
9 that earlier, and I'd forgotten about that, but there was a
10 cap put on producer/handlers by size. I think it was in
11 the Kansas City market of 500 pounds per day, I think.
12 Perhaps it was 500 pounds per month, but --

13 Q. Well, when was that?

14 A. In the '50s, but there was a historical precedent
15 for cap, and there was talk about -- in subsequent hearing
16 records, some in this market, some in the Texas market
17 where there was talks about -- there was a discussion about
18 advantages that producer/handlers had in the retail -- in
19 the competitive marketplace that were absorbed by other
20 costs so that shouldn't be a reason to change the
21 exemption.

22 Q. But the argument that if producer/handlers were
23 small when the orders were created, also applied that coops
24 were small when the orders were created, right? Was there
25 any coop in 1940 or 1950 that had producers in 47/48

1 states?

2 A. No. There were coops --

3 Q. Were there --

4 A. -- in 47 or 48.

5 Q. Huh?

6 A. There were coops --

7 Q. Oh, there were coops, right.

8 A. -- in 47 or 48 states.

9 Q. They were much smaller than they are today,
10 right?

11 A. Yes.

12 Q. And what about plants? Were there plants that
13 were located in, like, Dean Foods or something and covering
14 virtually every federal order one way or another in a lot
15 of the state orders?

16 A. There were some entities then that had pretty
17 wide reaches, and none of them are around any more, but --

18 Q. Right.

19 A. -- there was Hawthorne Melody had a pretty wide
20 reach, you know, multiple region. Sealtest had a wide,
21 multi-reach region, Carnation --

22 Q. But not the percentage of the market that you see
23 today?

24 A. I would say, probably no.

25 Q. And the size of producers themselves are much

1 bigger today than they were?

2 A. Correct. I agree.

3 Q. Now, the bottom of page nine, you say this seems
4 -- you're talking about the idea the cost curve lens
5 (phon.) of volume grows, and then you say, "This seems to
6 describe the retail markets scenario in Order 31 and is the
7 concern in Order 124 as well." And I just want to draw
8 your attention, you use the word "concern." Does that mean
9 you do not have any evidence that describes that scenario
10 actually occurring in Order 124 at this point?

11 A. Again, the two witnesses that testified in
12 Phoenix talked about their perception and meeting that
13 competition in the marketplace, and that over their
14 careers, their day-to-day business routines, they felt like
15 that they were meeting more and more of it.

16 Q. In preparing your testimony, did you do any
17 analysis of the risk a producer/handler, a business risk?
18 You know what I mean by business risk, when, you know, a
19 risk of loss of money in terms of not being able to be
20 profitable in that terms, I mean?

21 A. I did not.

22 Q. Did you do any risk of producers?

23 A. I did not.

24 Q. Okay. Now, you also stated that -- you talked
25 about that the -- you know, this idea of terminate the

1 orders and that the advantage of being a producer/handler
2 would terminate. Is it your testimony that the only
3 advantage of being a producer/handler is the existence of
4 the class one blend differential?

5 A. You mean the dollar advantage --

6 Q. Right. Whatever the -- whatever you perceive the
7 advantage to be.

8 A. Is that -- that is a key difference. I'm not
9 sure if it's the only difference, but that is certainly a
10 key difference.

11 Q. I mean, isn't it possible that the termination of
12 the orders would create producer/handlers?

13 A. It may.

14 Q. Did you do any analysis or any economic study to
15 look at that aspect?

16 A. I did not.

17 Q. Because isn't it true, Mr. Hollon, that the
18 regulation of producer/handlers limits their growth and
19 limits producers/handlers, and we experience that in the
20 history of the federal orders?

21 A. I suppose if you were to measure like they were
22 "X" then and there's "X" now, and there's less, so that
23 must be the conclusion. But there are still a viable base
24 -- it appears to be of producer/handlers, there are still
25 producer/handlers seem to be growing.

1 The larger ones seem to be the one that's
2 growing, they're -- in markets where I hear and have
3 discussions, you know, with our marketing personnel that --
4 on this particular issue, no one ever mentions the, you
5 know, 100,000 pound, the most typical size, as being a
6 competitive concern. It's, you know, in Order 1, you know,
7 in Order 33 and Order 32, in Southwest Order and Order 131
8 and Order 124, the mention is made of the larger than
9 average size producer/handlers and the competitive issues
10 that they bring. And those was where the business share
11 seems to be growing.

12 Q. And the only example you have is 131 where that
13 growing has actually occurred?

14 A. In terms of testimony in the record, yes. In
15 terms of discussions with other either DFA persons or, you
16 know, persons with job responsibilities concerned --
17 comparable to mine, have discussions in Order 1 where there
18 is a problem similar to what we've described with
19 producer/handlers. Same in Order 33, a similar concern.
20 Same in Order 32, a similar concern, and the same in Order
21 126, a Texas order.

22 Q. So at this point, that situation does not exist,
23 right? It's --

24 A. What situation does not exist?

25 Q. The situation that they are being discussed do

1 not exist? The growth do not exist, they're being
2 discussed? You're having discussions --

3 A. No, you're -- no, perhaps I didn't say it
4 clearly, or you misunderstood. The -- there are problems
5 with existing producer/handlers and their interaction in
6 the day-to-day marketplace. There is a parallel concern
7 that there are larger producers who are looking to see if
8 this exemption is going to remain in place, and if it does,
9 then they are considering doing the same thing.

10 Q. All right. And have you identified who those
11 producers are?

12 A. We've had discussions. I told you earlier this
13 morning, we've had discussions with some of those
14 producers. They have, you know, come into the office and
15 said, what about if I do this, what would happen?

16 Q. But are you aware of any ground being broken on a
17 new plant?

18 A. No, but that doesn't necessarily mean that
19 somebody wouldn't like to break some.

20 Q. Now -- so we don't know -- the market conditions
21 that exist today, there is not this producer/handler
22 growing, is this being discussed?

23 A. No, there are existing producer/handlers,
24 business is impacting sales in markets today, and at the
25 same time, there are people who are looking at that as a

1 business model and saying, gee, I wonder if I want to go
2 and do that business model?

3 Q. But they -- the ones that are impacting today
4 were impacting at the same level three, five, and ten years
5 ago?

6 A. No, that's not the case. They weren't at the
7 same level three, five, and ten years ago.

8 Q. Okay. You're saying in Order 124, there -- that
9 there's more activity today by producer/handlers than there
10 were three years ago.

11 A. That was the -- yes, that was the impression that
12 I get from talking to like marketing personnel as well as
13 the testimony of -- in Phoenix, people who were and are in
14 the market on a day-to-day basis.

15 Q. And yet the market administrator's numbers
16 reflect otherwise?

17 A. There could be, you know, changes in sales, there
18 could be price -- proposals made that impact bottom lines
19 that will never show up in the market administrator's
20 numbers.

21 Q. So as I understand it, you're saying the
22 secretary should change the producer/handlers, not because
23 of what might happen, but what is actually happening in the
24 124 right now?

25 A. There -- both cases and as well as we've tried to

1 present a number of reasons for why this change should be
2 made and, the threshold that we've presented should be
3 chosen.

4 Q. But we don't know -- you know, if somebody -- if
5 a new large PD was to create, which you don't have any
6 knowledge of one being created at this point in your
7 discussions, but you're not aware of any, right?

8 A. That's correct.

9 Q. All right. So you can't even testify what the
10 market conditions will be at that time, can you? The
11 market conditions when that large PD were to exist that
12 doesn't exist today -- we don't know what those market
13 conditions are, do we?

14 A. Oh, the best we can do is to look at some of the
15 situations we have now and the disruption that we see from
16 those, and say that it would only be that or worse.

17 Q. Now, you talk again about, you know, the size of
18 units and the profitability of the smaller farms. Isn't it
19 true that the larger farms are not receiving a full MILC
20 payment when that's available?

21 A. What are you talking about here?

22 Q. -- the MILC, the --

23 A. You prefaced your question, and then you --

24 Q. All right. Let me back up. Remember when they
25 had you talk about -- later on about the fact that the

1 smaller producers and larger producers and the price
2 advantage that a smaller producer has -- or, a larger
3 producer has in terms of efficiency --

4 A. You on page 15 --

5 Q. Yeah. Right.

6 A. -- referring to the ERS study?

7 Q. Right, but --

8 A. Okay.

9 Q. -- isn't it true that the CCC distributes to the
10 smaller producers a higher rate of MILC payment than the
11 larger ones to make up that difference, right?

12 A. Well, everyone is capped out at 2.9 or 2.4/2.9 --

13 Q. 2.4

14 A. 2.4 million pounds. So to the extent that a
15 producer is smaller than 2.4 million pounds, it will get a
16 payment on the entireties of his -- well, his production up
17 to 2.4 million, and a large producer is going to get no
18 more than. So a large producer is going to get as many
19 total dollars as a small producer, but on a per
20 hundredweight basis measured across the operation, and it's
21 true, these are per hundredweight numbers. You know, they
22 would not be the same rate. I agree with that. But I
23 think the federal milk market orders don't have much say so
24 over MILC policy.

25 Q. In other words, we're talking about federal

1 policy, though, right?

2 A. You are correct.

3 Q. Now, you also mentioned using this idea that the
4 promotion order only -- fluid promotion order only applies
5 to plants at three million or larger.

6 A. Yes.

7 Q. The -- but the PDs pay the fluid promotion,
8 right? Those above the three million, the ones that you're
9 wanting to impose this limitation on, do pay the full fluid
10 promotion, right?

11 A. They pay the 15 cents assessment. I don't think
12 -- depending on their size, I don't know that they pay the
13 process or assessment.

14 Q. Do -- if they're over three million, do they pay
15 the process --

16 A. Yes, I assume they do.

17 Q. But that's the point. I mean, if they're less
18 than three million, then they would -- they wouldn't have
19 to pay, and they wouldn't be regulated by your proposal.

20 My point is, is that if any of -- the PDs that
21 are larger than three million pounds today are paying the
22 full assessment, right?

23 A. You know, I assume, yes. I'm not in the day-to-
24 day business of collecting and transmitting. I am
25 knowledgeable about the 15 cents that's assessed on

1 producers and that we do collect that when we -- when we
2 buy a load of milk from a producer/handler, regardless of
3 their size, you know, we are required to pay the 15 cents
4 per hundredweight.

5 To the extent that they make a payment to the
6 processor fee, I don't deal with that fee, other than to
7 know that the law said that there's a threshold of three
8 million pounds. So I would assume a producer/handler of
9 three million pounds or greater would pay that fee, and one
10 less smaller would not.

11 Q. Have you done any analysis on small businesses --
12 on the impact on small plants on this proposal -- small
13 business analyses? Have you done any --

14 A. I have not.

15 Q. Have you done any civil rights analysis on the
16 impact of this decision?

17 A. I have not.

18 Q. Have you done any -- made any determination --
19 or, let me back up on that size issue. As you understand,
20 a small plant is defined as anyone with less than 500
21 employees; are you aware of that?

22 A. I think that's the definition.

23 Q. All right. And have you made any proposals to
24 the Department of Labor to change that, or Department of
25 Commerce to change that definition?

1 A. No, have not.

2 MR. YALE: That's what I got.

3 THE COURT: Okay. Thank you. Who's going to go
4 next? Mr. Ricciardi.

5 BY MR. RICCIARDI:

6 Q. Mr. Hollon, good afternoon. I'm Al Ricciardi on
7 behalf of Sarah Farms.

8 A. Good afternoon, Mr. Ricciardi.

9 Q. Does Dean Foods currently have a full milk supply
10 arrangements with Dairy Farmers of America?

11 A. That's a proprietary, you know, question for us.

12 Q. So you decline to answer it?

13 A. Yes, sir. We sell milk to Dean Foods. We sell a
14 lot of milk to Dean Foods and in a lot of locations, but
15 the -- you know, that particular aspect of that
16 relationship is proprietary.

17 Q. Might I assume from your answer that you do have
18 such a full supply of milk -- supply arrangement with Dean
19 Foods?

20 A. You can make all the assumptions you want.

21 Q. You've been with DFA, you said, since about 1977,
22 is that your testimony?

23 A. '79.

24 Q. '79. Dean Foods -- excuse me, I apologize. DFA
25 is a result of mergers of a number of large cooperatives,

1 including Dairymen, Inc., Mid-American Dairy, Southern
2 Region of Associated Milk Producers, and others, correct?

3 A. Your list wasn't quite right, but your first
4 assertion was that DFA is a merger of four regional
5 cooperatives.

6 Q. And those cooperative have, in the past, actually
7 since 1940 been accused of a variety of anti-trust
8 violations, correct?

9 A. There have been litigations for anti-trust
10 violations, that is correct.

11 Q. And there have been a number of reported
12 decisions with regard to findings of anti-competitive
13 behavior on behalf of those cooperatives or consent decrees
14 entered into by those cooperatives.

15 A. DFA operates under a consent decree today. It's
16 a matter of record.

17 Q. And I can go through -- I've got about five
18 different reported cases, but you'd acknowledge that there
19 are a number of cases in the past, in 1940 and currently,
20 in which DFA has had some issues with regard to anti-
21 competitive behavior?

22 A. That is true.

23 Q. Does anti-competitive behavior have an effect on
24 whether a market is orderly or disorderly?

25 A. I suppose it's kind of like beauty. It's in the

1 eye of the beholder.

2 Q. And one of the things that may happen if there's
3 anti-competitive conduct is, the pricing that a customer
4 may pay may be higher, correct?

5 A. Yes.

6 Q. And the pricing ultimately that the consumer may
7 pay may be higher, correct?

8 A. Yes.

9 Q. And with regard to the most recent proposed
10 merger -- by the way, did you testify before the judiciary
11 committee on the proposed merger back in the summer of this
12 year?

13 A. I did not.

14 MR. UNIDENTIFIED: Your Honor, I'd like to
15 interpose an objection to the line of questioning at this
16 point. This is not an anti-trust tribunal for the Federal
17 Trade Commission. You know, the history of alleged anti-
18 trust violations and testimony before Congress about the
19 anti-trust issues has nothing to do with this proceeding,
20 and I think questions about it are beyond the scope and
21 irrelevant, and I object to it.

22 MR. RICCIARDI: A direct --

23 MR. UNIDENTIFIED: Your Honor, may I raise an
24 additional objection before Mr. Ricciardi responds, that
25 there's no foundation that Mr. Hollon has any background in

1 anti-trust analysis.

2 MR. RICCIARDI: Doesn't need any background --

3 THE COURT: He's already admitted that there were
4 certain decisions in our public record, so any -- and the
5 question was whether he had testified, but I'll let you
6 answer specifically the objection --

7 MR. RICCIARDI: Issue is this, Your Honor. A
8 couple of different issues. First, on the question of
9 whether or not, in fact, anti-competitive behavior results
10 in disorderly marketing, that's one of the direct issues in
11 this case. The second is that we have the major mono-lists
12 in the dairy industry, including Dean Foods and DFA,
13 attempting at this point for reasons of their own to come
14 into this setting and try to change policy while not
15 acknowledging that the real problem in this industry may
16 have to do with their own actions and their own creation of
17 disorderly marketing. And I think all of those issues go,
18 not only to the question of substance, but also to
19 credibility, and I see --

20 THE COURT: You know --

21 MR. RICCIARDI: And I think I'm allowed to go
22 into those.

23 THE COURT: I'll let Mr. Berde respond, then I'll
24 rule.

25 MR. BERDE: Your Honor, the proponents of

1 proposal number three in this hearing is United Dairymen of
2 Arizona, which has never been involved in the anti-trust
3 litigation of which Counsel has described here. That issue
4 is narrowly tailored to address the question of whether
5 producer/handlers and their exemption create a disorderly
6 marketing condition in the area in which they operate. And
7 that, in turn, is -- in turn, it relates to the question of
8 whether the act requires the regulation of producer/handler
9 as a handler, because the act requires that the crisis be
10 uniform as among handlers and among producers. That's the
11 sole issue that this hearing is intended to address. Now
12 --

13 THE COURT: Thank you.

14 MR. BERDE: -- the attempt --

15 THE COURT: I think --

16 MR. BERDE: -- to bury this record in anti-trust
17 litigation going back to the '40s and '50s and '60s is
18 certainly beyond the pail (phon.).

19 THE COURT: Okay. That was a little -- I mean, I
20 consider Mr. Ricciardi was doing his background. There's
21 been some testimony on direct about what constitutes
22 disorderly marketing. I will let Mr. Ricciardi probe this
23 area for a few questions in terms of, presumably if it's
24 focus on the issue of what constitutes disorderly marketing

25 Mr. Beshore, go ahead.

1 MR. BESHORE: Well, on that point, I'm glad it's
2 focused on that point because I want to make this point.
3 Disorderly marketing is statutory language in the
4 Agricultural Marketing Agreement Act, no other acts. There
5 is no court precedent, administrative precedent, or any
6 other precedent which links that statutory language and its
7 meaning to the Sherman Act, the Clayton Act, the
8 Hartscot/Rodino (phon.) Act, the Federal Trade Commission
9 Act, or any other act of the United States anti-trust laws,
10 which is what he wants to get into.

11 THE COURT: Okay. I don't know what he's going
12 to get into because he hasn't had a chance to get into it,
13 but I'm going to ask you just to focus on how his testimony
14 relates to the issues that we have at hand today. And --
15 but that last question you asked, which is whether he
16 testified, as a legitimate question, I'm directing you to
17 answer it, if you remember what the question was.

18 THE WITNESS: He asked me, did I testify in a
19 judicial proceeding this summer, and I did not.

20 BY MR. RICCIARDI:

21 Q. Did you attend the hearings?

22 A. A judicial proceeding this summer?

23 THE COURT: I think he said -- I don't think he
24 said judicial hearings. I think he said before the House
25 Judiciary Committee --

1 MR. RICCIARDI: That's what I said.

2 THE WITNESS: Oh, I'm -- no, I did not, nor did I
3 testify.

4 BY MR. RICCIARDI:

5 Q. Can you tell me, in 2002 the amount of sales in
6 dairy products that DFA had?

7 A. In 2002, can tell you that we marketed milk
8 approximately (indiscernible) if that answers -- marketed
9 47.8 billion pounds of milk on behalf of its member/owners,
10 for other cooperatives, and non-member farms. Does that --

11 Q. Would that equate to about 1.585 billion in sales
12 in 2002?

13 A. You mean, DFA's dollar sales?

14 Q. Yes, sir.

15 A. No, it would not. Our dollar sales is published
16 in our annual report. For that period would be between
17 seven and eight billion.

18 Q. Seven and eight billion?

19 A. Yes, sir.

20 Q. Okay. And would you agree with me based upon the
21 relationship between DFA and Dean Foods, that Dean Foods
22 had sales in the amount of about \$8.1 or \$8.2 billion?

23 A. I'm sorry, I'm not familiar with Dean's, you
24 know, financials or sales data. Again, they're a public
25 company so it's a public record.

1 Q. Does DFA or any of its members have any
2 agreements to sell milk to any of the warehouse stores in
3 the United States?

4 A. When you say, or its members, what, individual
5 producers?

6 Q. That would work.

7 A. Okay. The answer to that question is no, to that
8 part, and DFA does sell directly products to some warehouse
9 stores, and not fluid milk, but we do sell some products.

10 Q. So your testimony is that neither DFA nor any of
11 its members, as far as you're aware, has any contract with
12 any warehouse stores which would include Cosco and Sam's
13 Club, et cetera, to sell fluid milk, correct?

14 A. That would be correct. I -- let me ask you a
15 clarifying question. You know, when you say "member," that
16 means a specific thing to me. That means a dairy farm. Is
17 that what that means to you?

18 Q. No.

19 A. Okay.

20 Q. Does Dean Foods, to your knowledge, have any
21 agreements --

22 A. But Dean Foods is not member of DFA.

23 Q. Understand.

24 A. Okay.

25 Q. But, in fact, DFA has agreements with Dean Foods

1 to supply milk, correct?

2 A. Yes.

3 Q. Okay. Do you know whether or not Dean Foods has
4 any agreements with any warehouse stores in this country?

5 A. Only to the extent that it's been reported in
6 business press or a speech by Dean management or a
7 financial press.

8 Q. Wilcox Dairies in the northwest, is that a member
9 of DFA?

10 A. No, they're not a member of DFA.

11 Q. Do they have any milk supply arrangements with
12 DFA?

13 A. Yes, we supply milk to Wilcox Dairies.

14 Q. Do you know whether or not Wilcox Dairies has any
15 agreements in the northwest with Cosco or any kind of
16 warehouse stores?

17 A. I'm not intimate with their business. I do know
18 that they do business with Cosco, but that's the extent of
19 my knowledge. I don't know their day-to-day transactions
20 --

21 Q. You --

22 A. -- or what type of business they do.

23 Q. Okay. Are you familiar in the last four to five
24 years with the growth of milk sales nationally in warehouse
25 stores?

1 A. You mean, percentage of market share held by --
2 not --

3 Q. Percentage of market share.

4 A. Not to an exact number, other than to say it's
5 grown.

6 Q. It's growing, correct?

7 A. Yes.

8 Q. Can you tell me whether it's the fastest growing
9 area of the fluid milk market?

10 A. I cannot.

11 Q. Can you tell me whether or not the fluid milk
12 sales in the last four to five years have -- has grown,
13 stayed the same, or decreased?

14 A. Fluid milk sales in the last four or five, I
15 would say would have a say small percentage increase, you
16 know, year to year. That again there's quite a bit of, you
17 know, data on that, so we could go look it up.

18 Q. Did you look it up?

19 A. You know, I do that off and on. In fact, I --
20 last week I spoke about sales of various products, and so
21 for this year compared to last year, year-to-date, it's
22 fractionally, maybe plus or minus a tenth of a percent up
23 or down. Earlier in the year it was greater. In the
24 middle of the year, it's been lesser.

25 Q. Are you aware that in the 131 area that a new

1 dairy, a 10,000 cow milking facility has just been
2 constructed?

3 A. I'm not aware.

4 Q. Are you aware that Shamrock Farms has, in fact,
5 constructed that dairy facility?

6 A. I'm not.

7 Q. That's not something you looked at?

8 A. No, it's not.

9 Q. You weren't concerned about that?

10 A. You asked me, was I aware of it. I was not
11 aware. I didn't know about it.

12 Q. I think overall I'm sure I can find it in your
13 testimony, you would agree that your position as a
14 participant at this hearing is that we need to have change
15 in the regulation of producer/handlers, correct?

16 A. Yes.

17 Q. And that would include the 131 area, correct?

18 A. Yes, that -- this hearing is for two Federal
19 Orders, Order 131 and 124. So those would be the only two
20 that this hearing would speak to.

21 Q. Of course, that's just the beginning, isn't it?
22 I mean, ultimately if this prevails, then you mentioned, I
23 think, in testimony on cross-examination of Mr. Yale that
24 you feel that there are other problems in other areas,
25 correct, with producer/handlers?

1 A. Yes.

2 Q. And that that will be the next thing?

3 A. That's possible.

4 Q. Okay. And that's probable, isn't it?

5 A. That -- you know, we have discussed that some,
6 and you know, we haven't reached that conclusion yet.

7 Q. Who's "we?"

8 A. DFA.

9 Q. Okay.

10 A. Intra-DFA.

11 Q. By the way, since I obviously struck a nerve
12 recently, your involvement in 131, and I mean DFA's, --

13 A. Yes.

14 Q. -- is what? You're not a proponent, Mr. Berde
15 said. What are you?

16 A. Actually, I would characterize us as a proponent
17 of the proposals.

18 Q. We have, and I'm quoting, "an extensive marketing
19 arrangements with the dairy farmer members of United
20 Dairymen of Arizona for the purchase of supplemental milk
21 supplies and to provide seasonal balancing services to
22 DFA." What does that mean?

23 A. It means that during some months of the year, we
24 buy milk from Dairy -- or United Dairymen of Arizona and
25 sell it to other DFA customers in other parts of the

1 country. And in other times of the year, we have milk that
2 is excess of our ability to balance in the southwest, and
3 we make arrangements with United Dairymen of Arizona to
4 process that milk for us in their plants.

5 Q. Excess of your ability, meaning DFA's to balance
6 in the southwest. What does that mean?

7 A. Means that certain times of the year, we have
8 more milk production in the southwest than we have either
9 sales or balancing capacity for, and that -- but not on a
10 year-round basis. And so it's a cost efficient decision
11 for us to contract with United Dairymen of Arizona when
12 they have capacity in their plant to process that milk for
13 us.

14 Q. So if you have excess milk, you sell to them, and
15 they process it?

16 A. That's correct.

17 Q. What does that cost you?

18 A. Whatever the negotiated current rate is at the
19 time.

20 Q. Okay. So that's an additional cost -- balancing
21 cost to DFA and DFA's members, correct?

22 A. Yes, that is correct.

23 Q. Now, if, in fact, DFA wasn't a cooperative, but
24 DFA was a producer/handler, you wouldn't have the option to
25 go to UDA to balance the milk. You'd have to balance it

1 yourself, correct?

2 A. I don't think that's correct.

3 Q. Okay. Well, I guess you could go to DFA,
4 assuming they were willing to take it, but under the
5 current regulations, could you do that and still be a
6 producer/handler?

7 A. Are you asking me, can a producer/handler sell
8 its surplus to DFA?

9 Q. I guess that's one question.

10 A. The answer is yes, we buy milk -- I've testified
11 earlier that we buy milk from producer/handlers.

12 Q. Those balancing costs to the producer/handler are
13 actual costs, correct?

14 A. Yes.

15 Q. And that would have to be factored in as an
16 economist to what it costs the producer/handler to actually
17 stay in business, correct?

18 A. Correct.

19 Q. Is it your testimony, because I'm unsure, that
20 there's currently a problem with producer/handlers, or that
21 there will be a problem with producer/handlers?

22 A. Both. We went through this line of questioning
23 with Mr. Yale extensively. It's in the records, so I'm not
24 sure that we need to go through it again, though.

25 Q. Well, I'm not going to go -- I'll go through what

1 questions I have, and I'm just sort of trying to get your
2 testimony straight in my own mind.

3 A. Okay.

4 Q. So if I could ask you the next question.

5 There are two producer/handlers in Order 131,
6 correct?

7 A. Depending on the month that you look at, there
8 are two, and in some months, there have been three.

9 Q. And Order No. 131 has the least amount in numbers
10 that we can share anyway, based upon your data, of any
11 other order area in the country, correct?

12 A. Sorry, you need to say that again.

13 Q. Sure. Let me be hopefully better at this.

14 A. Okay.

15 Q. There are two producer/handlers in Order 131
16 which is the least amount of producer/handlers in any other
17 order area, correct?

18 A. I think Federal Order 5 may also only have two.

19 Q. Okay. So they're tied?

20 A. Okay. And in some months, Order 131 would have
21 three.

22 Q. Okay. This -- and you described it variously,
23 loophole, competitive advantage, et cetera, et cetera, et
24 cetera, that exists if, in fact, it was a significant
25 advantage, then you would expect that there would be a

1 larger number of producer/handlers than there are currently
2 correct?

3 A. It is a significant advantage, and there are
4 producer/handlers and, there was a question again by Mr.
5 Yale that there -- there is interest in other large
6 producers about possibly becoming producer/handlers, and in
7 fact, they, from my point of view, are looking at this
8 proceeding to see what the end result may be, and may,
9 indeed, go that route.

10 Q. Of course, we're not here to be soothsayers or
11 here to deal with the current market in the market as it
12 existed since 1999, correct?

13 A. Well, I think you asked me my interpretation of
14 the facts, and I was simply answering your question.

15 Q. No, I don't think I did, but I'll see if I can be
16 better at my questions.

17 A. Okay.

18 Q. Do you know -- well, let me ask it this way
19 because I know you don't. You didn't interview Mr.
20 Hannigah (phon.), correct?

21 A. No, I did not.

22 Q. You did not interview Ellen Hannigah, correct?

23 A. I did not.

24 Q. Do you know who she is?

25 A. I do not.

1 Q. Do you know if she has any interest in Sarah
2 Farms?

3 A. Not of my direct knowledge.

4 Q. You don't know what the costs are for Sarah Farms
5 to market its milk, correct?

6 A. That's correct.

7 Q. You don't know at this point directly who the
8 current customers are for Sarah Farms, correct?

9 A. I know some of them to the extent that they were
10 testified to in this hearing in Phoenix.

11 Q. Are you talking about the testimony that came
12 from Shamrock?

13 A. And others, yes, sir.

14 Q. Okay. You haven't interviewed any of the
15 customers?

16 A. Actually, I've had discussions with Mr. Hitchell,
17 Kroger.

18 Q. Have you interviewed any of the customers of
19 Sarah Farms?

20 A. I have not.

21 Q. Thank you. Do you know what costs Sarah Farms
22 has to assemble its product from the dairy to the
23 production facility?

24 A. Of a general nature --

25 Q. You don't know what their costs are, right?

1 A. No, not specifically, no, I do not.

2 Q. And you specifically don't know what
3 transportation costs, if any, they have from the dairy to
4 the production facility, correct?

5 A. Again, of a general nature, I'm familiar with
6 statistics that are published on that, plus we pay those
7 costs in our cooperative. So I have some general knowledge
8 of those.

9 Q. General stuff you don't know what the actual
10 costs are for Sarah Farms, correct?

11 A. I do not.

12 Q. Okay. And I believe in looking at your testimony
13 that it's your position that a producer/handler essentially
14 can increase its market share at will, correct?

15 A. They appear to have latitude, and based on the
16 exemption granted them in the pricing provisions, that
17 provides quite a bit of range to increase market share.

18 Q. Let me get back to my question.

19 Is it your testimony, sir, that a
20 producer/handler can increase its market share "at will?"

21 A. Yes.

22 Q. And that would include the ability to increase
23 its market share over and above the three million pounds
24 per month limit, correct?

25 A. Why don't you be more specific with that

1 question?

2 Q. Again, go ahead and answer mine.

3 A. I said, you'll need to be more specific with that
4 question.

5 Q. Can you answer my question?

6 A. No, I cannot -- under the way that you asked it,
7 I didn't quite understand what you were asking..

8 Q. Okay. What it means is that a producer/handler
9 can increase its market share at will over and above the
10 three million pounds per month proposed limitation or
11 ceiling that you're talking about, correct?

12 A. I'm sorry, Mr. Ricciardi, I'm not --

13 Q. Does a producer/handler have the ability to
14 increase its market share beyond three million pounds a
15 month at will?

16 A. Yes, there are abilities there based on the cost
17 differential that would provide the ability to increase its
18 market share, whether it be at a smaller volume or at a
19 larger volume.

20 Q. Which would include three million pounds or more
21 each month, correct?

22 A. Yes. Yes.

23 Q. And so if there's a competitive advantage that
24 exists, a producer/handler can increase at will, including
25 beyond three million pounds a month, then that would

1 increase exponentially, one, the number of
2 producer/handlers, and the volume that a producer/handler
3 is putting out, correct?

4 A. There would -- we expect at this exemption, if
5 our proposals are denied, that there will be more
6 producer/handlers in markets.

7 Q. And from 1999 through 2003, tell me the number of
8 producer/handlers that have come into the market in 131.

9 A. I'm not aware of any.

10 Q. Tell me the number of producer/handlers that have
11 come into the market in 124.

12 A. I'm not aware of any.

13 Q. Tell me the number of producer/handlers that have
14 come into the market nationally in any of the other market
15 areas.

16 A. There are some.

17 Q. How many?

18 A. I don't know the number, but Mr. Yale asked me
19 that same question, and I pointed to at least one that I
20 know. However, I think the testimony in Phoenix pointed
21 out extensively that there have been sales change hands,
22 that the intimate knowledges of the market of both those
23 witnesses and the witnesses from 124 pointed repeatedly to
24 a distinct price advantage that they faced in competitive
25 factors, and that effected their business, and we're

1 concerned about that.

2 Q. You know, I asked you a question, you answered
3 it. I don't need a speech from you, and the record doesn't
4 need any more of this stuff in it. If I have a question,
5 I'll ask it, and answer --

6 A. Uh-huh.

7 Q. -- it, please. I would appreciate it.

8 A. Well, if you paint the answer to where -- paint
9 the question to where --

10 THE COURT: Well, Mr. Hollon --

11 THE WITNESS: -- there's only one possible answer
12 --

13 THE COURT: -- look, it'll -- I think your time
14 on the stand will go faster if you answer direct questions
15 when you can, just will --

16 MR. UNIDENTIFIED: Your Honor?

17 THE COURT: What?

18 MR. UNIDENTIFIED: I object to Mr. Ricciardi
19 lecturing Mr. Hollon --

20 THE COURT: Well, okay.

21 MR. UNIDENTIFIED: -- as well.

22 THE COURT: Yeah, fine, you shouldn't lecture,
23 but the point is that sometimes it's easier to answer
24 direct. Let me ask you, or is it a true question or is it
25 true, yes or no. If you can answer it, it's sometimes --

1 you might find -- might be easier to answer it that way, if
2 you can. And if you can't, you're entitled to say why you
3 can't.

4 THE WITNESS: Your Honor, I respect that, but
5 sometimes when you're asked, you know, did you quit beating
6 your wife, --

7 THE COURT: Yeah. Okay.

8 THE WITNESS: -- there's not a good answer to
9 that, and yet --

10 THE COURT: Okay.

11 THE WITNESS: -- whatever answer you give shows
12 up in the record.

13 THE COURT: Go ahead, Mr. Ricciardi.

14 MR. RICCIARDI: I'll leave it alone, Your Honor,
15 and there were two or three that I had, but that's fine.

16 BY MR. RICCIARDI:

17 Q. Exhibit 33, Table D, you've got a list of three
18 producer/handlers in 131, and you have an estimate of plant
19 size. Actually, you've got producer/handlers and exempt.

20 A. Yes.

21 Q. The source is "DFA competitive estimates." What
22 does that mean?

23 A. Yes, sir. That means that we surveyed our coop
24 brethren in the marketplace, customers that we serve in
25 other markets that have markets there, dairy farmers that

1 we have relationships with in those markets, and
2 interrogated them as to what they thought these volumes
3 were, and then reached these conclusions.

4 Q. You did it?

5 A. Yes.

6 Q. Okay. And you talked to UDA?

7 A. Yes.

8 Q. And you talked to who else?

9 A. Again, talked to Dairy Farmers, for which we have
10 relationships with. We talked to customers that we service
11 in other markets, and we talk to employees that we may have
12 who had perhaps worked in that market at one time or
13 another.

14 Q. Who?

15 A. That's the extent of the description.

16 Q. What do you mean, it's the extent? To the extent
17 that you remember, or the extent that you're willing to
18 give?

19 A. The extent that I'm willing to give. I see no
20 bearing to say we talked to Tom Jones and Dick and Fred
21 and.

22 Q. You know, it's amazing that we're having
23 testimony where I ask specific questions about the source
24 of that testimony, and you're unwilling to provide it. But
25 I, you know, I go on.

1 Take a look at Table F in Exhibit 33, if you
2 would, for a moment.

3 A. Yes, sir.

4 Q. Actually, I apologize. I want to go to G, which
5 is --

6 A. G. Okay.

7 Q. -- G -- I guess it would be G-1.

8 A. Okay.

9 Q. And I don't quite understand this, so explain
10 this to me.

11 A. Okay.

12 Q. In the third -- actually the fourth column where
13 it says "Average monthly class one volume for all 7A plants
14 in the market."

15 Do you see that? The --

16 A. The median sized, or the -- fourth column, yeah.
17 Okay.

18 Q. Do you have the column that I'm looking at?

19 A. Yes, sir.

20 Q. Okay. Take a look at Federal Order 131. You've
21 got about 29,595,104 in that column, correct?

22 A. Yes.

23 Q. Is that total; does that mean all of the class
24 one volume plants in the market?

25 A. Yes, that's all of the 7A that -- that's plants

1 defined at the regulation of 131-7(A). There's a
2 definition there. It described a certain plant, and then
3 the market administrator would compile statistics on the
4 average size volume of those 7A plants.

5 Q. And there are how many in the 131 market?

6 A. Three.

7 Q. So on an average month, you're saying that the
8 average volume would be around 30 million total?

9 A. Yes, sir. Of the three plants, each would have
10 an average of 30 million pounds of class one sales.

11 Q. Did you look at Exhibit No. 6 that was prepared
12 for this hearing in preparing these averages?

13 A. I did not. I asked the market administrator
14 directly for these numbers.

15 Q. Did you look at any historical, United States
16 Department of Agriculture -- Agricultural data regarding
17 producer/handler sales of milk in the United States?

18 A. Yes, I have looked at some.

19 Q. Did you look at the data from 1980 to 1998 to
20 look at the volume in the United States by
21 producer/handler?

22 A. I've seen some of those reports.

23 Q. And isn't it true that for that period of time
24 the amount of milk produced by producer/handlers actually
25 declined?

1 A. You know, I've seen the reports. I don't
2 remember what the numbers are.

3 Q. That it went from 1.47 billion pounds to 1.16.

4 A. That could be true. Again, I've not seen the --
5 I don't remember exactly what the numbers are.

6 Q. And that the percentage of milk produced by
7 producer/handlers during that period of time. 1.1 -- went
8 from 1.14 percent to 0.73 percent of production?

9 A. If that's what the report shows, I'll accept
10 that.

11 Q. And that actually the volume in 2003 of
12 producer/handler milk stayed at about 1.16 pounds?

13 A. If that's what the report shows, I'll accept
14 that.

15 Q. And this is the rapidly growing producer/handler
16 area?

17 A. Uh-huh. Yes.

18 Q. Okay. Would you also agree with me that the
19 producer/handler doesn't purchase any milk?

20 A. You mean -- sorry, you have to be more specific
21 in your question.

22 Q. The producer/handler does not purchase any milk
23 from his production facility to his processing facility,
24 correct? There's no actual purchase. They don't buy milk
25 from themselves, do they?

1 A. Well, it's an integrated business, so however
2 they choose to account for it, I would suspect that most --
3 set them up as stand alone business units, and have a
4 transfer price assigned in order to evaluate the
5 profitability of their businesses.

6 Q. Isn't your assumption that every time there's an
7 increase in competition, that that will be reflected in
8 disorderly marketing?

9 A. No, that's not my assumption.

10 Q. You'd agree with me that there can be an increase
11 in competition in a particular market without there being
12 disorderly marketing, correct?

13 A. Yes.

14 Q. For example, a regulated handler may lose a
15 customer to another regulated handler, correct?

16 A. Yes.

17 Q. And one of the reasons may be because the first
18 regulated handler has some problems with regard to service
19 issues with a customer.

20 A. There could be a wide range of issues that
21 business changes hands.

22 Q. Without there being any type of a competitive
23 advantage or disadvantage, correct?

24 A. You mean without there being some difference in
25 the price of milk that would stimulate that?

1 Q. That would be one thing.

2 A. Then in that case, yes, that could -- there could
3 be instances where business changes hands and that not be
4 the problem.

5 Q. It's also normal in the milk marketing area that
6 there's going to be new competition that's going to arise,
7 correct?

8 A. Yes.

9 Q. It's also normal in the milk marketing area that
10 there's going to be account switching, which we just talked
11 about, --

12 A. Going to be --

13 Q. -- account switching?

14 A. Yes.

15 Q. And in those situations, either new competition
16 or account switching, that doesn't equate directly to
17 evidence of disorderly marketing or payouts, correct?

18 A. Doesn't always.

19 Q. Now, there are inefficient, regulated producers
20 or handlers, correct?

21 A. There may be.

22 Q. And in your past experience, you've seen both
23 inefficient producers and inefficient handlers?

24 A. Yes, that's correct.

25 Q. And those people who are inefficient shouldn't be

1 given any benefit for their inefficiency, correct?

2 A. That is correct.

3 Q. The market recognizes and you also recognize that
4 if someone is doing something better or more efficiently,
5 that they should be able to prosper by that, correct?

6 A. I think you're going to need to be more specific
7 in your question. I can't qualify my answer. You need to
8 have to be more specific in your question.

9 Q. You fly the airlines?

10 A. I do.

11 Q. Every fly Southwest?

12 A. I do.

13 Q. Southwest has been the so-called low cost
14 carrier, and it's had certain efficiencies, such as flying
15 the same jets throughout the United States, correct?

16 A. Yes.

17 Q. And by doing that, they're able through their
18 efficiencies to go ahead and actually fly a regulated mile
19 for less cost than somebody else can?

20 A. In that scenario where they lower their capital
21 costs by having the same plane on all their fleets and all
22 their routes, they capture an efficiency, and they should
23 be able to capture that. I would not disagree.

24 Q. And if somebody who is a producer/handler has
25 lowered their cost in terms of production by being more

1 efficient at their plant, they should be rewarded also,
2 correct?

3 A. If in the example you gave that they are more
4 efficient in their plant, and there's some gains to
5 capture, I would agree.

6 Q. As I understand in reading your testimony, you
7 rely upon Mr. Herbine's data and testimony, correct?

8 A. Yes, sir.

9 Q. And I also understand that you also rely upon Mr.
10 Kryon's (phon.) testimony and data, correct?

11 A. Yes, sir.

12 Q. I think Mr. Yale asked you a couple of questions,
13 and let me follow up on those. If a member of DFA who has
14 a membership agreement has a problem with a load or loads
15 of milk, and those loads of milk are not accepted, or they
16 have to be basically flushed, does that member have any
17 kind of guarantee as to whether he's going to get paid for
18 those loads of milk?

19 A. I'm not familiar with all the intimacies of those
20 arrangements, but as a general rule -- and sometimes it
21 depends on the problem. For example, there's a storm, the
22 power goes out, and his vault (phon.) tank doesn't cool.
23 There are provisions that provide payment for that.

24 On the other hand, if there's a quality problem
25 of some sort that may be dealt with his treatment of some

1 cow medicines, and then depending on how that gets -- how
2 that reports -- if he self-reports that, there may be some
3 provisions that will provide some benefit for that.

4 In other cases, if that doesn't take place, if a
5 customer rejects a load of milk for some particular quality
6 reason that can be tied back to an individual producer, he
7 may have to bear those costs.

8 Q. But in every situation, not just exceptions or
9 some of the things that you've described, --

10 A. Uh-huh.

11 Q. -- a producer/handler has to bear the risk for
12 every load, correct?

13 A. Yes.

14 Q. So if, in fact, there's a problem, whether the
15 power goes out or whether there's a problem with
16 contamination of a load, that producer/handler has the
17 economic loss to deal with on his own, correct?

18 A. Correct.

19 Q. You have no knowledge as to whether Sarah Farms
20 has better trucks than other people in the 131 area,
21 correct?

22 A. I do not.

23 Q. You don't have any information as to whether or
24 not they provide better service to their customers and
25 other people in the 131 area, correct?

1 A. Only to the extent that Mr. Kruger's comments
2 about those business relationships. My first-hand
3 knowledge, I do not.

4 Q. You don't know whether they had better fillers,
5 for example, than any other person in the --
6 (Tape changed)

7 BY MR. RICCIARDI:

8 Q. -- regard to whether or not they have smarter or
9 better packaging designs, correct?

10 A. Correct.

11 Q. And you don't know whether or not Sarah Farm in
12 1999 has lost sales or customers to a regulated handler,
13 correct?

14 A. Only to the extent that was testified to in
15 Phoenix.

16 Q. Did anybody provide you with any information that
17 since 1999 there has been any type of lack of supply of
18 milk in the 131 area?

19 A. No one provided me with any information as such.

20 Q. And you have -- there's none of that information,
21 therefore, in your testimony, correct?

22 A. Correct.

23 Q. I think your testimony in questions by Mr. Yale
24 was, and I going to get it as close as I can, it was not
25 good for a majority of the dairy farmers to have a

1 producer/handler that produces more than three million
2 pounds of milk per month, correct?

3 A. Not sure if you got that close enough to agree
4 with, so.

5 Q. Well, do you agree with that?

6 A. As you stated it, I don't think I would agree
7 with that.

8 Q. Is it good for a majority of the dairy farmers
9 for Dean Foods to control 20 or 30 percent of the dairy
10 sales in this country?

11 A. I do not have an opinion as to that.

12 Q. How about if it was 50 percent?

13 A. Still no opinion.

14 Q. Ten percent?

15 A. Still no opinion.

16 Q. Is it good for a majority of the dairy farmers in
17 the United States for DFA to control as large a percentage
18 of the dairy sales as it controls?

19 A. If individual producers want to join DFA, that's
20 a good thing.

21 Q. Is it good for a majority of the dairy farmers in
22 the United States for DFA to control the percentage of
23 dairy sales it controls in this country?

24 A. The end result of your question, the percentage,
25 is driven by the fact that producers join DFA.

1 Q. Producers join DFA for a variety of reasons, --

2 A. Yes.

3 Q. -- correct?

4 A. Yes.

5 Q. DFA wants to make money, correct?

6 A. Yes.

7 Q. And DFA wants --

8 A. -- its members, it's owned by membership (phon.).

9 Q. It wants to make money for its members, correct?

10 A. Yes, sir.

11 Q. And you're not against -- God forbid, you're not
12 against people making money in this country, are you?

13 A. Absolutely not. No, sir.

14 Q. And you certainly don't want to make -- want to
15 have some over-regulation. That might take away somebody's
16 ability to make money, do you?

17 A. Our intent in that regard is that handlers
18 compete on the same level of regulation to the extent that
19 they have the same pricing structure. You know, that's our
20 goal. If some are more efficient than others, you know,
21 that's good. If some have better trucks or better
22 packaging, those are good things.

23 Our concern in this proceeding is that they
24 compete on the same price term and have the same minimum
25 price. All those entities that you've identified as

1 potential sources of improvements, those are good for the
2 industry. Our industry -- no one has an advantage for very
3 long because they, you know, if somebody has a better
4 package, somebody's going to copy that, that'll be good.

5 Q. Take a look, if you would, again at Exhibit 33,
6 G-1 for me.

7 A. Okay.

8 Q. Same -- in the same column, the average monthly
9 class one volume for the 7A plants in the market.

10 A. Yes, sir.

11 Q. Would you agree with me that the largest average
12 volume for 7A plants in any Federal Order market is in 131,
13 correct?

14 A. Yes, sir.

15 Q. And it's your testimony that there's then some
16 competitive advantage for Sarah Farms, which is in the 131
17 area, correct?

18 A. I'm sorry, would you say that again?

19 Q. Sure. Your testimony has been that Sarah Farms
20 has had some kind of competitive advantage as a
21 producer/handler in the 131 area, correct?

22 A. Yes, that's correct.

23 Q. And your testimony has been that they sort of
24 exploited that competitive advantage since 1999?

25 A. Yes, that's correct.

1 Q. Then wouldn't you agree with me that in looking
2 at the average, monthly class one volume for the 7A plants
3 in the market, that given your testimony that you would
4 actually look to see volumes that would be less than the
5 other Federal Order areas as opposed to more than the
6 average Federal Order areas?

7 A. No, I wouldn't.

8 Q. Okay. Do you know whether or not Shamrock sells
9 any surplus milk into California?

10 A. I do not.

11 Q. Did you ever interview anybody from Shamrock for
12 your work in this area?

13 A. I have not.

14 Q. Do you have a copy of the Institutional
15 Resources, Incorporated data that you rely upon?

16 A. I have a copy in my office of the request that we
17 made from them and the data that they provided back to us,
18 from which I drew the conclusions that I wrote about in my
19 testimony.

20 Q. Is that competitive?

21 A. Is that competitive?

22 Q. Yes, the -- is the information in that report, in
23 your opinion, somehow contain some kind of competitive
24 information that you're not willing to share with us?

25 A. I've shared the information that they gave. They

1 said there was this many stores, there was -- this was the
2 universe. This is how they determine the store sales.
3 They provided me national data to -- there was no more
4 numbers than I have. There were 12,000 stores roughly of
5 one size, 3,000 of another. The average delivery of this
6 -- of the group that was the smallest was this much. The
7 average deliveries of the entire universe was that much.
8 You subtract the two, and you get the difference.

9 Q. That wasn't what I asked you. Is there --

10 A. Oh, well, -- but I don't think I need more data
11 to give you.

12 Q. Well, you have -- there's the report to give us,
13 and I'm asking you why it wasn't provided. Is it
14 competitive information?

15 A. I'd have to -- in a sense, no. I don't remember
16 the agreement. I think there were some confidentiality-
17 type arrangements that defined my -- our relationship with
18 them as to, you know, can I give you a document that I get
19 -- came from them. It may say that, but if I were to give
20 it to you, other than the fact that you have it in your
21 hand, there would no other numbers on it than the ones that
22 I've given you.

23 Q. I don't have it.

24 A. I understand.

25 THE COURT: Do you want to see the report, Mr.

1 Ricciardi? Is that what you're getting at?

2 MR. RICCIARDI: It would be nice, but that's
3 fine, Judge. I'll go on.

4 BY MR. RICCIARDI:

5 Q. Did you set the limitations for the report
6 regarding the exclusion of superstores, club stores, --

7 A. I did not.

8 Q. Do you know why they were excluded?

9 A. That was their universe of stores. They do not
10 get data from that universe of stores, is my understanding.

11 Q. Did you request that they actually go into the
12 131 or 124 markets rather than the national markets to get
13 this data?

14 A. I considered that, you know, that possibility,
15 but chose not to do it.

16 Q. Since the hearing had to do with 124 and 131, is
17 there a reason you decided to get national as opposed to
18 specific data?

19 A. There was. The cost of getting sub-regional data
20 was pretty good sized. I chose not to do that.

21 Q. You didn't want to spend the money?

22 A. The cost was pretty excessive, so to (phon.)
23 getting the national data we felt was representative.

24 Q. Is there a reason why in getting that data you
25 limited the fastest growing segment of the milk market, the

1 warehouse stores?

2 A. They did not have that data to give me.

3 Q. Does DFA or any of its members have agreements to
4 provide fluid milk to Wal-Mart in any of the other order
5 areas other than 131 or 124?

6 A. Again, at the risk of being repetitive, when you
7 say "members," I assume that means dairy farmers. Is that
8 what you mean?

9 Q. What do you mean?

10 A. When -- you asked me does DFA or any of its
11 members, --

12 Q. I did.

13 A. -- and when I hear the word "members," I consider
14 that to be individual dairy farmers, and in that case, the
15 answer would be no. Individual dairy farmers who are DFA
16 members market all of their milk through the cooperative.

17 Q. Does DFA have any agreements with Wal-Mart in any
18 order areas to provide fluid milk?

19 A. Some of our joint ventures have sales
20 relationships with Wal-Mart, and I think some of them do
21 sell. I don't know intimately, but I think some of them do
22 sell Wal-Mart.

23 Q. Do any of your joint ventures between DFA and
24 whoever sell fluid milk to Cosco, in any order area in the
25 United States?

1 A. I think the answer is yes. I'm not, again,
2 intimately familiar, but I think the answer is yes.

3 Q. So if that's the case that there is an agreement
4 or agreements with Cosco, then DFA would have information
5 as to the cost structure between itself or this joint
6 venture and Cosco, correct?

7 A. On the surface, that sounds like that would be
8 reasonable, but that's not the marketing agreement. And in
9 every case of the joint ventures that we have, and I think
10 we have about a dozen of them, the other entity is the
11 managing partner, and we are not the managing partner in
12 any of those entities. So the specific relationships of
13 how milk is sold to grocery stores XYZ is not, you know,
14 not -- we're not privy to that. We don't set that, we
15 don't determine that.

16 Q. Okay. So help me understand this.

17 A. Okay.

18 Q. There's at least a dozen agreements that you're
19 aware of with joint ventures in which DFA is a member --

20 A. That is correct.

21 Q. -- between the joint venture and Cosco to sell
22 fluid milk throughout this country, correct?

23 A. I don't think you said that right.

24 Q. I will -- are there --

25 A. We have about a dozen joint ventures where a DFA

1 is a partner and Prairie Farms is a partner.

2 Q. Okay.

3 A. And that joint venture owns Roberts Dairy, which
4 is a dairy fluid milk processing firm, and they make some
5 ice cream, and there are three or four plants primarily in
6 the midwest.

7 Another example with Prairie Farms is we own
8 Hiland Dairy, and there's about a half a dozen plants.
9 With National Dairy Holdings, there are, you know 30
10 plants. In every one of those cases, we are not the
11 majority owner, but we are an owner. The managing partner
12 is the other side of that.

13 So in the Roberts Dairy example, Prairie Farms is
14 the managing partner. They run the businesses on a day-to-
15 day basis. They execute all of the retail relationships.
16 We don't do any of those. We negotiate with them for the
17 sale of raw milk, and we sell, you know, where we can. Our
18 members milk into those plants.

19 Q. But you can get information from your managing
20 partner in the joint venture regarding the relationship
21 with Cosco, correct?

22 A. Not -- no, not always. And in that particular
23 case -- well, I don't know about that particular case, but
24 no, we don't get that type of information.

25 Q. Did you provide the Cosco information in the

1 contracts to Mr. Herbine?

2 A. I did not.

3 Q. Did he ask you for them?

4 A. He did not. However, he has other principals in
5 his firm who have had those type of relationships before.
6 He has -- as in his testimony, he mentioned he has over 200
7 dairy client customers for which he does that exact type of
8 analysis, and for which he is -- as -- at his relationship
9 with them, he is allowed to use that data and information.

10 Q. But, sir, one of the issues that's been raised
11 during the course of this hearing is alleged costs
12 concerning Cosco agreements with Sarah Farms, correct?

13 A. Yes, sir.

14 Q. And your testimony is that DFA is a joint venture
15 in at least a dozen agreements with Cosco --

16 A. No, no, no, no, now you --

17 Q. With Cosco or Wal-Mart --

18 A. No.

19 THE COURT: Let him finish asking you his
20 question.

21 BY MR. RICCIARDI:

22 Q. Okay. Then tell me then of the dozen that we're
23 talking about, agreements that you have, who are the
24 ultimate customers, Cosco?

25 A. The customers are almost any supermarket chain in

1 the country.

2 Q. Is Cosco one of them?

3 A. They could be. Our joint ventures are with --
4 are entities that run fluid milk processing plants.

5 Q. I understand that.

6 A. Okay.

7 Q. Is -- Does Cosco have agreements with those joint
8 ventures?

9 A. With at least one of them that I'm aware of, and
10 there may be others, or there may be no more, but with at
11 least one of them, one of the joint ventures sells milk to
12 Cosco.

13 Q. Does one of the joint ventures sell milk to Wal-
14 Mart?

15 A. I think the answer is yes, but I'm not -- I don't
16 know for certain, but I think --

17 Q. Does one of the joint ventures sell to BJ's
18 Wholesale in the East Coast?

19 A. I don't think so.

20 Q. And so --

21 A. With the extent that -- let me rephrase that.
22 National Dairy Holdings does have plants in the East, so
23 they may, indeed, sell to BJ's.

24 Q. So DFA at least has access to information
25 concerning contracts with -- let me finish.

1 A. Oh. Okay. I'm sorry.

2 Q. Either Cosco, Wal-Mart or other warehouse stores,
3 correct?

4 A. That is not the case. The other entity is the
5 managing partner, and they manage those relationships, and
6 we don't manage those relationships.

7 Q. And you --

8 A. And they're deliberately set that way.

9 Q. And you don't have access to the information that
10 the managing partner has with regard to contracts, with
11 Cosco, et cetera?

12 A. It's my understanding that is correct.

13 Q. So they're limited, and they don't even tell you
14 that information?

15 A. For the most part, yes.

16 Q. Do you ever inquire about it?

17 A. Well, I don't, and I suspect from time to time
18 someone may, but for various other legal reasons, they've
19 been set up in that particular entity.

20 Q. Is there a reason you don't want to share that
21 type of information in this hearing so that the secretary
22 can rely upon it?

23 A. I don't have it.

24 Q. Okay. Done. Thanks.

25 A. Yes, sir.

1 THE COURT: Ms. Deskins, you or your colleagues
2 have questions at this time?

3 MS. DESKINS: I believe we do. Could we take a
4 ten minute break before we start our questions?

5 THE COURT: Well, let me see if anyone else has
6 questions. I wasn't -- this is a little bit early.

7 Does anyone else have questions at this point?

8 Go ahead.

9 BY MR. MILTNER:

10 Q. Ryan Miltner for Etteline Dairy, Smith Brothers
11 Farms, and Mallory's Dairy.

12 Mr. Hollon, you testified that DFA pools milk on
13 10 of the 11 orders, --

14 A. Yes, sir.

15 Q. -- one of which is -- the one that you don't pool
16 on is 131; is that correct?

17 A. Yes, sir.

18 Q. So you do pool on the Western order?

19 A. The Western order, correct.

20 Q. Order 135, right?

21 A. Correct, yes.

22 Q. Okay. Good, I've got that.

23 Does that also mean that you then have member
24 farmers that are located in that geographic area?

25 A. Of the Western order, --

1 Q. Of the Western order.

2 A. -- Order 135?

3 Q. Yes.

4 A. Do you intend the Western order or the Pacific
5 Northwest order?

6 Q. I intend the Western order.

7 A. Okay. Yes, we do.

8 Q. Okay. And also in your testimony is a statement
9 that you believe the Federal Order system to be the best
10 way -- or, I should quote you. "The most fair and
11 equitable manner to market dairy farmers' milk." Is that
12 --

13 A. That is correct.

14 Q. Okay. And is it my also -- am I also correct in
15 the understanding that DFA has recently voted to repeal the
16 Western order?

17 A. Well, the intent of your question is correct.
18 The way you actually asked it, I'm not sure if that's
19 right, but there's been a referendum on an order proceeding
20 in the Western order, and DFA has voted its shares, if you
21 will, in both the coop pool and the producer referendum as
22 no.

23 Q. Okay. And that would effectually terminate the
24 Western order; is that correct?

25 A. That's unknown at this point.

1 Q. Okay. If that -- if the changes to the --
2 proposed changes to the order are voted down in total, that
3 would terminate the Western order?

4 A. Under the rules of an order termination, if a
5 certain percentage of the production on the order votes no
6 on an order amendment, that would terminate the order. So
7 there's a possibility that that would happen.

8 Q. Okay. Does DFA alone control enough of that --
9 enough of a presence in that market to make that
10 determination on its own?

11 A. It's a proprietary question. I'm sorry.

12 Q. Okay. But I suppose that the intent in voting
13 the way you did would be that DFA would prefer to have no
14 order at all rather than the order as the secretary has
15 proposed?

16 A. I think that's the same answer as the question
17 before that, so I'm going to decline to answer that.

18 Q. Okay. Do you think that voting the way you did
19 is somehow inconsistent with your statement that the orders
20 are the best and most fair and equitable manner to market
21 dairy farmers' milk?

22 A. Our situation in Order 135 where we evaluated the
23 facts and the results of that hearing led us to the
24 conclusion to vote the way that we did. Since 2000 I think
25 there have been at least a dozen opportunities to vote on

1 Federal Orders one way or another, and we have voted to
2 support federal orders all the way through with the
3 exception of the referendum in 135.

4 Q. And if the secretary makes a decision that does
5 not implement the changes that you are the proponents of,
6 or one of the proponents of, will DFA vote to terminate the
7 Pacific Northwest and Arizona/Las Vegas orders?

8 A. I don't have an answer for that question.

9 Q. Didn't you suggest that in your testimony on, I
10 believe it was, page ten?

11 A. I don't know.

12 Q. I may be referring to the wrong page. No, I
13 think it is page ten.

14 A. Okay.

15 Q. So if I read that in that way, I'm incorrect?

16 A. Well, in Order 131, we would have no votes.

17 Q. You're right.

18 A. And in the Pacific Northwest order, we would have
19 a small amount of votes, and I don't think we have any
20 intent to vote no.

21 Q. Okay. On page two of your testimony, Exhibit 32,
22 you make a statement that "in some cases, retailers have
23 become sophisticated enough to understand the advantage and
24 seem to be recruiting producer/handlers for supply."

25 A. Yes.

1 Q. Are you willing to offer any specific examples of
2 retailers in the Pacific Northwest who are, indeed,
3 recruiting producer/handlers for supply?

4 A. No, as far as naming names, but we have had
5 discussions with several other cooperatives and other
6 marketing folks, if you will, that indicate to us that some
7 retailers have, indeed, begun to seek out
8 producer/handlers.

9 Q. But you don't have anything specific to add to
10 the record on that --

11 A. I'm not willing to provide any specific names.

12 Q. Okay. There's another statement you make on page
13 two, and I'm not quite sure what you mean by it. It's the
14 first line of the next paragraph. It says, "The drive to
15 exploit this loophole is or will create organized,
16 disorderly marketing." And at first blush, it seems that
17 orderly disorganized marketing is an oxymoron.

18 A. Organized disorderly marketing, in that we expect
19 to see if the provisions that we are supporting are not
20 found for, that there will be a concerted interest in more
21 producer handlers in other markets to take advantage of the
22 loophole. And as I indicated in earlier lines of
23 questioning, we have had large producers who have come to
24 us and asked questions about being a producer/handler.

25 Q. Okay.

1 A. And one of the key lines of that question is,
2 will this exemption continue or not?

3 Q. Again, in your statement there is -- it's on page
4 nine. You say that the majority of producer/handlers, the
5 90,000 pound per month monthly volume, --

6 A. Yes.

7 Q. -- they say that represents the majority of
8 producer/handlers, --

9 A. Correct.

10 Q. -- and that was based on your own proprietary
11 research, that some of the information that the market
12 administrators had provided to you; is that correct?
13 That's where you came up with that?

14 A. I'm sorry, I didn't -- you said, was that based
15 on our own research and the data we got from the market
16 administrator?

17 Q. Yes.

18 A. Yes, that's correct.

19 Q. Okay. And that is summarized in Exhibit 33,
20 Table D and E, correct?

21 A. No, it would be in Table F.

22 Q. Table F. Okay.

23 And so that statistic that the majority of
24 producer/handlers produced less than 90,000 pounds is based
25 on a nation-wide average?

1 A. Yes, the average for Federal Order 1, Federal
2 Order 6 and 7, and Federal Order 32 was 96,807. So I guess
3 the 90,000 is, you know, 5,000 on the low side, --

4 Q. Right.

5 A. -- but that's where that statistic comes from,
6 and out of 101 producers/handlers or additional 117, if you
7 count the other ones, that would be more than half of them.

8 Q. And I have not taken the time to calculate these
9 myself, --

10 A. Okay.

11 Q. -- but assuming that the estimates you have on
12 Tables D and E are correct, as far as the plant size and
13 pounds --

14 A. Okay.

15 Q. -- would it be fair to state that the average
16 producer/handler in orders 124 and 134 is -- I'm sorry, 131
17 are significantly larger than 90,000 pounds?

18 A. Yes, that would be correct.

19 Q. And looking at order 124, again, I'm just doing a
20 quick guess off the top of my head, but it's probably over
21 one million, maybe two million pounds per month?

22 A. I would agree with that.

23 Q. Okay. So in the affected orders, the majority of
24 producer/handlers are actually far larger than that 90,000
25 pounds; that's the, I guess, the conclusion that we can

1 make?

2 A. In orders 131 and 124, yes.

3 Q. Okay. And am I correct in interpreting your
4 testimony to say that Mr. Herbine's study suggests that the
5 prices observed in the warehouse and box stores in Phoenix
6 are unobtainable by regulated handlers?

7 A. Are --

8 Q. Unobtainable by regulated handlers.

9 A. The prices?

10 Q. The --

11 A. The regulated handler could not serve those
12 customers at a margin and pay regulated prices.

13 Q. Okay.

14 A. That would be the conclusion.

15 Q. Going back to your testimony on page 12. Toward
16 the bottom, you state that "the large-sized
17 producer/handlers has operational costs that are lower than
18 the averaged sized Federal Order regulated plant."

19 A. Yes.

20 Q. How did you come to that conclusion?

21 A. Mr. Herbine's data outlines some cost data for
22 various sizes of plants, and the operational cost data for
23 plants of a certain size, like the 18,000 pound large size
24 -- largest size producer/handler was lower than that of the
25 average Federal Order plant, which would be the 3,000 pound

1 plant and the 12,000 pound plant.

2 Q. In this statement, when you use the phrase "large
3 sized producer/handler," is that referring to a specific
4 producer/handler or larger producer/handlers in general?

5 A. Well, it would be those that were larger than the
6 average size Federal Order, 7A handler. Larger than the 12
7 million pounds, but in some cases even the, you know, the
8 five and six million pound based on some of Mr. Herbine's
9 work would have a lower cost than the three million pound,
10 which was a third of the Federal Order plants.

11 Q. And to the extent that Mr. Herbine's research
12 would be flawed or had overstated the costs and the
13 processing, would that affect your conclusions?

14 A. I think I'll leave that judgment up to the
15 secretary.

16 Q. You don't know how your conclusion would be
17 affected if his data was bad?

18 A. That presumes, I think, his data might be bad,
19 and I think his data is --

20 THE COURT: -- should answer the question. If
21 his data's bad, does that affect your conclusion? That's
22 all he's asking you --

23 THE WITNESS: And I answered that. I told him I
24 would leave that conclusion up to the secretary.

25 THE COURT: So you won't answer it. Okay.

1 BY MR. MILTNER:

2 Q. Throughout your testimony you talk about a drive
3 to exploit the loophole.

4 A. Yes, sir.

5 Q. And you talk about -- oh, well, I think it's
6 sufficient to say you talk about a drive to exploit a
7 loophole. Is it correct that the regulations governing
8 producer/handlers have been essentially unchanged, let's
9 say, even from the 1960s?

10 A. Yes.

11 Q. And you say that in the recent past, you have
12 been approached by producers who are expressing an interest
13 in becoming a producer/handler, or at least exploring that
14 option?

15 A. Yes.

16 THE COURT: You know, I just want to interject
17 here a second. I'm hearing a lot of the same questions
18 that I've heard before over the last hour and a half or so,
19 and I am allowed to stop redundant, repetitive testimony
20 and questioning. And I think we've -- you know, if you
21 have something new or different to ask about, please go
22 ahead, but don't -- just don't ask him the same questions
23 he just answered?

24 MR. MILTNER: Okay. Thank you, Your Honor.

25 BY MR. MILTNER:

1 Q. I did not hear you answer as to what changes in
2 the marketplace have occurred in recent years --

3 A. Okay.

4 Q. -- that would justify a change in a policy that
5 has been in existence for at least 40 years.

6 A. I may want to come back to that question because
7 I wrote down the answer to that, and I don't have it
8 sitting here. But I will give you some of the things that
9 I would observe. You know, one is that, you know,
10 producers are extremely larger than they were 40 years ago
11 or even ten years ago. The largest sized producers now are
12 much larger. Those large sized producers have different
13 economies of scale than they had several years ago.

14 The retail sector has changed dramatically, even
15 in the last ten years. And if you look at data from 1990
16 that surveyed the retail sector and looked at the top ten
17 retailers, you know, that list is dramatically different,
18 and the market share is dramatically different.

19 The position of the large warehouse-type stores
20 and the segments of the market that they command is much
21 different than it was 40 years ago, or even 10 years ago.
22 Some of the technologies that are available in terms of on
23 farm fractionization (phon.) of milk components,
24 transportation efficiencies. Those are far different than
25 they were 40 years or even 10 years ago.

1 It's not uncommon for milk to move hundreds of
2 miles, even to thousands of miles to a fluid customer.
3 That was not, you know, the same even as recently as ten
4 years ago.

5 Q. Have those conditions changed in the past three
6 years drastically?

7 A. Some of those conditions have changed.

8 Q. Which ones?

9 A. The fact that the increasing market share by
10 fewer and larger retailers has changed.

11 Q. What -- do you have statistics that demonstrate
12 that, any evidence?

13 A. I think if you go back and look at Supermarket
14 News' reports on market share held by major retailers, you
15 would find some change.

16 Q. I want to question you about a couple of
17 statements you made. You suggested that Mr. Herbine's
18 study was based on a pool of 200 plant observations that he
19 had made.

20 A. I think he said there were 200 different
21 businesses, so it could be even more than 200 plants, I
22 think, but the record will bear out what he said.

23 Q. Okay.

24 A. The 200 was right. I don't know if it referred
25 to a plant or to businesses.

1 Q. Is it correct that his actual study prepared for
2 Dairy Farmers of America was based on 20 plant
3 observations?

4 A. I don't remember the number, but that may well be
5 true. In fact, I think that's in his exhibit. I think you
6 could go back and add up the number of observations in each
7 of the costs, groupings.

8 Q. So if the record reflected 20, you would agree
9 with that?

10 A. Yes.

11 Q. And you also made a statement from Mr.
12 Vanderpool. I believe he was the representative from --

13 A. Vitamilk?

14 Q. -- Vitamilk. Yes. That he lost sales to Alaska
15 to producer/handlers?

16 A. I -- if I said that directly, that may have been
17 wrong. However, somewhere in this presentation someone has
18 said they had business in Alaska and lost that business to
19 a producer/handler. If it wasn't Mr. -- if it wasn't
20 Vitamilk and Mr. Vanderpool, it was perhaps another entity.

21 Q. Okay. So if Mr. Vanderpool's testimony actually
22 showed that he lost business in Alaska to Safeway, you
23 wouldn't argue with that?

24 A. No.

25 Q. And is Safeway a regulated handler?

1 A. Yes, they are.

2 MR. MILTNER: Okay. I don't have anything
3 further, Your Honor.

4 THE COURT: Thank you. Let's take that ten
5 minute break now. Come on back about five after the hour.
6 (Off the record and reconvened.)

7 THE COURT: Okay. Let's get back on the record.
8 Ms. Deskins, you and your colleagues had a few
9 questions first?

10 MS. DESKINS: Yes, I think Mr. Rower is going to
11 go first.

12 THE COURT: Okay.

13 MR. ROWER: Can you hear me? Okay.

14 BY MR. ROWER:

15 Q. Jack Rower, USDA.

16 A. Yes, sir.

17 Q. Mr. Hollon, I want to start off with some small
18 business questions where --

19 A. Okay.

20 Q. Does DFA have members, and when I say "members,"
21 I mean dairy farmers.

22 A. Okay.

23 Q. Who would be considered to be small businesses?

24 A. Yes.

25 Q. Okay. With matters before this, or under

1 consideration, in this hearing have an impact on those
2 small businesses?

3 A. Yes, they would.

4 Q. Could you elaborate briefly?

5 A. Well, the small business dairy farmer
6 member/owners of DFA, you know, a part of their financial
7 picture every month is the blend price in the Federal
8 Order, and to the extent that there are some dollars that
9 are not shared in the blend pool in the Federal Order due
10 to a producer/handler business, then they would be
11 negatively impacted by that. So to the extent that those
12 dollars got in the pool, they would gain access to those
13 through the market-wide pool.

14 Q. Thank you. Just a quick question on over-order
15 premiums. In Order 124 are over-order premiums charged?

16 A. Yes, they are.

17 Q. Okay. And 131 as well?

18 A. Yes.

19 Q. Okay. Thank you. I had a concern about transfer
20 prices that were discussed in the hearing when we met in
21 Phoenix --

22 A. Okay.

23 Q. -- by Dr. Kryon, and I didn't ask the question
24 then, but would you in your position agree that the -- that
25 a producer/handler is a single, continuous operation as

1 opposed to a producer and a handler under the definition of
2 producer/handler in, for example, 131.10?

3 A. Yes, I would agree that they are continuous,
4 seamless operation.

5 Q. Okay. And then the same would apply for Order
6 124, --

7 A. Yes.

8 Q. -- wouldn't you agree?

9 A. Yes.

10 Q. Okay. One of my concerns that I haven't been
11 able to put to rest and isn't on the record, and I was
12 hoping you could get it on here so that if not you today,
13 others who've testified before may be able to answer in
14 briefs or comments later. This notion that the optimal
15 transfer price that Dr. Kryon had talked about as the
16 market price, in a seamless, single operation it's not
17 clear to me that the transfer price is anything more than
18 literally the market price that the entity as a whole would
19 be collecting in the marketplace. For example, Mr. DuPey
20 from Braums talked about his market price being the retail
21 price rather than, say, the Federal Order Class 1 or any
22 other Federal Order class price, plus or minus any premium.

23 A. Okay.

24 Q. Do you understand what I'm saying?

25 A. I thought I did. I'm getting foggier now.

1 Q. Okay.

2 A. I interpret a transfer price to be, you know,
3 when one business has multiple business lines, --

4 Q. Right.

5 A. -- and it moves product from one line to another
6 line. There is some price that gets transmitted back and
7 forth.

8 Q. Yeah. I agree with you, and I even went back to
9 one of my old textbooks. I had to --

10 A. All right.

11 Q. -- and my colleagues laughed at me because it was
12 from 1966, but the key thing here -- because some of them
13 weren't born yet -- the key thing here, though, is if it's
14 a single, seamless operation by definition, --

15 A. Uh-huh.

16 Q. -- the definition is fiat. It's a regulation.

17 A. Yes.

18 Q. Then the market price that applies is the market
19 price that the entity as a whole will receive and not its
20 parts. For example, the producer/handler in its capacity
21 as a producer and its capacity as a handler is one. So
22 really it's the final price, the end price, the handler
23 price that will be the price, we would call it his market
24 price, as producer/handler. Do you understand?

25 A. Yeah, that's going to --

1 Q. The reason -- there aren't two prices there.

2 There's --

3 A. That's going to define his income strain.

4 Q. And there'll only be one to consider, not two as
5 though he were a producer and a handler, because here he's
6 a seamless, single entity. That's where -- that's why I
7 had to go back to my textbooks.

8 A. Okay.

9 Q. And I was hoping that -- if you couldn't get to
10 it, we got it on the record so that others --

11 A. Okay.

12 Q. -- might be able to respond to that.

13 A. We'll look at it in that light.

14 MR. ROWER: Okay. I appreciate that. Ms.
15 Deskins had a question or two here.

16 BY MS. DESKINS:

17 Q. Okay. I wanted to ask you some questions about
18 some of this language that you proposed.

19 A. Yes, ma'am.

20 Q. Okay. Let's start with page 17.

21 A. Okay.

22 Q. Okay. You've changed this to cut out the milk
23 market administrator designating someone as a
24 producer/handler?

25 A. Yes.

1 Q. Okay. So I'm just trying to figure out how this
2 section is going to work. In order for someone to be a
3 producer/handler, once they meet all the conditions, what
4 happens next?

5 A. Okay. I think I understand your question. When
6 we read that, it read to us as if there was some discretion
7 in the market administrator, and we viewed that as, here
8 are the hurdles, or here are the qualifications, and the
9 producer/handler, the responsibility's up to them to show
10 the market administrator that they meet those particular
11 qualifications.

12 And once that's done, they would be a
13 producer/handler. And so from the standpoint of your
14 question, okay, how does the rest of the world know they
15 are one? Then you're right, that there would be some type
16 of publication they would be listed as a producer/handler,
17 but the burden of proof is up to the individual to show
18 that they meet all the standards. They bring the proof to
19 the market administrator. The market administrator simply
20 audits or looks at that proof.

21 Q. Okay. Let's say that someone brings in their
22 proof.

23 A. Yes.

24 Q. And the market administrator has a question about
25 it.

1 A. Yes.

2 Q. Under the way you have it now, there's no way for
3 him to ask for additional information, correct, because if
4 he brings in -- from what you've said, a producer/handler
5 brings in certain documents.

6 A. Okay.

7 Q. All the MA does is verify it, he's a
8 producer/handler?

9 A. I don't think any market administrators would
10 stand for that. If they had a question about a particular
11 aspect, they would want to be made certain in their own
12 right that that's what it would be.

13 You know, we're certainly open to -- I'm not
14 quite sure I know the direction that you're headed, but
15 we're certainly open to having some give and take between
16 the market administrator to find out, you know, the answers
17 to the various -- you know, are you more or less than three
18 million pounds? Did you buy more or less than 150,000
19 pounds of milk? Did you sell milk to a distribute (phon.)
20 plant, whether they be pool or non-pool?

21 Those kind of things, you know, should be
22 presented by the person who wants to be a producer/handler.

23 The market administrator would check and see, and if
24 something's not clear, then certainly they're going to have
25 to, you know, investigate them.

1 So if the language needs some changing to provide
2 them the latitude to investigate those, then, you know, I'm
3 not opposed to that. I just want to make sure that it's
4 clear where the burden of proof falls, and it's not on the
5 market administrator.

6 Q. Okay. So you're -- so the changes you're
7 proposing here, you're not proposing that the market
8 administrators just automatically, --

9 A. Accept?

10 Q. -- if someone's a producer/handler based on
11 whatever they submit?

12 A. No.

13 Q. So there should be some discretion in there for
14 the MA to review it --

15 A. Yes.

16 Q. -- and to see if there's additional information
17 that he might need?

18 A. Correct.

19 Q. Okay. So would you propose any changes to that
20 section to allow the MA to do that, or do you need to think
21 about it and get back to us later on?

22 A. Okay. I think we may need a little bit more, you
23 know, definition of, you know, where we fell short. I
24 mean, but yes, we can ponder that.

25 Q. Okay. Okay. I have a similar question. I have,

1 on page 18, where you have -- I'm trying to find the spot
2 where you have the milk market administrator verifying the
3 information that they presented?

4 A. Okay. On page 18?

5 Q. Right up here, page 18.

6 A. Okay.

7 Q. There's a line in here I have in my notes where
8 you have the -- oh, here it is. "The market
9 administrator's responsible to verify what is presented."
10 And as we just discussed here, this roll is more than just
11 to verify?

12 A. Correct.

13 Q. Okay. Because also if he needs more information,
14 as you -- as we've discussed, he should be able to ask for
15 it?

16 A. Yes.

17 Q. And that producer/handler would have to produce
18 it before getting the status?

19 A. Correct.

20 Q. Okay. You wouldn't envision there be -- being
21 someone getting, say, a provisional producer/handler status
22 while they get the additional information --

23 A. No.

24 Q. Okay.

25 A. No, would not envision that.

1 Q. Okay. So they would have to have everything
2 first. Then they would get the designation of
3 producer/handler?

4 A. Correct.

5 Q. Okay. Okay. On page 19, and too, you struck the
6 word "ownership."

7 A. Yes.

8 Q. And you did give some testimony as to why, and
9 I'm just wondering, isn't ownership important for the
10 determination of producer/handler?

11 A. We had quite an extensive discussion over, you
12 know, the words, you know, to pick, and in our discussions
13 -- you know, and this discussion had been going on for a
14 long time, not just in the last two or three months. That
15 we felt like that there were various forms of management
16 control that didn't always include ownership, and yet, the
17 entity would be in -- would be making the management
18 decisions, and that would be enough.

19 And there was also cases where I think Mr.
20 Ricciardi talked about maybe their package filler was
21 better than everybody else's, but maybe they don't own
22 that, they lease that particular -- and that's pretty
23 common in our business.

24 Or there's even cases where producers lease cows,
25 but yet they manage the herd. And so we felt like that in

1 those cases, the market administrator would have the
2 latitude and the ability to seek that out rather than have
3 ownership of every entity, and we didn't want somebody to
4 say that, well, you know, I don't own them so you can't say
5 that, so I'm not a producer/handler, even though in every
6 other way maybe they acted like they were.

7 Q. Okay. So you're not trying to get rid of
8 ownership as a way of determining producer/handler status,
9 but you just don't want that to be the limiting one?

10 A. Yes, I think that's a fair characterization.

11 Q. Okay. Is there any way if a, say, an "or" was
12 put in there, "or ownership," that that might cover what
13 you were saying?

14 A. Wouldn't be opposed to that if we had, I think in
15 Congress, you call it legislative history. If there's
16 enough, you know, detail supporting that to give some, you
17 know, the broad latitude. You know, a lot of times what
18 seems to happen is that, you know, we get up to a point
19 where we think things are good, and then some technicality
20 just blows us out of the water.

21 So if -- you know, or ownership perhaps would not
22 be, you know, we wouldn't totally object, but the reason
23 why we struck it was we felt like that there was enough
24 broad in terms of complete and exclusive control
25 management. I mean, some of those words gave the market

1 administrator enough latitude to decide that.

2 Q. Okay. Okay. Page 20.

3 A. Okay.

4 Q. I'm just looking at my notes. Oh, you used the
5 term "total risk."

6 A. Yes.

7 Q. Could you tell us what you mean when you use that
8 term?

9 A. There are a variety of different ways that a
10 business can be, and I'm not expert in this, that a
11 business structure can be put together. And so we felt
12 like if the person who wanted to be a producer/handler,
13 they had to have the total risk. You know, of that, they
14 had to stand the chance to make all the money or lose all
15 the money, and that they had to demonstrate that they had
16 that in order to be. And if they couldn't, then they
17 wouldn't be able to be a producer. In other words, if they
18 were sharing that risk with somebody else, then it wouldn't
19 work.

20 Q. So -- by total risk, you mean the economic
21 burden?

22 A. Yes.

23 Q. Okay. Okay. Page 21. Actually, I don't have a
24 question on page 21.

25 Let's look at page 24. Okay I have in my notes

1 here that -- would eliminate "sole risk in enterprise;" is
2 that right?

3 A. Uh-huh.

4 Q. Okay. I'm just trying to understand, why do you
5 want to eliminate those terms from the definition?

6 A. On page 24?

7 Q. Yeah, if you look at 23, you're -- are you
8 looking at -- if you look on 23, you're cutting out "under
9 the sole and exclusive ownership of the producer/handler."

10 A. Uh-huh.

11 Q. And I'm just trying to understand why you want to
12 eliminate that phrase there.

13 A. I think because we felt like that somebody could
14 have management control over an entity. Again, that was
15 leased, for example, where they wouldn't necessarily own it
16 entirely, or they might have a, you know, a structure where
17 they might have -- they might be making all the decisions
18 or perhaps a herd was partially owned by someone else.

19 Q. Okay.

20 A. But if they had the management, you know,
21 interests and controlled where that -- where those milk
22 supplies went, and then they would have to -- again, they
23 would have to designate all of those pieces to the market
24 administrator. These are all the cows that I'm, you know,
25 I have an interest in. And if the market administrator

1 were to do some type of search of various UCC, you know,
2 filings and find some that weren't, you know, that -- some
3 that they didn't list, then they wouldn't be able to be a
4 producer/handler.

5 Q. I guess I'm just wondering. I mean, sometimes
6 I've heard of things where people have a joint operating
7 agreement, but they're separate businesses.

8 A. Uh-huh.

9 Q. Under this definition, if someone has an
10 agreement like that, they wouldn't be able to be a
11 producer/handler?

12 A. Right.

13 Q. Could you explain to us why that would be?

14 A. Well, again, we think that the exemption is a
15 pretty big deal, and so in order to get that ability to be
16 exempt from the pricing and at a part where even at three
17 million pounds, you can have some impact in the
18 marketplace, you ought to have to show, you know, show some
19 pretty strong relationships -- business relationships.

20 So we're not interested in having somebody split
21 out the risk with somebody else. If you want that
22 exemption, you're going to have to bear it. And if you
23 don't want to do that, then you would be -- you couldn't be
24 a producer/handler.

25 Q. Okay. And then also going back to earlier

1 question to have. In order for someone to determine if
2 it's considered an integrated operation, wouldn't that then
3 be the milk market administrator needs to do that?

4 A. Yes.

5 Q. Okay. So that would be another reason to say
6 he's the one, or she's the one who needs to make that
7 determination?

8 A. Yes.

9 Q. Okay. Okay. Okay. And also on page 25. I
10 notice in that one you left in "designations of
11 producer/handlers shall be canceled upon determination by
12 the market administrator."

13 A. Uh-huh.

14 Q. So in this section you did want the milk market
15 administrator to make the determination?

16 A. Well, at some point if somebody doesn't meet the
17 standards, it would have to be, you know, published in the
18 list of handlers of who is and who isn't. Then the market
19 administrator would be the person to do that, and if I'm
20 doing business with you and you were a producer/handler,
21 that may or may not define my business relationship as if
22 you were a regulated handler. So there does need to be, m
23 you know, something published in the monthly statistical
24 information of who is or who isn't a producer/handler.

25 Q. Okay. And also in this section where you have

1 that -- you've changed it in this last sentence to say,
2 "Cancellation of producer/handler status pursuant to
3 paragraph shall be effective on the first day of the month
4 in which the conditions were met."

5 A. Were not met?

6 Q. "Were not met."

7 A. Right.

8 Q. As a practical matter, how would the market
9 administrator's office be able to determine that?

10 A. I think what we had in mind there -- I'll just
11 give the analogy of a sale between, you know, any two
12 parties, and a year later on audit, there's a determination
13 made that something didn't work out. You know, something
14 wasn't right, and that maybe, you know, we sold milk to
15 somebody at a class two price, and that handler didn't have
16 any class two utilization at that point, and it all became
17 class one.

18 We would receive a bill, you know, say, or we'd
19 do funds, but they would go back to the point where the
20 audit said something changed. And so there was some
21 language that seemed to indicate that when a
22 producer/handler status was changed, it wouldn't
23 necessarily be in the month that the change occurred, but
24 the following month, and we couldn't line that up with
25 other order practices, where again under example of an

1 audit, if you discover that there's something changed in
2 January, then, you know, Party A and Party B have to make
3 financial settlement for January's business. So we felt
4 like that needed to be the same in terms of these
5 relationships.

6 Q. Okay. So just so I understand. So the way this
7 would work is, someone could have producer/handler status
8 for December. January they change their practices
9 slightly. They don't have that status then, but the milk
10 market administrator's office doesn't find it out till they
11 do an audit in March. So for January then they would not
12 have been a producer/handler?

13 A. That is correct.

14 Q. Okay.

15 A. Because --

16 Q. And they might not know it until months later
17 when --

18 A. That is correct.

19 Q. -- an audit is determined that they didn't meet
20 the conditions?

21 A. That is correct. However, I would point out
22 that's true in any other, you know, buy/sell arrangement in
23 milk commerce, that it's frequent occurrence that an audit
24 adjustment occurs for some particular change, and there's
25 no skip or forgiveness, you know, that's given, the proper

1 financial settlements are made.

2 Q. Okay. I'm just trying to find out -- make sure I
3 understand how this works.

4 Okay. Then also you've been relying on saying
5 that if a producer/handler produces less than three million
6 pounds a month, then they should not -- they wouldn't --
7 they could still have the status of producer/handler --

8 A. That's class one sales of less than three million
9 pounds, they could still have the status of
10 producer/handler is correct.

11 Q. Okay. And you said the reason for that is based
12 on the requirements in the fluid milk research and
13 promotion ad?

14 A. That's just one of the things that we tried to
15 point out, that, you know, Congress has decided that at
16 three million pounds, you know, a producer -- a processor
17 is able to afford and receive benefit from. But we've
18 tried to point out a number of other reasons for the three
19 million pound threshold.

20 Q. Okay. And just -- I'm sorry. I didn't -- what
21 would the other reasons be, just quickly?

22 A. Okay.

23 Q. If you've said them before, we don't need to go
24 through them --

25 A. We talked about positions on a cost curve where

1 economies of scale begin to come into play. We've talked
2 about the impact in a retail market where of a certain
3 size, a customer could -- a processor could service a
4 certain number of customers and have an impact on retail
5 price transactions. We've talked about economies of scale
6 on the farm, where at a certain size there is differences
7 in cost of production as outlined in the ERS reports. So
8 those would be at least four of the reasons that I've
9 outlined in my testimony and in questions.

10 Q. Okay. And for all those reasons you've outlined,
11 would -- is three million pounds appropriate, or would 2.5
12 million be appropriate or four million be appropriate?

13 A. You know, the subject of every hearing is where
14 do you draw the line?

15 Q. Right.

16 A. And so, you know, we've chosen 3 million pounds,
17 and we tried to provide some reasons for why that's an
18 appropriate number. I don't know that there's a magic
19 bullet that says absolutely, you know, this is it, and so
20 certainly there's some discretion the secretary will have
21 to provide, and we've tried to provide, you know, reasons
22 why that number is reasonable.

23 Q. Okay. Another reason I'm asking that is because
24 the fluid milk ad is a research and promotion on, --

25 A. Uh-huh.

1 Q. -- and their criteria for setting a limit is a --
2 based on different things for milk orders. So I'm just
3 trying to --

4 A. I understand. That's --

5 Q. Understand --

6 A. -- we just want to try to provide more than one
7 reason. Yet that is one spot where, you know, Congress has
8 said, well, there's some threshold here that seems to have
9 a bearing. So we've adopted their wisdom at least for
10 that.

11 Q. Okay. Next question I had was, in your testimony
12 a couple of times, you rely on the Herbine study.

13 A. Yes, ma'am.

14 Q. And I was just wondering if -- and in particular,
15 when you're asked a question, you made some conclusions
16 based on the Herbine study about the effect the large
17 producer/handler would have on the market.

18 A. Yes.

19 Q. I think that was on page -- was that page ten
20 that you made that conclusion?

21 A. Okay.

22 Q. It was page ten, that's right?

23 A. Well, I don't know what your question is.

24 Q. Okay. Well, I'm just trying to -- you made a
25 conclusion here, "But if the large producer/handler can

1 enter return and grow his business, pressure" --

2 A. Yes, that's on page ten.

3 Q. Okay. And I believe you were asked a question.
4 You said that was based on your conclusion it was based on
5 the Herbine study.

6 A. Correct.

7 Q. Okay. I was just wondering. Can you explain to
8 us how you use the Herbine study to support this?

9 A. We discussed with Mr. Herbine the various levels
10 at which the not paying the regulated price would affect
11 ability to make or lose. And at the 18 million pound
12 limit, I'm -- this is memory now. That -- we said, if we
13 factored in the difference between the regulated and
14 unregulated price, that that volume would come close to
15 breaking even. And in this particular case, the estimates
16 of that volume is about that limit, so it seems possible to
17 us that perhaps a producer/handler who doesn't have to pay
18 the regulated price could have a margin or break even at
19 that point.

20 Q. Okay. Part of the reason I'm asking that is
21 because when Mr. Herbine testified, he said the database he
22 used only had one producer/handler in it, --

23 A. Yes.

24 Q. -- and it was -- and the one that was defined as
25 a producer/handler was under the state order in

1 Pennsylvania.

2 A. Uh-huh.

3 Q. So I'm just trying to understand how that
4 database then is used to make conclusions about
5 producer/handlers as defined under the Federal Orders.

6 A. That -- the logic that you're proceeding on is
7 not, I don't think, in the right direction.

8 Q. Okay.

9 A. At the limit of 18, or Plant E, I think, on
10 Exhibit --

11 Q. 25?

12 A. -- 25-J, at that spot, I think Plant E was an 18
13 million pound plant.

14 Q. I'm turning to it.

15 A. That's okay.

16 Q. Okay. Go ahead.

17 A. And at 18 million pounds and under this type of
18 sale, the loss would be \$1.25 per hundredweight to a
19 regulated handler.

20 Q. Okay.

21 A. So if you were an unregulated handler, you would
22 not be paying the difference between the regulated price
23 and the blend price. And that dollar amount is not far
24 from an average cost. So the basis for this statement is
25 that if you were at 18 million pounds, and you didn't have

1 to pay regulated prices, then you're -- you would have a
2 piece of business that might make money. And in order 131,
3 the handler that fits that description, the Sarah Farms
4 plant, is a -- has been attributed to be about 20 million
5 pounds, and so --

6 Q. Is that a month or a year?

7 A. A month.

8 Q. A month.

9 A. A month.

10 Q. Okay.

11 A. And so they would closely approximate the plant
12 described here, and if by not paying the regulated price,
13 that \$1.25 loss might possibly go to a margin. If you went
14 back up the curve to the D sized plant, which was --

15 Q. Exhibit I on Exhibit 20 --

16 A. Just back up. That's right, --

17 Q. Yeah.

18 A. -- Exhibit I, that was a 12 million pound, and
19 they're the bottom loss per hundredweight was \$2.10. That
20 would not be able to overcome, in many cases, the
21 difference in paying the regulated price versus not paying
22 the regulated price.

23 Q. Okay. And also just to clarify, when you
24 referred to J that's part of Exhibit 25, and you said 18
25 million pounds, it's 18 million pounds a month?

1 A. Correct.

2 MS. DESKINS: I don't have any more questions,
3 but Mr. Tosi has some. Thank you.

4 BY MR. TOSI:

5 Q. Hi, Elvin. Thank you for appearing.

6 A. Yes, sir.

7 Q. The questions that I want to ask you --

8 THE COURT: Would you identify yourself?

9 MR. TOSI: Yes. Hi, I'm Gino Tosi, T-o-s-i, with
10 the USDA.

11 BY MR. TOSI:

12 Q. Elvin, the questions I want to ask, build a
13 little bit off the some of the concerns that were expressed
14 by Charlene on the -- some of your intents here on --

15 A. Okay.

16 Q. -- the language of -- that you're proposing here
17 for the producer/handler definition.

18 A. Okay.

19 Q. Do you think it's important that -- in
20 considering an adequate producer/handler definition, in
21 addition to the things that you have articulated here, one
22 of the things that I'm concerned about is that during the
23 times when we have a price inversion, where we've had a
24 quick run up on either the class three or four price, such
25 that it's higher than the effective class one price, that

1 to the extent that a producer/handler could decide to
2 disqualify --

3 (Tape changed)

4 BY MR. TOSI:

5 Q. -- becomes a -- he loses his producer/handler
6 status in -- by doing that, and that in theory here we
7 could have a situation now that he becomes a fully
8 regulated handler --

9 A. Uh-huh.

10 Q. -- by engaging in that behavior. And then in the
11 time of a price inversion, rather than having to make a
12 payment to the producer settlement fund that it would, in
13 effective, qualify themselves for a draw from the pool.
14 Are you concerned about that --

15 A. That seems to be an unfair or an unreasonable
16 chance for that to happen. So it would be nice for that
17 not to be able to happen.

18 Q. Okay. And do you -- would you be of the opinion
19 that there's something about the quality of your proposed
20 definition for producer/handler that would address that
21 concern?

22 A. Now, we discussed that off and on, but I don't
23 think we came to a conclusion on that. So I guess the --
24 part of it would be, if you're going to be -- you know, if
25 you meet the criteria, and you're going to be a

1 producer/handler for some time, seems like -- perhaps there
2 ought to be some calendar duration. Or if you, you know --
3 if you choose not to be for some time, maybe you should not
4 be for a while. We'll have to discuss that as a language
5 alternative.

6 MR. TOSI: Okay. That's all I have. Thank you.

7 THE WITNESS: Okay.

8 THE COURT: Okay. Let's have questions from this
9 -- from the, what I'll call the proponents' side of the
10 room.

11 Go ahead, Mr. English.

12 MR. ENGLISH: Charles English for Shamrock Foods
13 Company and Dean Foods Company.

14 BY MR. ENGLISH:

15 Q. Good afternoon, Mr. Hollon.

16 A. Good afternoon, Mr. English.

17 Q. I'd like to start with the language of the
18 proposals again, and following up on some of the questions
19 just asked by department. Maybe put in the record at least
20 one example where the status of an entity may change upon
21 audit some months thereafter.

22 Are you familiar with the provision for partially
23 regulated plants?

24 A. Yes.

25 Q. And that provision is based on the idea that a

1 plant that sells into a marketing area may not meet the
2 minimum route disposition requirements for a particular
3 month to be fully regulated, but will nonetheless have to
4 meet the requirements of partially regulated plants,
5 correct?

6 A. Correct.

7 Q. And do you know of instances in the last several
8 years in which some time after filings, entities have ended
9 up showing up on marketing administrator reports as having
10 been fully regulated for months in the past?

11 A. Yes, that has happened from time to time.

12 Q. And that isn't for the month, you know,
13 afterwards or the month when discovered if the first month
14 when an entity has met the route disposition requirement,
15 correct?

16 A. That's correct.

17 Q. And so when you discuss this issue on page 25
18 with respect to producer/handlers, you're really tying it
19 to that kind of determination --

20 A. Yes.

21 Q. -- that is made similarly for partially regulated
22 plants?

23 A. Yes.

24 Q. And on page 23, referring to discussion on page
25 24, that you're deleting the option for producer/handler

1 declare parts of an operation included or excluded, I
2 confess, I'm confused when I look at 23(b)(1), which
3 references in the middle of the pages, which the
4 producer/handler has designated as a source of supply --
5 milk supply for the producer/handler's plant operation.

6 A. Uh-huh.

7 Q. How is that language in (b)(1) consistent with
8 the concept that we're deleting the option for a
9 producer/handler declare parts of the operation as included
10 or excluded?

11 A. I think that there's no opportunity to say parts
12 are excluded. You're either all in or all out, but you
13 still have to be the one to bring your information to the
14 market administrator and say, this is my milk supply, this
15 is my plant, this is my distribution, but you don't have an
16 option of saying, this herd is, and this herd isn't.

17 Q. So you have -- the idea is that the
18 producer/handler -- it's not so much what he's designated
19 so much as has available as a milk supply?

20 A. Say that again.

21 Q. Isn't it what a producer/handler has available as
22 a milk supply as opposed to designated?

23 A. Well, again, they're going to say this -- these
24 are the cows I own, the farms that -- the farms I have an
25 interest in, this is part of my milk supply. Market

1 administrator, here is the farm, here's the address, you
2 know, here's where you get the production records, and so
3 you'll know of all that information. But there's not the
4 option to say, you know, this farm is in, or this farm is
5 out, or this plant on this side of the state line is in,
6 and this plant on a different side of the state line is
7 out.

8 Q. As we're discussing legislative history, then the
9 point is that after such designation, the market
10 administrator certainly should have the power to go
11 determine whether or not that designation was full and
12 complete, correct?

13 A. Correct, yes.

14 Q. And if the market administrator shall determine
15 that there is some farm over there that is part of this
16 producer/handler operation that's not being included, the
17 market administrator would have the power to effectively
18 designate it for the producer/handler, correct?

19 A. Either that or deny producer/handler status.

20 Q. Right. You were asked a series of questions by
21 Mr. Yale having to do with regulating handler size, or
22 limiting -- I'm sorry, limiting handler size. Is there
23 anything in the proposals that actually limits a handler
24 size?

25 A. No.

1 Q. Is there any attempt to limit the ability of a
2 handler to have any size in any of these markets?

3 A. The only intent is if you're bigger than three
4 million pounds, you should be regulated, but if you want to
5 be a three million pound handler or a 23 million pound
6 handler, you can certainly try to grow your business to
7 either size.

8 Q. Mr. Yale had some discussion with you concerning
9 Safeway and the idea of an integrated operation.

10 A. Yes.

11 Q. First, you understand that Safeway in many
12 instances also chooses to sell to stores that are not owned
13 by Safeway?

14 A. I have to admit, I did not know that.

15 Q. Regardless, is any advantage that Safeway obtains
16 by being integrated have anything to do with the Federal
17 Milk Order System regulation?

18 A. Not with regards in any way that I know, with
19 minimum price. That was -- this is where our, you know,
20 our argument hones in on. If -- outlined in Mr. Ricciardi,
21 if they have a better packaging filler machine or a better
22 package or any economies, you know, they are due those, and
23 you know, should earning get the benefit from them, but our
24 proposal deals strictly with the price minimums.

25 Q. And then you were asked a series of questions by

1 Mr. Yale concerning what may or may not have changed since
2 2000, and guess I would ask a series of questions about
3 that.

4 In last three years, before we had this hearing,
5 did USDA have the benefit of Mr. Herbine's analysis?

6 A. It did not.

7 Q. Did USDA have the benefit of Roger Kryon's
8 testimony?

9 A. It did not.

10 Q. Did it have the benefit of Mr. Kruger's
11 testimony?

12 A. It did not.

13 Q. Did it have the benefit of the testimony of the
14 two Order 124 witnesses today?

15 A. It did not.

16 Q. Had Vitamilk gone out of business?

17 A. It had not.

18 Q. You were asked questions as an economist
19 concerning the costs of doing business as a
20 producer/handler -- the regulated costs. If the costs of
21 the things that the producer/handler has to do in order to
22 maintain producer/handler status exceeded the benefits of
23 not being pooled, as an economist, what is your opinion of
24 what a rational producer/handler would do?

25 A. It would cease being a producer/handler, and they

1 would be pooled. In fact, I think Mr. DuPey testified to
2 that, that his company did those analyses, and from time to
3 time, they chose to be pooled, and time to time they chose
4 not to be.

5 Q. You were also asked a series of questions by two
6 or three questioners concerning disorderly marketing.

7 A. Yes.

8 Q. And were you -- did you participate in a Federal
9 Order hearing back in April of 2002 regarding the Western
10 and Pacific Northwest markets?

11 A. Yes.

12 Q. And did that proceeding include a question of
13 disorderly marketing with respect to relatively small
14 processors that were not paying regulated minimum prices?

15 A. It did.

16 Q. And do you recall what USDA's determination was
17 with respect to the very fact that entities, whatever size,
18 had that kind of situation where they were not paying
19 regulated minimums?

20 A. The recommended decision or the interim, final
21 decision in that order eliminated the ability for the
22 proprietary bulk tank handler unit to exist at, and in
23 effect, erase those provisions in the order, and one of the
24 reasons that they gave was the fact that it had created an
25 equity in handler prices.

1 Q. And, in fact, did the secretary in that August
2 2003 final interim said that a provision gives rise to
3 disorderly marketing conditions because the order is unable
4 to establish minimum prices that are uniform among
5 regulated handlers?

6 A. Yes.

7 Q. And do you agree with that statement?

8 A. I do.

9 Q. And, in fact, those entities were far smaller
10 than three million pounds, correct? Do you remember the
11 testimony --

12 A. I do --

13 Q. -- from that hearing?

14 A. I do not remember the testimony from that
15 hearing, not with regard to the size of those two plants.

16 Q. And finally, you were asked some questions and
17 sort of discussed with Mr. Ricciardi the idea of the
18 airline industry and Southwest Airlines. If Southwest
19 Airlines were the only airline that did not have to pay
20 airport fees for landing, --

21 A. Yes.

22 Q. -- and Southwest Airlines was then offering
23 cheaper seats to passengers, would you conclude as an
24 economist that at least one of the reasons why they were
25 able to do so was the fact that they, unlike every other

1 airline, were not having to pay those kinds of airline
2 fees?

3 A. Yes, I would draw that conclusion.

4 MR. ENGLISH: Thank you.

5 MR. BERDE: Sydney Berde.

6 BY MR. BERDE:

7 Q. I'm going to ask you some questions that relate
8 to Mr. Yale's testimony -- cross-examination, rather.

9 A. Yes.

10 Q. I think almost at the opening of his examination,
11 he asked you to explain what would happen to a
12 producer/handler if the handler became regulated. Would he
13 be selling milk to the pool?

14 A. Yes, I remember those.

15 Q. And had some query about what the exact
16 relationship would be between his milk and his relationship
17 to the pool. Wouldn't the short answer to that question be
18 simply that he'd be regulated the same as every other
19 handler and be subject to the same provisions of the order
20 as supplied to every other handler?

21 A. That would be true.

22 Q. You're aware that a producer/handler is a
23 handler?

24 A. Yes.

25 Q. Does the term producer/handler appear anywhere in

1 the act?

2 A. In the act. I do not know. I do not know.

3 Q. Do you recall the testimony of Mr. Kryon
4 concerning the reasons why the producer/handler concept was
5 invented by the Dairy Division in the first place?

6 A. Yes.

7 Q. As a matter of administrative convenience?

8 A. Yes.

9 Q. And you also recall that in the course of his
10 testimony, he referred to the Kansas City order?

11 A. Yes.

12 Q. And it's 500 pound limitation, when that
13 administrative convenience idea was adopted?

14 A. That is correct.

15 MR. UNIDENTIFIED: Your Honor, at some point, the
16 question from Mr. Berde, all he's asking him to do is
17 recite what's already in the record. He said he has no
18 basis for this testimony, so what we're having is argument
19 (phon.) (indiscernible).

20 THE COURT: Okay. Why don't you ask him some
21 questions other than --

22 MR. BERDE: Yeah.

23 THE COURT: -- if he agrees that what was already
24 testified to.

25 BY MR. BERDE:

1 Q. You were also asked the question by Mr. Yale as
2 to whether the secretary should also regulate the size of
3 producers. Do you recall that?

4 A. Yes.

5 Q. Does the secretary have any authority to regulate
6 the producers in their capacity as producers?

7 A. No.

8 MR. RICCIARDI: Objection, Your Honor. Now he's
9 asked for legal conclusion (phon.).

10 MR. UNIDENTIFIED: That was a question.

11 MR. RICCIARDI: It's not -- first of all, it may
12 be a question, but it's a legal conclusion --

13 THE COURT: Well, he can -- you can examine him
14 on his basis for -- I agree it's a legal conclusion, but he
15 asked it, and --

16 BY MR. BERDE:

17 Q. You were also asked whether it would be
18 appropriate for the secretary to regulate the size of a
19 handler's plant. Do you recall that?

20 A. Yes.

21 Q. Isn't that a problem for the Justice Department
22 in its capacity as the regulator of anti-competitive
23 problems and monopoly problems?

24 A. I thought that, but I didn't want to go there
25 because I assumed it would spawn a lot more questions.

1 Q. You were also asked what the concern was at the
2 present time inasmuch as there has been no explosive growth
3 in the number of producer/handlers in the country. Do you
4 recall that?

5 A. That's correct.

6 Q. Do you recall the testimony in the record of the
7 explosive growth of multi-thousand cow herds in the past
8 five years?

9 A. Yes.

10 MR. RICCIARDI: Objection, Your Honor. What's in
11 the record is in the record. (Indiscernible) question and
12 answer that has nothing to do with other than reciting the
13 question?

14 MR. BERDE: This is addressed to the adverse
15 cross-examination of another counsel opposing these
16 regulations. I have an absolute right to draw out in the
17 record the reasons why those questions were inappropriate
18 and irrelevant to the proceeding from this witness.

19 THE COURT: What do you have to say, Mr. Beshore?

20 MR. BESHORE: Well, I think Mr. Berde should be
21 allowed to examine without Mr. Ricciardi's repeated
22 interruptions.

23 MR. RICCIARDI: Mr. -- Your Honor, my objection
24 is, he's asking him whether or not this is in the record.
25 It's either in the record, or it's not.

1 THE COURT: I'm assuming, perhaps erroneous, that
2 he's asking that so that he can ask him a question about it
3 at some point that will tie to --

4 MR. RICCIARDI: I haven't seen any --

5 THE COURT: Well, we -- you know, I'm trying to
6 give him the benefit of the doubt, and I'm assuming that
7 he's going to tie it up with a question. I may be wrong,
8 but I don't know until he gets to that, so I'm going to let
9 him ask the question, and I'm going to let him answer it,
10 and --

11 MR. RICCIARDI: And if he --

12 THE COURT: -- hope that it addresses the --

13 MR. RICCIARDI: (Indiscernible)

14 THE COURT: -- points you made in cross-
15 examination. So go ahead, Mr. Berde.

16 I think you already answered that last question,
17 did you not.

18 THE WITNESS: I think so.

19 THE COURT: Okay.

20 BY MR. BERDE:

21 Q. Now, relating to the issue of whether there
22 should be any present concern inasmuch as there has not
23 been a great increase of the number of producer/handlers in
24 the market. Do you recall that?

25 A. Yes. Yes.

1 Q. And is the concern, in fact, the fact that the
2 number of multi-thousand cow herds have arisen in the past
3 five years to the extent of accounting for 15 percent of
4 total class -- of total milk production of the country?

5 A. That is correct. I think one of Mr. Miltner's
6 concern -- questions was about that, or perhaps Mr. Yale,
7 of the growth of large sized herds and what size they were,
8 and certainly the potential for both additional interest
9 and the ability to carry out those interests is a concern.

10 Q. As a matter of fact, you recall that the notion
11 of keeping options open was a concern of Mr. Marsh during
12 his testimony, that is, a certain client of Mr. Yale's
13 wanted to keep his options open.

14 A. Yes, I remember that --

15 Q. And is the fact of that option being open the
16 reason why we're here?

17 MR. UNIDENTIFIED: Objection, Your Honor, --

18 THE COURT: Yea, let him answer that one. That's
19 not a real -- that's not a legitimate question. We're here
20 because some -- his people filed petitions and --

21 MR. UNIDENTIFIED: Yeah.

22 THE COURT: Yeah.

23 MR. UNIDENTIFIED: But the question was -- Mr.
24 Berde's question was, wasn't that one of the base -- one of
25 the reasons the petitions --

1 THE COURT: He said, wasn't that the reason he's
2 -- he asked whether something that someone testified to was
3 the reason that we were here.

4 MR. UNIDENTIFIED: Which is a question of whether
5 that wasn't why the proposals were filed.

6 THE COURT: I don't know that we know, you know,
7 why. It's just not a question that's worth having an
8 answer to.

9 So why don't you continue? Move on.

10 MR. BERDE: One minute.

11 THE COURT: Sure.

12 (Pause)

13 BY MR. BERDE:

14 Q. You were also asked the question of whether a
15 producer/handler purchases his milk from his own herd. Do
16 you --

17 A. Yes.

18 Q. -- recall that?

19 A. Yes.

20 Q. And isn't it a fact that a producer/handler who
21 acquires milk as a bay-lee (phon.) for example, not
22 purchases it at all, but just happens to receive milk from
23 a source other than his own farm production --

24 A. Okay.

25 Q. -- for whatever reason, would be disqualified as

1 a producer/handler?

2 MR. UNIDENTIFIED: Objection, Your Honor.

3 THE COURT: Let him answer it, if he knows the
4 answer to the question.

5 THE WITNESS: I think the regulations require, if
6 you get milk greater than a certain quantity, you lose your
7 exemption. That's one of the subsections.

8 MR. BERDE: I think that's all I have. Thank
9 you.

10 THE COURT: Okay. Mr. Beshore, did you have some
11 follow-up?

12 BY MR. BESHORE:

13 Q. Mr. Hollon, I want to just clarify perhaps a
14 couple of factual questions with respect to DFA operations,
15 which Mr. Ricciardi asked you about.

16 MS. DESKINS: Judge, I hate to interrupt. I
17 think you need to identify yourself for the record.

18 MR. BESHORE: I'm sorry. Marvin Beshore. Thank
19 you.

20 BY MR. BESHORE:

21 Q. DMS, Dairy Marketing Services, LLC, is a joint
22 venture between Dairy Farmers of America and I think you
23 just said Dairy Lee (phon.).

24 A. Yes.

25 Q. Okay. That's -- you're talking about Dairy Lee

1 Cooperative, Inc., --

2 A. Yes.

3 Q. -- which is headquartered in Syracuse, correct?

4 A. That's correct.

5 Q. Okay. I don't think Dairy Lee's been identified
6 before.

7 A. Okay.

8 Q. We should make that clear.

9 Secondly, you used the number 12 at one point
10 when being asked about servicing Cosco or Wal-Mart, I
11 think, and with respect to joint ventures --

12 A. Attempting to quantify the number of joint
13 ventures that DFA had with fluid bottling -- with -- that
14 involved the business of fluid bottling operations, and I
15 said about 12 because that's how many I think there are.

16 Q. Okay. So the number 12 was the number of joint
17 -- DFA joint ventures relating to --

18 A. Yes.

19 Q. -- fluid milk processing plants?

20 A. Yes, it could be 11, it could be 13, but we have
21 about a dozen of them.

22 Q. Okay. And it -- 12 had nothing to do with the
23 number of agreements with supermarket chains or wholesale
24 clubs or anything of that sort?

25 A. That is correct. I thought I had communicated

1 that.

2 Q. I just want to make sure that's --

3 A. I understand.

4 Q. -- clear because there was some --

5 A. Several questions --

6 Q. I thought there might have been some confusion
7 with that colloquy.

8 Okay. You were also asked, and this doesn't
9 relate to DFA now. You were also asked whether -- what
10 would be the result of -- if your proposal was adopted and
11 a producer/handler became -- had more than three million
12 pounds per month of class one sales?

13 A. Correct.

14 Q. Okay. And I think this is either -- probably Mr.
15 Yale, said they'd have to then pay some amount into the
16 pool, correct?

17 A. Yes.

18 Q. Okay. Would they not also be entitled to draw
19 from the pool the blend price on any milk that they had
20 which was not a class one --

21 A. Yes.

22 Q. -- usage?

23 A. That would be true.

24 Q. Okay. So that in essence, becoming regulated
25 means equalizing with all other producers and handlers in

1 the order?

2 A. Correct.

3 Q. Equalizing minimum class prices for raw milk with
4 all the -- all other handlers in the order, correct?

5 A. Yes.

6 Q. And being on an equal basis for minimum blend
7 price on all your milk is --

8 A. That is correct --

9 Q. -- other producers in the order?

10 A. Yes.

11 Q. Okay. And that dynamic, I think, is what you
12 referred to with respect to Braums, Mr. -- the witness for
13 Braums who said that at times it was advantageous for them
14 to become pooled, even if they are a producer/handler.

15 A. Yes.

16 Q. Because they draw money from the pool?

17 A. Yes.

18 Q. -- if the pool utilization was --

19 A. That was his testimony.

20 Q. -- was higher.

21 (Someone sneezes)

22 THE WITNESS: Bless you.

23 (Second sneeze)

24 THE WITNESS: Bless you.

25 MR. UNIDENTIFIED: Thank you.

1 BY MR. BESHORE:

2 Q. Now, with respect to a question from Ms. Deskins,
3 and maybe Mr. Rower also, regarding your elimination on
4 page 23, or the strike-out on page 23 of Exhibit 32, of the
5 language under the sole and exclusive ownership of the
6 producer/handler. Is -- did you not explain that on page
7 24 in the second bolded sentence at the top where you said,
8 "We have deleted the references to ownership control solely
9 risk and enterprise since we consider that language an
10 intent covering Section A."

11 A. Yes.

12 Q. Okay. And the elimination of the ownership
13 language was, in fact, intended to be permissive, if you
14 will, toward producer/handlers in that it would allow
15 qualification if they did not hold legal title to assets,
16 but, in fact, had sole risk in enterprise with respect to
17 those assets?

18 A. That's what I tried to explain.

19 Q. Okay. And, indeed, where ownership is crossed
20 out in your language at more than one point, sole risk is
21 inserted to be the determining factor?

22 A. Correct.

23 Q. Now, if there -- you've indicated that you would
24 think about the question of whether any additional language
25 would need -- might be needed to be provided or clarified

1 with respect to the market administrator's role in the
2 process.

3 A. Uh-huh.

4 MR. BESHORE: Okay. Your Honor, we would like to
5 reserve the possibility of recalling Mr. Hollon later if
6 when he has the opportunity to ponder, as he requested,
7 that issue of language that the Department's counsel
8 addressed.

9 THE COURT: Sure.

10 MR. BESHORE: And with that, I have no further
11 questions.

12 THE COURT: Okay. (Indiscernible) few more
13 questions on this side, then I'm going to turn it over --
14 just sort of go (indiscernible) any more questions from the
15 proponent side?

16 Okay. Go ahead.

17 MR. BERDE: Well, my only --

18 MR. UNIDENTIFIED: One question.

19 THE COURT: Oh, sorry.

20 MR. BERDE: Again, Sydney Berde.

21 BY MR. BERDE:

22 Q. During the course of Mr. Yale's cross-
23 examination, he asked you whether a producer/handler was
24 more regulated or regulated to some extent greater than is
25 apparently indicated by our proposal.

1 A. I recall that line.

2 Q. Do you recall that?

3 A. Yes, I do.

4 Q. And isn't it fact that a handler is not regulated
5 in his capacity as a handler with respect to classified
6 pricing or obligations to the pool?

7 MR. UNIDENTIFIED: Objection, Your Honor.

8 THE COURT: I'll let him answer if he knows the
9 answer. It's --

10 THE WITNESS: I'm not --

11 THE COURT: -- regulations say what the
12 regulations say anyway, so I'll let him give
13 (indiscernible)

14 BY MR. BERDE:

15 Q. Isn't it a fact that with respect to the reasons
16 why we're here, a producer/handler is not regulated with
17 respect to the classified pricing required and obligation
18 of the pool required of all other handlers with whom he
19 competes?

20 A. That is correct.

21 MR. UNIDENTIFIED: Objection, Your Honor.

22 THE WITNESS: You know, --

23 THE COURT: I know, it's -- the regulations say
24 what the they say. I going to let him -- it's going to be
25 easier to let him answer it than to go back and forth. I'm

1 going to let him answer the question.

2 Please answer the question.

3 THE WITNESS: Yes.

4 THE COURT: Okay. Thank you. Anything else?

5 MR. BERDE: That's it.

6 THE COURT: Okay. Now, I'm going to let Mr.
7 Ricciardi go. He's standing up first.

8 MR. RICCIARDI: I'm not (indiscernible) Mr. Yale
9 can go with that, but with regard to the request that the
10 reservation of this witness being allowed to come up and
11 provide some additional testimony, my only point would be
12 that that issue has to happen prior to the time that the
13 opponents, for want of a better word, put on their
14 testimony. I want this witness to come in if he's going to
15 give any additional testimony prior to the time that
16 anybody on this side has to provide any kind of testimony
17 or (indiscernible)

18 THE COURT: And why is that? Why -- I mean, --

19 MR. RICCIARDI: I want --

20 THE COURT: It would be his --

21 MR. RICCIARDI: -- their entire issue, Judge, so
22 that we can address it.

23 THE COURT: Well, I mean, this issue of
24 interpretation just came up for the first time half an hour
25 ago, I mean.

1 MR. RICCIARDI: Well, I understand that, Judge,
2 but I think my point would be, you have the right to decide
3 on the order, and we would request that they be provided
4 with that -- we provided this information prior to the time
5 we start any kind of a testimony on --

6 THE COURT: Would you have that opinion by
7 tomorrow, you think, Mr. Hollon?

8 THE WITNESS: I do not know, but I disagree with
9 Mr. Ricciardi's --

10 THE COURT: Okay. I'm not asking -- I didn't ask
11 you that question. Well, you going to point to --

12 MR. ENGLISH: Yeah, Your Honor, Charles English
13 for Shamrock Foods and Dean Foods. And I'll be glad to
14 hand Mr. Ricciardi a copy of the rules. There is nothing
15 in the rules that says that you go proponents then --

16 THE COURT: I know that. He's just talking about
17 doing it as a --

18 MR. ENGLISH: Well, I mean, --

19 THE COURT: I'm just going to reserve --

20 MR. ENGLISH: He needs to put somebody on
21 afterwards --

22 THE COURT: I'm not even going to -- I'm not
23 going --

24 MR. ENGLISH: Yeah.

25 THE COURT: -- to rule on it now.

1 MR. ENGLISH: Yeah. Fine.

2 THE COURT: Okay? And we'll see what -- you
3 know, we'll see how things are --

4 MR. RICCIARDI: And I don't need the rules,
5 Judge.

6 THE COURT: Okay. We'll see how things are
7 tomorrow, how we're going.

8 Mr. Yale, do you have any questions of the
9 witness?

10 MR. YALE: Yes, some follow-up from the
11 Department's questions, Your Honor.

12 BY MR. YALE:

13 Q. I -- let's talk about this --

14 MR. UNIDENTIFIED: State whom you represent.

15 MR. YALE: Ben Yale on behalf of Smith Dairy --
16 Smith Brothers Dairy, Etteline Dairy, and Mallory's Dairy.

17 BY MR. YALE:

18 Q. Post-month audit, it turns out based on a weekend
19 sale of milk that it gets posted to the next month, and it
20 should've been posted to Sunday, the previous month, and it
21 puts them over the three million by a pound. And this is
22 discovered in an audit, which, by the way, audits can be up
23 to two years later?

24 (No verbal response)

25 MR. YALE: Okay.

1 THE COURT: You got to use words like "yes, sir."

2 THE WITNESS: Oh, I'm sorry. You're right. Yes,
3 that is correct, audits can be up to two years later.

4 BY MR. YALE:

5 Q. All right. So let's say it's a year later, and
6 the department comes in, they do their audits, and they
7 discover that for that month a year earlier that there was
8 a sale that left, you know, the plant or however that works
9 out, that looked like it could've been on Sunday, but it
10 ended up being on Monday, and it was a new year -- or new
11 month, and therefore, it created for one of these months a
12 higher sale than three million pounds.

13 So according to you, that would make that month
14 -- they would be ineligible for being producer/handler?

15 A. Correct.

16 Q. And they'd have to settle with the pool for that
17 volume of milk based on their class utilization, right?

18 A. Correct. Yes, sir.

19 Q. All right. Now, what about all the subsequent
20 months up to the audit?

21 A. The same, general procedure that would follow any
22 other audit. If there's a, you know, a ripple affect, you
23 know, it would ripple right on through.

24 I've been -- just to give you an example, it's
25 not unusual at all for a producer to not touch base in an

1 appropriate month. Maybe in spite of everybody's best
2 intentions, that producer didn't get pooled properly, and
3 that's not discovered until a year later. You know, the
4 market administrator goes through his duties, goes through
5 his audit procedures, comes back and says, not only in
6 month one was that producer not pooled, but in month two,
7 three, four, five, six, you collected funds from the pool
8 for that producer. Pay them back.

9 Q. So it's your position that if in month one he --
10 they were under three million, month 2, they're over by one
11 pound, and 3, 4, 5, 6, 7, 8, 9, 10, and 11, they're under
12 three million, and then on the 13th month, they do an audit
13 and find out that month 2, they're off, that all of 3, 4,
14 5, 6, 7, and 8, 9, 10, 11, they've got to pay into the pool
15 until they are qualified again; is that correct?

16 A. Correct. No different than any other audit
17 procedure.

18 Q. Now, somebody brought up the issue of partially
19 regulated handlers. Is that the case for a partially
20 regulated handler?

21 A. Yes.

22 Q. That once that they are off one month, then
23 they're off all the rest of the months?

24 A. If whatever that requirement was in month one had
25 corollary, you know, incidents in month two through month

1 last, then yes.

2 Q. But it doesn't on producer -- on partially
3 regulated clients?

4 A. I'm sorry.

5 Q. Partially regulated clients it's a month-to-month
6 determination, right?

7 A. Okay. Then the same case would apply. You know,
8 in the examples that I gave, that example, the producer
9 didn't touch base in this particular month, and then in --
10 perhaps there was only one month touch base. But if there
11 was an every month touch base, in month one, they didn't,
12 month two, they did. Then in month two, they would be
13 qualified again.

14 Q. I want to talk about this ownership issue that
15 was raised, and I --

16 A. Okay.

17 Q. -- just want to ask this kind of hypothetical to
18 see where we're at on this.

19 A. Okay.

20 Q. Dairy -- an individual dairy farmer has the dairy
21 farm, and let's say it's two and a half million pounds, and
22 he sells that, and decided -- he bills them, has --
23 operates another dairy farm some place else. And the
24 buyer, who's some kind of land contractor or whatever,
25 desires to be a PD. Is the ownership broken between the

1 first producer, or is that still part of the issue?

2 A. I'm -- I do not know.

3 Q. What about a dairy farmer sells cows to a
4 producer/handler, and the producer/handler has not yet paid
5 for the cows. Does that interfere, does that deprive the
6 producer/handler of being a producer/handler? And the
7 terms of the sale are, you pay me next month.

8 A. Again, you'd have to work your way through some
9 of the various pieces and try to determine, you know, did
10 those cows get into the milk supply, yes or no, you know?
11 Did they take possession? Did they milk them? You know,
12 did they move from farm to farm? You know, some of those
13 are going to have to be determined, you know, using some
14 degree of, you know, decision-making, some degree of
15 discretion.

16 I don't know that I can answer every possible
17 hypothetical that would come out.

18 Q. But isn't fundamentally the approach is, is if
19 you're going to be antagonistic towards producer/handlers,
20 you take one view, and if you're going to be more
21 permissive, you take another; isn't that really the
22 dividing line?

23 A. Well, I, you know, hopefully you would try to
24 make as fair a decision as you can possibly make. And, you
25 know, and the intent, you know, is that, if you want the

1 benefit that comes, then you try to -- you justify all of
2 the requirements that they are, and justify those to the
3 market administrator.

4 Q. A question, again, going back to this three
5 million and, you know, the timing and the issue. Let's say
6 the secretary adopts your proposal. Is there any
7 transition period to allow the producer/handlers to make
8 the adjustments necessary?

9 A. That's a good question, and I have to note we did
10 not discuss that amongst ourselves. So I don't have a, you
11 know, a collective opinion. I guess I would have to say
12 that some transition time would not be totally
13 unreasonable.

14 I can't -- you know, I can't speak for the other
15 proponents on that. That would only be, you know, my
16 opinion representing DFA.

17 Q. Now, there was a question brought about this
18 transfer costs and the idea of a single entity and the
19 purchase and all that other, right?

20 A. Yes, Mr. Rower asked that question.

21 Q. So if the sale and the amount of purchase takes
22 place between the retailer and the producer, does that make
23 the retailer a handler?

24 A. I'm sorry, I'm not following your line of
25 question.

1 Q. As a producer/handler a sale, you know, is with
2 the retailer, you know, Harry's Grocery. Okay?

3 A. Okay. Harry's Grocery buys milk from
4 producer/handler X --

5 Q. From the producer/handler, does that make then
6 the grocery then the handler, because that's the moment of
7 the purchase?

8 A. I don't have an opinion.

9 Q. Does that take you, in a situation where the
10 Department begins to regulate the retailer as a retailer as
11 opposed to a handler?

12 A. I don't think that the department can regulate
13 under federal orders the retailer.

14 Q. In a follow-up on that same point is, is that if
15 evidence -- we've had none of the buyers of milk come in?
16 I'm talking about the stores haven't come in and said, hey,
17 I've got -- you know, the producer/handler came in on
18 Friday, and he sold it to me at this price, and the
19 regulated handler came in on Monday, and he sold it in this
20 price, and they were so much lower, I'm going with the
21 producer/handler. We don't have any of that testimony,
22 right?

23 A. Well, now, we did have Mr. Hitchell was a
24 witness, --

25 Q. But --

1 A. -- and so he testified --

2 Q. But he doesn't buy milk as a retailer from
3 processors. He doesn't buy any milk from a
4 producer/handler, does he?

5 A. I don't think that he does, but I think his
6 testimony was based on the competition that he faces in the
7 marketplace.

8 Q. Competition, but I'm just saying, we don't have
9 -- you talked about Cosco.

10 A. Uh-huh.

11 Q. We don't have Cosco. They haven't testified,
12 right?

13 A. No, Cosco has not testified.

14 Q. And Wal-Mart hasn't testified?

15 A. Wal-Mart has not testified.

16 Q. And Albertson's hasn't testified?

17 A. No, sir, they have not.

18 Q. All right. Now, if it were to be that the
19 testimony, or that there was evidence that showed that the
20 producer/handlers that were selling to those plants, were
21 selling it at prices that were consistent with minimum
22 class one prices and reasonable processing fees, doesn't
23 that undermine your whole premise that it's disruptive of
24 the market?

25 A. If there were evidence that showed that, we'd

1 certainly have to consider that.

2 MR. YALE: With that, Your Honor, I'm done.

3 THE COURT: Okay. Anyone else?

4 Are you getting up to ask questions, Mr.
5 Ricciardi, or are you just moving around in your seat over
6 there? I can't quite tell.

7 MR. RICCIARDI: Well, you know, Judge, I couldn't
8 make up my mind, but you know what, I'm going to sit in my
9 seat and not ask --

10 THE COURT: Okay. In that case -- did you have
11 any more questions over there?

12 You may step down.

13 THE WITNESS: Thank you.

14 THE COURT: And let me -- before we move on, I
15 just want to check with -- is Mr. Van Treek here?

16 (No response)

17 THE COURT: I guess he won't be testifying till
18 tomorrow morning then anyway, given the opportunity.

19 Are you going to call Dr. Smith next, and I -- do
20 you want to take a five minute break before we do that just
21 to --

22 MR. UNIDENTIFIED: I think we should take a five
23 minute break, and I -- and Dr. Smith is here prepared to
24 testify. I'd like to -- if we started him, I'd like to get
25 done with him --

1 THE COURT: That's fine by me. When we come
2 back, I was going to discuss a few things about the
3 calendar over the next couple of days.

4 Let's take a five minute break.

5 (Off the record and reconvened.)

6 THE COURT: Okay. We're back on the record.

7 You can have a seat, and let me swear you in.
8 Please raise your right hand.

9 TERRY SMITH

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

12 THE COURT: Okay. And if you could please state
13 your name and spell it.

14 THE WITNESS: Terry, T-e-r-r-y, middle initial,
15 R, last name Smith, S-m-i-t-h.

16 MR. UNIDENTIFIED: Your Honor, before I ask Mr.
17 Smith any questions, I'd like to --

18 THE COURT: I need you to identify -- I know --

19 MR. BESHORE: Marvin Beshore.

20 THE COURT: (Indiscernible) by now, but --

21 MR. BESHORE: I'm sorry.

22 THE COURT: Okay. You can proceed.

23 MR. BESHORE: Marvin Beshore. I'd like to ask
24 that Dr. Smith's statement, seven pages with his C.V. as
25 the eighth, be marked for identification as the next

1 consecutive exhibit number.

2 THE COURT: Okay. I believe that would be 34.
3 Correct me if I'm wrong.

4 MR. BESHORE: I think so. Thank you.

5 THE COURT: Marking this as Exhibit 34.
6 (Exhibit No. 34 was marked.)

7 BY MR. BESHORE:

8 Q. Dr. Smith, would you give us your address and --
9 for the record, please, your business address?

10 A. Yes, 2801 International Lane, Suite 210, company
11 name is Dairy Strategies, LLC, based in Madison, Wisconsin
12 53704-3152.

13 Q. Okay. Now, Dr. Smith, would you -- you've
14 attached your curriculum vitae to Exhibit 34. Would you
15 briefly review your profession -- your education and
16 professional experience?

17 A. My -- I grew up in the state of New York. I went
18 to Cornell University, a bachelors degree in animal science
19 and agricultural economics, a masters degree at the
20 University of Maine, and emphasis in dairy manure
21 management, animal nutrition, computer science and
22 economics, and my Ph.D. is from Michigan State University
23 in dairy science and agricultural economics. I met the
24 requirements for a Ph.D. in both those departments of dairy
25 science and agricultural economics. My Ph.D. is in dairy

1 farm management.

2 Q. And could you --

3 A. Background?

4 Q. -- tell us about your professional background --

5 A. I've held -- well, immediately following, or
6 actually during my graduate program in Michigan State
7 University, I managed the university dairy farm with 45
8 employees, mostly students. And following that and the
9 completion of my degree, I took a position in the
10 Department of Dairy Science at Ohio State -- the Ohio State
11 University, excuse me, in the Department of Dairy Science
12 and also held a joint appointment in the Department of
13 Agricultural Economics at Ohio State.

14 Following Ohio State, I joined the faculty at
15 Cornell University in Ithica, New York where I had an
16 research extension in teaching appointment focused on dairy
17 farm management system, similar to what I did at the Ohio
18 State University. And following that, I was -- became the
19 first director of the University of Wisconsin Center for
20 Dairy Profitability, which is a multi-campus center,
21 includes the University of Wisconsin-Madison, University of
22 Wisconsin-Platteville/River Falls, and University of
23 Wisconsin Extension. Coordinated the center as well as
24 holding a full professorship in the Department of Dairy
25 Science at the University of Wisconsin, and I own the

1 visiting professor at the University of Wisconsin. I just
2 don't visit as often as I used to when I got paid there.

3 I took a sabbatical leave with AgriBank, a farm
4 credit bank, which is the wholesale bank for the middle
5 part of the U.S. and one of the -- one of my tasks as part
6 of that sabbatical leave was to develop business plans for
7 financially related service companies by commodity, and one
8 that I know something about is the dairy industry.

9 That resulted in the formation of Dairy
10 Strategies, and I formed that company in 1997, and today
11 have 15 staff domestically. 80 percent of our business is
12 in the U.S. We have clients in about 25 states in the U.S.
13 with offices in Wisconsin, California, Texas, and
14 Minnesota. And then we have international consulting
15 associates in Argentina, Australia, Brazil, China and New
16 Zealand.

17 Q. Have you testified, Dr. Smith, as an expert
18 witness in courts and other tribunals in the United States
19 and in other countries around the world?

20 A. Yes, I have, both in the U.S. and most recently
21 in the High Court of New Zealand.

22 MR. BESHORE: Okay. At this time, Your Honor, I
23 do offer Dr. Smith as an expert witness in dairy science,
24 agricultural economics, with an emphasis in dairy science
25 production economics and farm management, so that he may

1 present his opinions in those areas to the secretary.

2 THE COURT: Okay. That's fine. He's an expert;
3 he's qualified.

4 MR. BESHORE: Thank you.

5 BY MR. BESHORE:

6 Q. Dr. Smith, have you been retained by Dairy
7 Farmers of America to present testimony in this proceeding,
8 and have you prepared a statement?

9 A. Yes, I have been retained by Dairy Farmers of
10 America, and I've prepared a statement that I believe has
11 been distributed.

12 Q. It has. Would you proceed with it, please?

13 A. Yes. "I am Terry R. Smith, the Ph.D., and have
14 attached my brief curriculum vitae. I'm president and CEO
15 of Dairy Strategies, LLC, a dairy business consulting firm
16 based in Madison, Wisconsin, with offices in California,
17 Minnesota, Texas, and Wisconsin.

18 "Dairy Strategies, LLC has clients in over 25
19 states in the U.S. and seven foreign countries. Our
20 clients are dairy producers and dairy related agri-
21 businesses. In the context of this matter, our clients
22 include dairy farm businesses that range in size from 40
23 cows to over 10,000 cows.

24 "I have been engaged by Dairy Farmers of America
25 to provide my dairy business management and economics

1 expertise to the issues relevant to this hearing.

2 "Dairy industry overview, challenges and
3 opportunities. Long-run returns, excluding appreciation
4 and agriculture have been quite low over time, and
5 therefore it has often been difficult for many producers to
6 justify making the necessary capital investments needed to
7 take advantage of new technology and improved production
8 and management systems.

9 "Capital investments in the dairy sector have
10 typically resulted in low returns, two to four percent
11 return on assets are away, due in great part to the over-
12 investment in machinery, buildings, equipment, and land.

13 "The challenge for the future as margins continue
14 to tighten is to focus on the operational systems that
15 produce cost-effective levels of milk output while
16 employing assets that provide the greatest returns and
17 reduce investments in the lower return assets. In many
18 situations, this may mean increasing the level of
19 specialization within the dairy farm business and having
20 other businesses provide inputs and services, for example,
21 feed, heifers, contract veterinary services, contract
22 manure hauling, et cetera, to the business.

23 "Profitable dairy farm businesses can be
24 characterized by high production efficiencies, reasonable
25 income levels, and excellent cost control. A business'

1 expectations of the possible future gains from an
2 investment or change in management practices or technology
3 must be based in part on past performance and in part, on
4 forecasts of expected future performance.

5 "The dairy profit equation is quite simple;
6 profit equals price, minus costs, times volume. Therefore,
7 there are three ways to increase profitability. One,
8 increase the price. Two, decrease costs. Three, increase
9 volume. These are the dairy manager's three primary
10 control factors for maintaining or increasing profits.
11 Management is challenged to find the best balance among
12 these three factors. A change in the cost, volume, or
13 price will likely affect both -- one or both of the other
14 two factors.

15 "The best a business can do is to make some
16 estimate of the range of possible future costs and expected
17 returns, and the relative chances of earning a high or low
18 profit on the particular investment or investments. The
19 producer/handler faces this complex of operational
20 investment decisions as they position their businesses for
21 the future, the same as does any business.

22 "Characteristics of U.S. dairy operations
23 operating in total cost. The following figures, which have
24 been referred to previously, from a recent USDA ERS
25 publication, McElroy, et al, 2002, Agricultural Income and

1 Finance Outlook, USDA Economic Research Service, Bulletin
2 AIS-79, September 26, 2002, depict the average estimated
3 operating and full cost of production by size of business.

4 These average costs and relationships reinforce the well-
5 known economies of size characteristic of the U.S. dairy
6 farming sector."

7 And the following tables, or figures demonstrate,
8 or are taken directly from AIS-79, small dairy operations
9 less than 50 cows, medium dairy operations with 50 to 199
10 cows, large dairy operations with 200 to 499 cows, and then
11 what they characterize as industrial scale dairy operations
12 of 500 cows or more. And depicted in the graphs are from
13 the arm (phon.) survey -- the year 2000 dairy arm survey,
14 the percent of operations and the corresponding operating
15 costs, and operating and ownership costs are what I've
16 referred to as total economic costs.

17 "The well-managed, smaller sized operations can
18 be very cost effective with larger sized dairies in
19 relationship to operating costs or operating efficiencies
20 as depicted in the four figures above, figures 24 through
21 27 from McElroy, et al 2002. Note in particular that the
22 percent of farms with operating costs below, say, ten
23 percent, that's \$10 per hundredweight are reasonably
24 similar across herd size ranges.

25 "However, the advantage is typically reduced when

1 ownership costs and other fixed costs are added to arrive
2 at total economic costs of production. Operating and
3 ownership costs, see figures above. Therefore, the short
4 run survivability of many dairy farm businesses is
5 achievable while not being concerned with capital
6 replacement costs, which, of course, are real costs, and
7 must also be accounted for when planning for the longer
8 term viability and sustainability of the business.

9 "In the short run, a focus on improving
10 operational efficiencies, for example, using operating
11 expense ratio as a measure of operating efficiency, will
12 help improve operating profits. However, a dairy business
13 with high capital investments per cow or pound of milk
14 produced will negatively impact the ability of the business
15 to grow, which is characteristic of many average sized
16 dairy operations in the U.S. Many dairy farm businesses
17 are over capitalized and/or have invested in lower return
18 assets that dramatically impact the ability of the business
19 to produce competitive returns.

20 "Taking a critical look at both the operating
21 efficiency and capital efficiency of any business are
22 important to the future success and sustainability of the
23 business. Businesses return on -- business with returns --
24 return on assets are away greater than the average cost of
25 capital, have the opportunity to use leverage debt capital

1 effectively to enhance the opportunity for the business to
2 grow, which is a characteristic challenge for many average
3 sized dairy businesses across the U.S.

4 "Challenges and opportunities facing
5 producer/handlers. The median sized producer/handler sells
6 approximately 100,000 pounds of milk per month, as you've
7 heard in previous testimony. This approximates a 50 to 70
8 cow herd with average, annual milk sold per cow of 17,000
9 to 20,000 pounds per cow. The table below depicts some
10 realistic yet hypothetical size ranges, levels of output,
11 and projected return -- returns."

12 And what I've -- I'm depicting in Table One that
13 I've titled "Hypothetical Producer/Handler Examples By
14 Size," are again, arbitrary but somewhat representative of
15 the diversity, and certainly the diversity of clients that
16 we deal with in our business, of a more typical the average
17 herd size, depending on whose numbers you look at or use in
18 the U.S. is something -- somewhere around 73 cows, I
19 believe.

20 So typical being somewhat near the average, mid-
21 sized dairy operation. I've suggested at 900 cows and then
22 larger operations, and for those that think in terms of
23 milk sold per month, at 20,000 pounds of milk sold per cow,
24 that would be 1.5 million per month. And then an 1,800 cow
25 herd would be selling about three million pounds, which is

1 similar to the -- well, is the number that we've been
2 talking about in the context of this proposed new
3 regulation.

4 "Across these" -- and what I've also done is just
5 to characterize profit per pound of milk sold, capturing
6 some of the economies of size associated with the larger
7 units, particularly attributable to improvements in capital
8 efficiency.

9 "Across these hypothetical size ranges, 90 to
10 1,800 cows, the structure and organization of these
11 businesses is typically quite different. The typical 90
12 cow dairy operation will have a work force of two to three
13 full-time equivalents, comprised of the owner and family
14 members providing all labor and management to the business.

15 In contrast, the typical 1,800 cow dairy operation will
16 have a work force of 15 to 20 full-time equivalents,
17 comprised of one or two full-time herd managers, the dairy
18 operations manager and/or general manager, outsider feed
19 manager and a parlor manager.

20 "The ability of these businesses to specialize in
21 specific areas of responsibility is quite different. The
22 larger business, in addition to being able to capture the
23 economies of size, will typically also achieve greater
24 levels of specialization, due in great part to the depth of
25 management. The smaller sized dairy businesses will

1 typically be more diversified operations, often raising
2 their own forages, raising their own replacement heifers,
3 and in the case of a producer/handler, also processing and
4 distributing finished dairy producers, thereby spreading
5 their management thin across the respective cost and profit
6 centers under their control.

7 "More and more of the larger dairy operations are
8 specialized milking operation, and are typically have their
9 replacement heifers custom raised, or sell heifer calves
10 and buy springing (phon.) replacements as needed.

11 "If and when there are seasonal milk production
12 needs that are somewhat predictable within their annual
13 marketing plan, there is obviously a greater opportunity to
14 adjust herd inventories and number of cows milked by
15 managing within herd milk production levels and herd
16 numbers.

17 "A larger specialized dairy operation can more
18 easily decide to milk a portion of their herd three times
19 per day and the balance of their herd two times per day,
20 thereby adjusting their level of output and also managing
21 operating expenses, particularly milking labor. This level
22 of management control is also more easily applied to a
23 larger herd managing cows in large groups when utilizing a
24 technology such as BST, bovine somatotropin, as a tool to
25 manage production efficiency quite effectively.

1 "Due to the fact that the larger producer uses
2 primarily purchased feeds versus home-raised feeds or
3 pasture in many cases, the seasonality of milk production
4 is usually less -- should say 'of a management challenge,'
5 "as there is a greater ability to target the feed purchase
6 decisions to the herd and milk market needs from a planning
7 standpoint. Similarly, the ability of a larger herd where
8 cows are managed in groups, typically with groups of larger
9 size than the median producer/handler represents, has a
10 labor and production efficiency advantage over the smaller
11 herd sizes.

12 "The ability to implement feeding and management
13 strategies designed to directly impact the milk composition
14 of the overall herd or a group is certainly more feasible
15 in a larger operation. This would, of course, be a
16 potential advantage for the larger operator to effectively
17 balance the milk components to better meet their particular
18 marketing needs, particularly since the producer/handler
19 producing for a fluid market will be less concerned with
20 butter fat depression than the non-producer/handler.

21 "The larger dairy operation has the ability to
22 market tanker load quantities of milk every day, which is a
23 clear, competitive advantage from a milk marketing
24 standpoint, than the typically sized producer/handler that
25 might produce a tenth of a tanker load per day.

1 "The larger dairy operation is much -- is in a
2 much more favorable position to consider the application of
3 on-farm milk concentration technologies, reverse osmosis,
4 and ultrafiltration as another means of effectively
5 matching their milk production more closely with their
6 local market needs, while having the flexibility to move
7 concentrated milk to more distant markets in a cost-
8 effective manner.

9 "The larger, more specialized operations have a
10 much lower risk exposure in most situations to the risk
11 associated with farming or cropping operations, and are
12 typically forward contracting both forages and concentrates
13 and by-product feeds often a year in advance, thereby
14 having much more control over the variability of input
15 costs than the diversified operations, usually the smaller
16 dairies that are producing their forage and even some of
17 their grain.

18 "While any dairy business has the ability, often
19 through their milk marketing organization, to take
20 advantage of the price risk management tools available to
21 them, the larger operations with more depth of management
22 and/or with greater ability and willingness to hire
23 consultants to assist with the development and
24 implementation of a comprehensive marketing and risk
25 management program are more likely to have an input and

1 output price risk management program.

2 "The milk futures and options markets available
3 on the CME, Chicago Mercantile Exchange, while available to
4 all dairy producers to manager their milk price risk, have
5 contract sizes of 200,000 pounds, which are more compatible
6 with the larger producer than average sized producers. The
7 minimum contract size, coupled with the transactions costs
8 and management time required to manage milk price risk
9 tends to favor the larger dairy operation's ability to
10 implement them.

11 "A producer/handler, large or small, has made the
12 commitment to market their own milk and therefore has
13 positioned their business for the value ad opportunities
14 and associated risks of producing and marketing a
15 perishable product.

16 "The capital intensiveness of the dairy farming
17 business represents a challenge for all dairy producers.
18 However, the corresponding economies of size in milk
19 production are real and certainly favor the larger
20 operation -- the larger dairy operations that are in a
21 position to make the level of investment needed to capture
22 these economies while still maintaining a high level of
23 operational efficiency.

24 "The management structure of a large dairy -- of
25 larger dairy operations certainly provides a capacity for

1 these operations to leverage this more specialized
2 management expertise throughout the business from
3 operations, dairy, and processing, through to the marketing
4 of a quality, finished product. In addition to capturing
5 the economies of size at the milk production level, other
6 testimony will or has" -- it has, "demonstrated the
7 economies of size associated with the greater -- of the
8 larger processing capacities as well.

9 "The ability of producer/handlers producing and
10 marketing milk in excess of the proposed three million
11 pounds per month limit before becoming regulated should not
12 present a large economic disincentive for those
13 producer/handlers that will be affected."

14 Thank you.

15 Q. Now, Dr. Smith, I'd like to focus on -- with you
16 for a couple of questions with respect to a more than three
17 million pound per month dairy production unit that is
18 vertically integrated into milk processing and is a
19 producer/handler. What techniques are available for that
20 entity to match its components -- milk component production
21 with the needs of its fluid milk market?

22 MR. UNIDENTIFIED: Your Honor, we're going to
23 object. He has not established any expertise dealing with
24 producer/handlers. He's a farmer expert, which is a
25 wonderful thing. I'm not belittling that, but he has no

1 evidence of knowing what the swings are in
2 producer/handlers, no evidence, nothing in his curriculum
3 vitae, that he's done any processing or anything else.
4 It's out of his expertise.

5 THE COURT: Well, I'm going to let him answer it
6 and the secretary can give it weight that he -- she feels
7 is necessary, given his expertise. Although, if you want
8 to -- in answering the question, if you want to discuss --
9 (Tape changed)

10 BY MR. BESHORE:

11 Q. -- for the three million plus producer to match
12 components with the known components demands of the fluid
13 milk market?

14 A. Well, there's certainly a number of techniques,
15 and it's -- there are techniques that'll -- producers that
16 are concerned about butter fat and protein specifically,
17 and I do have expertise in this area, are fighting against
18 so that they are concerned about depressing the components.

19 In the case of a fluid marketer where the -- that
20 the butter fat requirement of the marketplace is probably
21 closer than a two percent cow, which we haven't genetically
22 bred yet, there are abilities to manage that components,
23 particularly as it relates to fat, and worrying less about
24 fat depression, and in fact, having the ability to, in many
25 cases, feed a less expensive ration because the energetics

1 of producing fat are such that it -- you don't get
2 something for nothing. The feed input's required to
3 produce fat are greater than if you're producing lower
4 levels of fat.

5 And in the context of expertise, we have clients
6 that are not classified as producer/handlers, but we have
7 clients that market their own milk. We have clients that
8 are proprietary dairy plants that are cooperative dairy
9 plants. So to suggest I have no expertise in milk
10 marketing as it relates specifically to producer/handler, I
11 think is a little bit of a stretch.

12 Q. Okay. Now, you heard Mr. Hollon's testimony
13 today, which was drawn apart from some of the statistics of
14 demand in these particular milk markets. And you know that
15 he testified drawing from the market administrators
16 exhibits, which I've been previously presented, that the
17 fat percentage demanded of the fluid milk market in Order
18 124 or Order 131 is around two percent, correct?

19 A. Yes.

20 Q. Now, is that the level of butter fat that the
21 average herd produces?

22 A. No, it wouldn't be. A --

23 Q. I'm sorry. So that it would not be. The average
24 is more like what, 3.7, 3.6?

25 A. Yeah, 3.67 I think is the market average. We

1 typically are concerned -- and again, the -- there's
2 obviously a clear difference between the producer/handler
3 who is selling that specific product of that specific
4 component level versus a typical dairy producer that's
5 getting paid for pounds of solid, pounds of fat, pounds of
6 protein, and then a quality adjustment around that. So
7 there's certainly differences there.

8 But, you know, typically we would be concerned if
9 a herd were running an average butter fat at two percent.
10 The cows would not be very healthy, and it would be
11 difficult to achieve. Not that it doesn't happen, but as I
12 said, we haven't bred that cow yet.

13 There certainly are cows in the, or sires in the
14 genetic pool that are well-known to cause reduced butter
15 fat output, and strategically there would certainly be an
16 advantage. They tend not to be the most expensive bulls,
17 to be an advantage to utilize those low-testing bulls in a
18 breeding program for a producer/handler that's looking for
19 that lower fat percentage.

20 Q. So if I understand you, Dr. Smith, as a dairy
21 farmer, if your market is a fluid market that demands low
22 butter fat tests, you can actually -- and you're a
23 producer/handler producing your own milk input for your
24 processing plant, you can manage your production so that
25 it's a lower fat level, and therefore you have less excess

1 butter fat coming out of your production system?

2 A. Yes, with -- the caveat would be within reason,
3 and I think within reason would be, we're talking about a
4 herd that might be testing in the 2.9 to 3.1 to 3.2 percent
5 butter fat versus the 3.5 or .6 more typically expected.

6 Q. And therefore, if your herd's at 2.9 or 3.0,
7 you've got -- and you've managed it with cheaper feed
8 inputs actually, you've managed it to be 2.9 or 3.0 rather
9 than 3.5 or 3.6, you have less surplus butter fat to be
10 sold in possibly a distressed marketing circumstance?

11 A. Yes.

12 Q. Correct?

13 A. Yes.

14 Q. Okay. Are there ways that a larger farm
15 producing more than with -- how many cows do you have to
16 produce roughly three million a month, 1,800 --

17 A. -- 1,800 I showed --

18 Q. Okay.

19 A. -- at 20,000 pounds a month sold per cow.

20 Q. Okay. If you've got -- if you're milking 1,800
21 or more cows, are there ways that, in the short and long
22 run, you can tailor the production to the demands of your
23 end product market if you're a producer/handler, to the
24 volume you need for your fluid production?

25 A. Well, I certainly think you can, again, within

1 reason, within reason, but I truly believe that every dairy
2 farmer is challenged with taking more control of their
3 marketing. And so I don't think that -- I don't think the
4 marketing of milk is unique to the producer/handler. The
5 challenges -- as I suggest, there's risk management tools
6 available to all dairy producers and processors and
7 marketer to take advantage of managing some of that
8 volatility and price risk that's so characteristic of the
9 marketplace today.

10 Q. Now, if -- in terms of just milk production
11 volume, what tools are available nutritionally or in terms
12 of management technics to tailor that production to your
13 end market demands?

14 A. Production in terms of output per cow or per --

15 Q. Just --

16 A. Output per cow?

17 Q. Total aggregate volume in your operation.

18 A. Well, probably one of the most basic
19 opportunities is to feed a total mixed ration, which is a
20 little more difficult than our typical 70 or 80 cow
21 stall/barn operation than it is in an 1,800 cow dairy. The
22 ability to use lower cost commodities and by-product feeds
23 in a total mixed ration, the -- every bite the cow takes is
24 balanced usually by a professional nutritionist. So the
25 ability to manage production by group and across the herd

1 is certainly more feasible in a larger operation -- 1,800
2 cow dairy that's not using a total mixed ration, I'm not
3 sure I could find one.

4 That coupled with technologies like bovine
5 somatotropin, as I suggested before, a typical response is
6 eight or nine pounds of milk increase in milk output on
7 average across a herd following the label recommendations
8 --

9 Q. Per cow per day?

10 A. Per cow per day. We're well-known, the expected
11 increase in production in the 13 to 15 percent range, going
12 from 2X milking to 3X milking. Probably expect another ten
13 percent increase to go to 4X milking. There's a few 4X
14 milking herds in the U.S.

15 Q. Well, can you just explain what you mean for the
16 record by 2X, 3X, 4X milking?

17 A. Okay. I'm sorry. 2X milking would be the most
18 prominent frequency of milking cows over the course of the
19 day.

20 THE COURT: By 2X, you mean two times a day?

21 THE WITNESS: Two times a day, you know,
22 typically 12 hours apart, and a 3X herd would be milking
23 every eight hours, and to be perfectly honest, the labor
24 issues of milking three times a day or four times a day are
25 real on a -- particularly on a single, or even a two-family

1 operation.

2 We often see a trend when milk prices are down in
3 the basement, a typical response because producer knows
4 that they'll get a response will be to go to 3X milking.
5 The usual challenge is who's going to get the midnight
6 shift, and it represents a labor challenge for a typical
7 average sized dairy in the U.S. And then, of course, four
8 time a day milking would be every six hours.

9 Another option is to -- that has been pitted as
10 an opportunity for average sized operations is by using
11 robotics, and a typical robotic milker, which actually goes
12 in -- the cow walks into a stall, the -- there's a picture
13 of the cow electronically in the computer. The milking
14 machine comes up and attaches itself all robotically, just
15 same kind of robots that paint cars, and there doesn't need
16 to be an operator there.

17 It's a capital efficiency issue, a trade-off
18 between labor and capital because they cost about \$150,000
19 a stall, but they do provide an opportunity to reduce labor
20 costs and improve milking efficiency. A typical cow in a
21 robot installation will be milked three and a half or four
22 times a day.

23 BY MR. BESHORE:

24 Q. Are those -- would those technics allow the large
25 farm operator, in your opinion, to closely tailor the

1 output of their production unit to the demands of their own
2 fluid milk market?

3 A. Oh, I think absolutely. I mean, there's -- we
4 have clients that are matching their production on a
5 regular basis to what they feel is the most profitable mix
6 of resources. So there's no question about it. The
7 ability to milk a group of cows, the more efficient cows
8 three times a day, as I mentioned as an example, and the
9 rest of the herd two times a day is a fairly common
10 practice. Again, it has some logistics issues that -- and
11 practical issues of how to implement it, but it's certainly
12 done and done quite successfully.

13 It's -- just as an example, if you talk to the
14 folks in Canada who are under, of course, a supply
15 management system, these technics are used quite commonly
16 to comply with their quota requirements because the over-
17 quota price is well below the operating costs of
18 production.

19 Q. Okay. So that if a producer/handler in any of
20 these markets was experiencing distressed returns for their
21 milk, such as the over-quota prices in Canada, they could
22 manage their output to avoid that loss?

23 A. They have that ability, as does any dairy
24 producer.

25 MR. BESHORE: May I have just a second?

1 (Pause)

2 MR. BESHORE: I have no further questions for Dr.
3 Smith on direct. I would ask that Exhibit 34 be received
4 into the record, Your Honor.

5 THE COURT: Any objection to that exhibit?

6 MR. UNIDENTIFIED: What was the request that --

7 THE COURT: Exhibit 34 be admitted into evidence.

8 MR. UNIDENTIFIED: (Indiscernible)

9 THE COURT: His statement -- his testimony
10 coupled with --

11 MR. UNIDENTIFIED: -- objections, Your Honor,
12 because there's some inaccuracies (indiscernible)

13 THE COURT: Well, you can bring it out. I still
14 -- I don't think it's going to make it any less admissible,
15 just --

16 MR. UNIDENTIFIED: (Indiscernible)

17 THE COURT: -- goes to the weight. So I'm going
18 to admit it.

19 (Exhibit No. 34 was received.)

20 THE COURT: (Indiscernible) examine next?

21 MR. YALE: (Indiscernible)

22 THE COURT: You're all done, right, Mr. Beshore?

23 MR. BESHORE: Yes.

24 THE COURT: Okay.

25 MR. YALE: I'm ready.

1 THE COURT: Okay. Then go ahead, Mr. Yale.

2 MR. YALE: Thank you.

3 BY MR. YALE:

4 Q. Benjamin F. Yale on behalf of Smith Brothers
5 Farmers, Etteline Dairy, and Mallory's Dairy.

6 Mr. -- Dr. Smith, let me ask this question. Are
7 you here testifying in favor of limiting the size of a
8 producer/handler exemption under the Federal Orders?

9 A. No.

10 Q. What are you here for?

11 A. I'm here to provide my expertise on the issues at
12 hand here. I'm -- I've been retained by Dairy Farmers of
13 America, but when you say limit the size, I -- you know,
14 you're talking about something that I don't think this
15 proposed change has really anything to do with.

16 Q. You --

17 A. You're putting -- if you're suggesting -- I'm not
18 going to agree with something that --

19 Q. All right. Well, let me ask this question then.

20 Do you understand that a producer/handler of -- that
21 exceed three million pounds per month under the proposal
22 will cease to be a producer/handler under the order?

23 A. Yes, I understand that as its proposed --

24 Q. And beginning at 3,000,001 pound will have to pay
25 the difference between the blend and the class one price

1 into the Federal Order?

2 A. Well, making that assumption as a certainty, I
3 wouldn't agree with.

4 Q. Well, what do you understand the impact of
5 regulating a producer/handler over --

6 A. I do that they would become regulated.

7 Q. And do you know what the impact of them being
8 regulated would be?

9 A. Yes, they would become regulated and receive the
10 uniform blend price as a producer like other regulated
11 processors and the producers that supply those plants are
12 receiving.

13 Q. And --

14 A. And what it does is, in my -- from my standpoint,
15 it levels the playing field in terms of the opportunity to
16 take advantage of what are obviously some historical law
17 that was designed to stay away from the administrative
18 requirements associated with producer/handlers.

19 Q. I -- well --

20 A. So if you're asking me to -- is three million
21 pounds the magic number or not, I don't have an opinion
22 about that.

23 Q. No, that's not my question. My question is, what
24 is your understanding of the economic impact of a farmer
25 that's a producer/handler that moves under this proposal

1 that has in excess of three million pounds of class one
2 sales per month? What is the economic impact on that
3 farmer?

4 MR. UNIDENTIFIED: He just answered the question,
5 Your Honor.

6 THE COURT: Well, I think he -- it's -- it was
7 difficult to see exactly what question he was answering.
8 He went on a little bit, so I'm going to allow that
9 clarification, because I was sort of thinking the same
10 thing.

11 If you could answer his specific question, it
12 will make it a little bit easier, I think.

13 THE WITNESS: Okay. Could you ask it again?

14 BY MR. YALE:

15 Q. What is the economic impact on a producer/handler
16 that it produces and markets more than three million pounds
17 of milk as class one per month as a result of the adoption
18 of the proposal that's before the secretary at capping that
19 at three million? What is that economic impact?

20 A. I'd be happy to answer that in work with
21 producer/handlers to better understand their cost and
22 returns. I can't generalize that, and I won't generalize
23 that across the population of producer/handlers.

24 I don't know the impact it'll have on each one of
25 these individual businesses. It may be a positive impact

1 in terms of their business opportunities and profitability.

2 So I won't make a blanket statement that's negatively
3 impacting or positively impacting all producer/handlers
4 because I know what the diversity of cost and returns are
5 for dairy producers across the population. We make our
6 living understanding that for businesses.

7 Q. Is there anything as a producer/handler that you
8 would recommend that would be different from a regular
9 farmer that would maximize that amount of money -- or
10 amount of money they would return over, if they produce
11 more than three million pounds?

12 A. Absolutely. I'd take a look at their operating
13 efficiency. I'd separate them into cost and profit
14 centers, their dairy operation, their processing and
15 marketing operations, and look at how they are contributing
16 to the overall performance of that combined business, and
17 see what opportunities exist for taking advantage of the
18 risk management tools that are out there, and marketing --
19 marketing their milk in an aggressive and business-like
20 manner.

21 Q. Let me make this a little more specific. There's
22 been testimony that indicates -- I think Mr. Hollon today
23 testified that if their proposal is adopted, and the
24 producer/handler had a access of three million pounds, that
25 that producer would pay into the producer settlement fund

1 the classified price and receive back a blend price, right?

2 Do you understand that?

3 A. Yes.

4 MR. UNIDENTIFIED: I'm going to object to the
5 form of the question, Your Honor. I'm sorry it's already
6 been answered.

7 THE COURT: I don't --

8 MR. UNIDENTIFIED: Mr. Yale's referring to three
9 million pounds, and it's critically important not just to
10 refer to three million pounds, but to refer to three
11 million pounds of production and/or three million pounds of
12 route dispositions within the order. And the distinction
13 is important, and as these questions come, sometimes it's
14 been asked one way, and sometimes it's been asked the
15 other. And I think he needs to be clear which he's
16 speaking to because the answers will differ.

17 THE COURT: All right. Okay. Do you want to
18 clarify that?

19 MR. YALE: Your Honor, I'll clarify that.

20 BY MR. YALE:

21 Q. We're going to talk about three million pounds of
22 class one --

23 A. Sales.

24 Q. All right. So he's got in excess of three
25 million pounds of class one, and he markets that milk. And

1 he has to pay into the Federal Order pool the classified
2 price on all that milk, and return back a blend price,
3 right?

4 A. Yes.

5 Q. Do you know what the economic impact that is?

6 A. On all producer/handlers?

7 Q. On a producer/handler, how would you figure that?

8 Let me ask --

9 A. It'd be very easy to figure. If I had three
10 years of balance sheets, two years of income statements, I
11 could answer that question with great specificity for the
12 individual.

13 MR. UNIDENTIFIED: Your Honor, I would also
14 object to the question. It's a hypothetical without
15 complete foundation. How much surplus is -- how much non-
16 class one production does the producer have because that's
17 part of the equation also? I don't know whether Mr. Yale
18 --

19 THE COURT: Well, he can answer -- he can ask the
20 questions, and he can answer them. If you want to modify
21 them on redirect, then that's fine, but, I mean, unless he
22 doesn't understand the question, the question stands. And
23 I think he's answered it, actually.

24 MR. UNIDENTIFIED: Well, actually here's an
25 additional objection to this line of question. Dr. Smith

1 was not offered as an expert in the operation of the order,
2 and that is the examination --

3 THE COURT: He asked him if he knew what the
4 impact of something would be, and he's -- and that -- the
5 question stands, and the answer stands, and let's go on to
6 --

7 MR. UNIDENTIFIED: All right.

8 THE COURT: -- the next thing.

9 BY MR. YALE:

10 Q. I want to make a -- I want to go to a specific
11 example.

12 A. Uh-huh.

13 Q. I want you to assume for a moment that there's a
14 farm out there that produces four million pounds of milk
15 per month, has for a long time. Well managed, uses many of
16 the management tools that you -- always can use more. We
17 can always be better. We can always be more efficient, but
18 is doing that well as a farmer. And is also a processor,
19 and he produces all that and turns all that milk into
20 bottled milk and sells it. All is class one.

21 A. Uh-huh.

22 Q. All right. Under the current situation, when he
23 sells that milk, and I'm going to ask this as a form of a
24 question, he has no obligation to the pool for any of the
25 sales that he gets back, right?

1 A. What level of --

2 Q. He's at four million today without any -- no --

3 A. (Indiscernible)

4 Q. He gets to keep all that money, right?

5 A. I would agree with that.

6 Q. All right. Now, if tomorrow this order proposed
7 amendment took effect, and we're into a new month, and
8 everything else stays the same. Now he's over the three
9 million, he's fully regulated, right, is your understanding
10 of this proposal?

11 A. That's my understanding.

12 Q. All right. Now, you would agree then that he has
13 to pay into the pool for that four million of class one,
14 the class one price, right?

15 A. Yes.

16 Q. And he would get back a blend price, right?

17 A. Yes.

18 Q. On all that milk, right?

19 A. That's a 100 percent of his --

20 Q. Right.

21 A. -- of his marketing? Uh-huh.

22 Q. All right. So now I think you can do this math.
23 If the average difference between that class one and that
24 blend for that four million pounds or class one sales in,
25 you know, that's all that they're selling. There's no

1 other blend in that, is \$1.70 a hundredweight, what is his
2 monthly contribution to the pool? It'd be four million
3 turned into hundredweights, right? What, 40,000, --

4 A. Uh-huh.

5 Q. -- times \$1.70, right?

6 A. Uh-huh.

7 Q. 680,000 or -- wait -- huh? 68,000, right?

8 A. Somebody did a calculator on it.

9 MR. UNIDENTIFIED: (Indiscernible)

10 THE WITNESS: You did it in your head.

11 MR. UNIDENTIFIED: (Indiscernible)

12 BY MR. YALE:

13 Q. Okay. It's \$1.70 a hundredweight --

14 A. Yeah.

15 Q. -- on four million pounds a month.

16 A. Yeah.

17 Q. What's that effect?

18 A. 68,000.

19 THE COURT: It's (indiscernible) \$1.70, so --

20 BY MR. YALE:

21 Q. 68 -- okay. And then for 12 months. Let's say
22 it's 70,000 for 12 months. How much is that?

23 A. 816,000.

24 Q. Okay. That he wasn't paying before, and now he's
25 paying, right?

1 A. Uh-huh.

2 Q. That's what this proposal's about. Do you
3 understand that?

4 A. Well, potentially.

5 Q. Well, how's he going to change that number? How
6 can he change that class one and that blend price?

7 A. You tell me where the \$1.70 comes from. Is that
8 coming --

9 Q. Do you have the exhibits available
10 (indiscernible)

11 A. Yeah. Well, they're at my seat, --

12 Q. 34. I'm going to show you --

13 A. --but I'll go ahead with your line of
14 questioning.

15 Q. I'm going -- no, I want to show you
16 (indiscernible) yeah, this is Elvin's. 33, I want to show
17 you Exhibit 33. And I want to point to you, to Exhibit --
18 Table A-2 and page five. Now, when you were here -- you've
19 set through some of that testimony today, right?

20 A. I did.

21 Q. Did you -- were you here when he explained that
22 table?

23 A. Yes.

24 Q. All right. Do you understand that to explain
25 that that's the difference that the producer/handler would

1 be required to pay into the pool if they went from a
2 producer/handler to a fully regulated?

3 MR. UNIDENTIFIED: If they were 100 percent

4 BY MR. YALE:

5 Q. 100 percent class one.

6 A. That's my understanding.

7 Q. All right. Now, coming back to that again, you
8 -- day one, or today, there are four million pounds class
9 one. They don't pay anything in the pool, and tomorrow
10 they begin, and they have to pay at this rate of 800,000
11 plus per year. What can they do to change that number?
12 Not in their operations or profitability. What can they do
13 to change that number?

14 MR. UNIDENTIFIED 1: Now, Your Honor, I object to
15 the question. He says, what can they do to change the
16 number, not change any of their operations. I mean, it's
17 nonsense.

18 MR. UNIDENTIFIED 2: No, it's not --

19 MR. UNIDENTIFIED 1: How can they change a number
20 if --

21 THE COURT: You -- okay. Do you understand the
22 question?

23 THE WITNESS: I do. If -- it's -- I mean, it's
24 so hypothetical, it's -- you know, it gets a little bit
25 ridiculous at some point, but what I will say, using your

1 hypothetical, never-to-exist-probably example, he has the
2 ability to go into another business, to make changes in his
3 business. If he decides that the dairy production part of
4 the business is more profitable than the processing part of
5 the business, which one he's going to grow? There -- or,
6 rational business person going to grow, and vice versa.

7 You're giving me a hypothetical example across a
8 integrated business and saying, you know, what choices does
9 he have? He has a number of choices, just like every dairy
10 farmer has choices to make every day as they're faced with
11 either record low milk prices or pretty favorable milk
12 prices.

13 BY MR. YALE:

14 Q. But you answered the question. You indicate that
15 based on this change and being faced with 800,000, they've
16 got to -- they have to consider changes in their operation,
17 right?

18 A. Sure, it's change in the business climate.

19 Q. Possibly the sale of their herd, or sale of their
20 plant, or maybe both?

21 A. No, no. Possibly -- anything's possible. You're
22 painting a worse case scenario that I don't think is
23 necessarily realistic.

24 Q. You don't --

25 A. Because I also know that -- I also know something

1 about the margins that a business the size that you just
2 described are likely to generate. Now, is this change
3 going to impact them? Of course it can impact a business,
4 and it might impact a business quite dramatically, but
5 we're not talking about -- we're talking about a really
6 statistical outliers in terms of what the intent initially
7 was from an administrative standpoint.

8 So, I mean, --

9 Q. Do you have --

10 A. -- I could easily -- I'll just give you my
11 opinion. I could easily argue that there should be no
12 exemptions, and I know the hardship that that will present
13 to this -- the average 70-cow producer/handler, but the
14 cleanest and easiest thing to do would be to provide no
15 exemptions, and then we don't -- we're not talking about
16 these hypotheticals. That's reality then.

17 Q. So, in other words, an ongoing -- you have no
18 concern that an ongoing operation affected by government
19 regulation imposed with -- in excess of a million dollars
20 in new costs --

21 A. No, I mean, you said --

22 Q. 800,000, that's not something that they should be
23 worried about?

24 MR. UNIDENTIFIED: Objection, Your Honor. Object
25 to the form of the question. He's asking -- in terms of

1 the relevance of the thing, does he have concern on a human
2 level for whether somebody --

3 THE COURT: Well, he can answer --

4 MR. UNIDENTIFIED: -- has a change in their
5 operations?

6 THE COURT: I see where it's not real relevant
7 (phon.), but I'm -- I don't know if he's asking on a human
8 level or a --

9 MR. UNIDENTIFIED: (Indiscernible) concern.

10 MR. YALE: I -- we --

11 THE COURT: Well, --

12 THE WITNESS: Let me just add this. We have
13 clients right now that are asking the very question that
14 you're posing on a hypothetical, saying we're designing and
15 implementing some large scale operations in the Midwest.
16 And the question that's being asked is, how close do we get
17 to the consumer in the product that we product and market?

18 Do we stop at the farm gate, or do we go further?

19 And they're exactly asking the question that
20 you're talking about, but they're going to make it -- based
21 on whether the regulation gets changed or doesn't get
22 changed, they're going to make it based on good, sound
23 business decision.

24 BY MR. YALE:

25 Q. How many producer/handlers do you represent or

1 consult?

2 A. Have as clients currently?

3 Q. Yes.

4 A. No producer/handlers currently.

5 Q. How many producer/handlers have you had in the
6 last five years?

7 A. Two.

8 Q. What was their largest size?

9 A. It would be about 150 to 200 cows.

10 Q. Did you make any representations to them on how
11 to operate their processing site?

12 A. What are you specifically asking? How to --

13 Q. I'm going to withdraw the question. I'm going to
14 take it another way.

15 Have you had -- so I take it by that, you have
16 not had a full entity, a producer/handler that's three
17 million pounds or bigger per month as a client?

18 A. That would be fair to say.

19 Q. And you have not analyzed their total enterprise
20 from the moment that they produced or buy the feed until
21 they market the milk, to know it's -- where their
22 profitability and their costs are; is that correct?

23 A. That's correct.

24 Q. And you've not made recommendations to them on
25 how to improve their profitability; is that correct?

1 A. Well, if we didn't have them as clients, it's
2 hard to make recommendation.

3 Q. Right. Now, if I -- you've got a web site, and
4 I've looked at the web site, and you got some stuff, and I
5 think your C.V. comes off your web site, it looks like it.
6 You're in the business to make farmers profitable, right?

7 A. Farmers and agri-businesses. Half --

8 Q. Farmers and agri-businesses, right?

9 A. Yes, half our clients are farmers, half of them
10 are agri-businesses.

11 Q. So you look at -- for the farm -- let's talk
12 about the farmers, for example. Okay?

13 A. Sure.

14 Q. You look at what -- how they can control their
15 risk in pricing of their product, right?

16 A. Yes.

17 Q. And pricing of their costs, right?

18 A. Yes, inputs, outputs.

19 Q. Right. And by your talk of the 2X and the 3X and
20 the 4X and the BST. You even make recommendations and talk
21 to them about the opportunities they may have in changing
22 management style to increase costs, right?

23 A. Well, not increase --

24 Q. Or, not increase costs, increase profitability?

25 A. Yes, profitability. Yes.

1 Q. All right. And do you do this in a full-scale
2 thing? I mean, you sit down and do a full representation
3 to them, like, you know, here's all the opportunities and
4 the narrative and business plans and stuff like that?

5 A. Absolutely.

6 Q. Okay. How many of those have you recommended
7 become a producer/handler in the last two years?

8 A. If you -- producer/handler as defined by this --
9 definition of producer/handler --

10 Q. As it exists today. As it exists today.

11 A. None that I -- well, when you say "recommend,"
12 one of the recommendations being that you should consider
13 and evaluate based on our evaluation, whether
14 producer/handler's an option?

15 Q. That's right.

16 A. Two.

17 Q. And those were the ones that are 150 cows?

18 A. Right.

19 Q. All right. How many farmers do you have that
20 have three million pounds of milk or month -- or more per
21 month in your clientele?

22 A. Oh, a large number.

23 Q. And you've never recommended to any of them to be
24 producer/handlers?

25 A. Not under this definition. Have we recommended

1 that they do on-farm processing, or that they consider
2 certified organic or other marketing opportunities?

3 Absolutely.

4 Q. Now, you have a newsletter that goes out, right?

5 You know, a general thing to your --

6 A. We have a global newsletter.

7 Q. Global newsletter. And it talks about trends and
8 things you can do, to look at to be more profitable, right?

9 A. Yes.

10 Q. How many articles have you talked to them about
11 becoming a bottler and selling their milk as bottled milk?

12 A. I don't recall -- you asking me personally?

13 Q. Yes.

14 A. I don't recall writing an article to that effect.

15 Q. But isn't it your job and your advertisement that
16 you're trying to make producers as profitable as they
17 possibly can be?

18 A. Absolutely.

19 Q. And isn't it --

20 A. And more importantly, to reach their business and
21 personal goals, which in some cases isn't just strictly
22 return on assets. We also are concerned about quality of
23 life and other things that are not quantified in return on
24 assets.

25 Q. Now, you talk about this fad and three percent.

1 Do you know what the definition of grade A milk is?

2 A. The official definition, I can't -- if you're
3 asking me to repeat it, I can't repeat it --

4 Q. Is there a minimum amount of butter fat that's to
5 be in that milk to qualify as grade A milk?

6 A. Oh, there probably is, but I don't know what it
7 is.

8 Q. Now, you talked about this two percent, and you
9 had these questions with Marv about the 1.8 and the two
10 percent and all this other stuff. The assumption is, is
11 that that cream is a cost to a producer/handler, right?
12 The excess cream is a cost item, it's a burden, needs to be
13 --

14 A. Oh, it -- well, no, not -- I never said that.
15 You might have implied that. But I never said that. He
16 was specifically asking whether there's any flexibility
17 within management programs, breeding programs, to change
18 the composition of milk, and I answered yes.

19 Q. And what is the normal cycle of doing that, you
20 know, increasing components and reducing and increasing
21 through a lactation? How long can you keep a cow, reduce
22 the butter fat for a few months, and then bring it up and
23 then bring it down again? Can you do that?

24 A. Well, remember, in a herd of cows, you don't have
25 the whole herd going through the same stage of lactation --

1 Q. I understand that.

2 A. -- at any one point in time.

3 Q. But as a herd --

4 A. Can I change the components of my herd --

5 Q. On a monthly --

6 A. -- on a monthly basis? You bet I can. Have
7 clients that do it on a regular basis, most cases
8 unintentionally.

9 Q. I want to turn your attention to page five of
10 your statement.

11 A. Yes.

12 Q. Says profit per pound of milk sold. Where did
13 that come from?

14 A. I said hypothetical.

15 Q. So --

16 A. I can tell you where it came from in terms of a
17 validation. We benchmark a lot of herd across those size
18 ranges, and I know something about the means and standard
19 deviation or variation in profit per pound of milk sold.
20 So I picked some numbers that, you know, in the current
21 milk marketing situation are somewhat representative of, I
22 think, a realistic relationship.

23 You can argue the absolute numbers up and down,
24 but the -- when we look at the difference primarily in
25 capital replacement costs between a 90-cow dairy, a 900-cow

1 dairy, and an 1,800-cow dairy, I've characterized most of
2 that in those profits -- profit per pound of milk sold.

3 Q. How did you qualify the costs and the capital
4 associated with the processing?

5 A. I took my best estimate at what I thought it was.

6 Q. Because you don't -- you have --

7 A. You already told -- you already have reinforced
8 that, and we probably don't need to do that again.

9 Q. But, I mean, you don't do -- you don't have any
10 knowledge of the process or costs --

11 A. Other than what I've read from other testimony.
12 I absolutely spent time with Mr. Herbine's analysis, and so
13 I do have an understanding second-hand, not directly,
14 working with clients that have these facilities.

15 Q. Now, I want to move back here earlier on. You
16 have these charts, and looking at page three, figure 26,
17 "Large Dairy Operations." Now, a three million cow, or
18 three million pound per month, if it all went to class one,
19 where would that cut-off be in terms of average size of a
20 cow? How many cows would you have to have?

21 A. Well, you know, I suggested that 20,000 pound
22 sold, 1,800 cows.

23 Q. Well, I'm looking at figure 26 on page three.

24 A. Well, figure 26 wouldn't be covered there because
25 you got 200 of the 500 cows. And so your ability to shift

1 three million pounds of milk a month is not possible, well,
2 at least not today, at those -- at that size.

3 Q. So really you need to look at the, what, 50 to
4 199?

5 A. No, I would suggest -- unfortunately, the BRS
6 stops at 500 cows, but I would suggest, you're at -- on
7 page four, figure 27. And, you know, if you understand my
8 table on page five to shift three million pounds of milk
9 per month, selling 20,000 pounds of milk per cow, which is
10 not an unrealistic and close to average and below average
11 in a state like Washington, then you got about 1,800 cows
12 to do that.

13 So even -- the problem with the ERS data is that
14 it's -- it doesn't segment the population above 500. They
15 used to cut it at 200 cows. You know, made it very
16 difficult --

17 Q. So we really don't know where that cut-off is?
18 We don't know the impact, for example, of the 10,000-cow
19 herds or the 500 or anything in this data, right?

20 A. Well, I wouldn't say that. I think the important
21 thing about the tables as presented is that we show the
22 efficiencies primarily on the ownership cost side. You
23 look at the operating cost, we've got some very efficient,
24 small operations. They know how to get milk out of cows.
25 They know how to do it cost effectively.

1 But that efficiency doesn't go on forever because
2 you look at these larger operations, and their operating
3 costs are actually fairly similar. What you see is the
4 compression of the total cost line coming closer to the
5 operating cost line at the larger herd sizes, and that's
6 because they've spread their fixed costs out, and their
7 investment -- their capital efficiency is that much
8 greater. That's the economies of size principal in black
9 and white, very characteristic of the dairy industry.

10 Q. I want to move your attention over to page six
11 where you talk about reverse osmosis.

12 A. Okay.

13 Q. What do you know about on-farm or reverse
14 osmosis?

15 A. What do I know about it? We have a client that
16 we've helped -- are in the process of helping do a
17 feasibility analysis on it. We're using a variety of
18 industry and proprietary data to analyze the feasibility of
19 on-farm concentration.

20 Q. What volume is necessary for on-farm?

21 A. That's the \$64 question. Studies have been done
22 that show there's opportunities at, you know, 1,000-cow
23 herd size. We believe that's probably a bit too small,
24 given the capital investment associated with equipment and
25 the level of maintenance and management required to manage

1 the equipment. We think it's probably closer to the five
2 or six thousand cow size, but I don't have a specific
3 answer. It obviously is, depends on the situation.

4 Q. And that's all that milk going through that
5 reverse osmosis, right, at the five or six thousand-cow
6 size?

7 A. I'm saying it's somewhere in that range, between
8 probably 1,000 and 5,000, yes.

9 Q. So where would they have the opportunity to sell
10 milk as class one? They'd have to have additional cattle,
11 right, and additional production?

12 A. Well, that's certainly an option, but what I'm
13 suggesting is the ability to have the flexibility of moving
14 milk greater distances as obviously it's a different
15 product. There is a capability to reconstitute it, but
16 moving that milk by taking the water out, or two thirds of
17 it, and being able to move it the greater distance provides
18 some marketing flexibility.

19 Q. All right. You mentioned in here earlier that a
20 tanker load a day kind of necessary to reach some kind of
21 level of efficiency, is that -- or sell it in tanker units,
22 right?

23 A. I believe there's an advantage from a marketing
24 standpoint to be working in tanker load quantities in milk.
25 We design dairies that are centered around tanker load

1 quantities of milk.

2 Q. All right. On ultrafiltration or filtration,
3 that's a concentration, right, --

4 A. Yes.

5 Q. -- approximately three times?

6 A. Yes.

7 Q. So if you have a tanker load of milk, you have to
8 have three tankers of milk coming off the cows -- harvested
9 from the cows that goes into the --

10 A. To send a tanker of concentrated, --

11 Q. Right.

12 A. -- right. Yeah, about.

13 Q. And if you deliver that every day, then you're
14 going to have to have three loads of milk a day, right,
15 just for the concentration, right?

16 A. Well, you're suggesting -- you're assuming that
17 you're using the same transport technology for concentrated
18 milk as you are for fluid milk. That's --

19 Q. No, I'm not. No, I'm not.

20 A. Oh. Okay.

21 Q. I'm saying that, you know, basically on this, you
22 actually are going to have to run it most of the time,
23 right, to make -- get the efficiencies to make it
24 worthwhile, right?

25 A. How's that different than running a milking

1 parlor --

2 Q. Why --

3 A. -- all the time? I don't think it is different.

4 Q. Well, I know it's not. Okay.

5 A. Okay.

6 Q. So a farm --

7 A. Yes.

8 Q. -- that has reverse osmosis --

9 A. Yes.

10 Q. -- that delivers one load of reverse osmosis
11 three times concentration per day, --

12 A. Yes.

13 Q. -- one load will have to produce three loads a
14 day off the cows just into the reverse osmosis, right?

15 A. You're assuming they're moving the milk every
16 day.

17 Q. Right.

18 A. Not necessarily the case, but sure.

19 Q. You don't think that would be the case with
20 reverse osmosis, with the --

21 A. -- have to be.

22 Q. Have you done an analysis of a producer/handler
23 who both markets bottled milk and operates a producer, or a
24 reverse osmosis plant?

25 A. No.

1 Q. So you really don't know whether it would work
2 for three million pounds, right?

3 A. Well, I think it's in the range of possibilities,
4 based on the analysis that we're currently doing. So no, I
5 wouldn't agree with that.

6 Q. You -- on your last line of your statement, you
7 make this comment, "The ability of producer/handlers
8 producing and marketing milk in excess of the proposed
9 three million pounds per month limit before becoming
10 regulated should not present a large economic disincentive
11 for those producer/handlers that will be affected."

12 Now, the question I have is, who are those PH
13 that will be affected in your sentence?

14 A. Who -- well, my understanding from previous
15 testimony that it would be a small number of
16 producer/handlers.

17 Q. So this would be ones that have an excess of
18 three million per month; --

19 A. Correct.

20 Q. -- is that right?

21 A. Correct.

22 Q. And you're saying that -- forcing them to three
23 million will not affect them?

24 A. What I said was -- I didn't say it wouldn't
25 affect them. I said it should not present a large,

1 economic disincentive.

2 Q. And at what point does it become a large,
3 economic disincentive?

4 A. Where they maybe haven't captured the economies
5 of size of their existing business and their, you know,
6 opportunities to change a business under a different
7 pricing structure are going to be unique to that particular
8 business. I'm just suggesting, based on the data that's --
9 and the analysis that's been done, that I've reviewed up to
10 this point in time, I don't see evidence that there's a
11 large, economic disincentive for producer/handlers that
12 would be (phon.) over three million pounds of class one
13 sales a month that will impact them significantly.

14 Q. Being ongoing?

15 A. On an ongoing basis.

16 Q. All right. Let's turn back to your Table 1. And
17 you've got an annual -- total, annual profit of \$522,000,
18 right?

19 A. For my hypothetical 800 --

20 Q. Right.

21 A. Yeah.

22 Q. All right. Now, as you understand it, you add a
23 pound and make that three million pounds -- bear with me
24 one second.

25 All right. Going back to that exhibit that I

1 showed you, the \$1.60 -- I think it says \$1.69 for Order
2 124 for -- average for 2003. You round it to \$1.70, right?

3 A. It's the one that ranges from 74 cents to \$3.12?

4 Q. Right. Okay. The average \$1.70 -- on three
5 million pounds, that's \$51,000, right, per month on a
6 hundredweight basis?

7 A. Yeah, I think we got -- did we do it at 1.70 at
8 68,000 before?

9 Q. Yeah, so three million, about 51,000, right?

10 A. Keep going.

11 Q. All right. Now, times 12, what's 51 times 12?

12 A. 612,000.

13 Q. And that exceeds your profit at \$522,000, doesn't
14 it, on your --

15 A. Sure. Yeah.

16 MR. YALE: I have no other questions, Your Honor.

17 MR. RICCIARDI: Al Ricciardi for Sarah Farms.

18 BY MR. RICCIARDI:

19 Q. Mr. Smith, you have not analyzed three years of
20 profit and loss statements for Sarah Farms, correct?

21 A. I have not, never been asked to.

22 Q. You have not analyzed three years of financial
23 statements for Sarah Farms, correct?

24 A. Have not.

25 Q. You have not analyzed any financial statements

1 for Sarah Farms, correct?

2 A. I have not.

3 Q. So with regard to what type of an economic impact
4 the regulation proposed would have on Sarah Farms, you
5 don't have any specific information or opinion that you can
6 give today, correct?

7 A. No, I don't. I'd welcome the opportunity.

8 Q. DFA's your client currently?

9 A. Yes, in this matter.

10 Q. Were they your client before this matter?

11 A. We keep our client lists confidential. If you're
12 asking whether DFA's been a client of ours in the past,
13 I'll breach our confidentiality and say yes.

14 Q. And by you, I mean Dairy Strategies, LLC --

15 A. Dairy Strategies.

16 Q. Is Dean Foods a current client --

17 A. No.

18 Q. -- of Dairy Strategies, LLC?

19 A. Are you going to go through a list of companies
20 and ask me to disclose who our clients are? Are --

21 Q. Going to -- I am going to go through a list of
22 some of these major companies in the United States in the
23 agri-business area to find out if they're your clients so
24 that I can test some issues with regard to your testimony,
25 yes.

1 A. The standards and ethics of the American Society
2 of Agricultural Consultants prevents me from disclosing
3 clients in a public forum for -- upon questioning as you're
4 suggesting here without advance permission from the
5 clients. So you can go through the list, but I will not
6 tell you whether they're a client currently or have been a
7 client. I already breached it with respect to Dairy
8 Farmers of America.

9 Q. Well, you told us in your statement that Dairy
10 Farmers had asked you to present this statement, says on
11 behalf of Dairy Farmers, Inc.

12 A. Excuse me. I was talking in terms of previous
13 relationships with Dairy Farmers of America.

14 Q. Do you have a client at this point currently in
15 the Order 131 area?

16 A. Several.

17 Q. Do you have any -- and you told us, I think, in
18 response to Mr. Yale's question, you have no current
19 producer/handler clients, correct?

20 A. That's correct.

21 Q. You won't tell me if Shamrock Farms is a client,
22 for example?

23 A. No. We have clients in both orders under
24 discussion here.

25 Q. And you are being paid, I assume, for the time

1 that you spent and the preparation of the statement, and
2 for your testimony today?

3 A. Yes, that's the nature of our business.

4 Q. Understand. And how much is that?

5 A. Well, you're asking for my rates?

6 Q. That's correct, for --

7 A. Yes.

8 Q. -- this particular issue that we're here for
9 today.

10 A. My rate is \$195 an hour for professional time and
11 \$250 an hour for testimony, plus expenses port to port.

12 Q. What did you review in order to prepare your
13 statement?

14 A. I can get my folder and go through what I
15 reviewed. I principally reviewed Mr. Herbine's statement.

16 I reviewed the Texas Order Federal Register entry of 1980
17 -- I'm going to say '88/'87 something like that. I
18 reviewed the Puget Sound discussion around this similar
19 matter. I reviewed the testimony from the Phoenix portion
20 of this hearing. I reviewed Mr. Hollon's statement and
21 exhibits. Let's see. I'm sure there were some other
22 things. My folder's fairly thick, but that -- those are
23 the ones that come to mind.

24 Q. Have you ever published any articles regarding
25 producer/handlers?

1 A. No.

2 Q. And I assume you never operated as a
3 producer/handler?

4 A. That's actually an interesting question. I
5 suspect that, although unique, Michigan State University
6 dairy farm might have been a producer/handler and I managed
7 that.

8 Q. May have been, and that is -- in terms of looking
9 at your resume in terms your background, the only time that
10 you've operated or managed a dairy farm was at Michigan
11 State, correct?

12 A. Correct. Well, --

13 Q. In '79/'80?

14 A. Yeah. Excuse me, but I had management positions
15 at two other dairy farms.

16 Q. Okay. Do you know whether or not Sarah Farms
17 uses BST technology at its farm?

18 A. I don't.

19 Q. And I think you've said, but let me make it
20 clear, you have no information regarding either the
21 operation of the dairy portion of Dairy Farms or the
22 production facility, correct?

23 A. No, I don't.

24 THE COURT: You said "Dairy Farms." Did you mean
25 Sarah Farms just now, where you just said -- that last

1 question of yours?

2 MR. RICCIARDI: Well, I --

3 THE WITNESS: -- Sarah Farms.

4 MR. RICCIARDI: I said Sarah Farms --

5 MR. UNIDENTIFIED: I don't think you said it, but
6 I think you meant it.

7 THE WITNESS: Oh, I answered it as though you
8 were talking specifically about Sarah Farms.

9 THE COURT: I may be hearing things, I don't
10 know, at this time --

11 MR. RICCIARDI: And I understand, Your Honor.
12 Let me make it clear.

13 BY MR. RICCIARDI:

14 Q. With regard to Sarah Farms, you have no specifics
15 regarding either the dairy portion or the production
16 facility for Sarah Farms, correct?

17 A. I do not.

18 Q. Okay.

19 A. Correct.

20 MR. RICCIARDI: I don't have anything further,
21 Judge.

22 THE COURT: Okay. Let me ask -- I'm trying to do
23 a little rotation here. I want to ask Ms. Deskins and her
24 colleagues if they have any questions of this witness.

25 MS. DESKINS: We don't have any questions.

1 THE COURT: Okay. Go ahead, Mr. English. And
2 don't forget to identify yourself.

3 MR. ENGLISH: I did it last time. Charles
4 English for Dean Foods Company and Shamrock Foods Company.

5 BY MR. ENGLISH:

6 Q. Dr. Smith, just a clarifying question or series
7 of questions based upon the questions asked by Mr. Yale.

8 On Table 1, page five, the total, annual profit
9 that you listed, \$522,000, that is at the farm, correct?

10 A. Yes.

11 Q. That would not include any processing profit,
12 correct?

13 A. Right. That is correct.

14 MR. ENGLISH: That's all I have. Thank you.

15 THE COURT: Go ahead, Mr. Berde.

16 MR. BERDE: Sydney Berde.

17 BY MR. BERDE:

18 Q. Dr. Smith, you're aware of the opponents of
19 proposals to regulate producer/handlers who distribute more
20 than three million class one in a marketing area, contend
21 that their balancing costs outweigh whatever gains or
22 savings that they might realize on the class one blend
23 obligation to the pool.

24 A. I'm aware of that comment.

25 Q. And is your testimony designed to show that such

1 a claim is, in fact, specious because other strategies are
2 available to them to minimize their balancing costs?

3 MR. UNIDENTIFIED: Objection for the
4 (indiscernible) beyond his direct and cross-examination,
5 and we're going into a different area.

6 THE COURT: I'll, you know, I'm going to let him
7 answer the question (indiscernible), if you know the answer
8 to the question --

9 THE WITNESS: I think there's flexibility to do
10 their own balancing.

11 BY MR. BERDE:

12 Q. And that's essentially what the burden and thrust
13 of your testimony is today, is it not?

14 A. It's a portion of --

15 MR. UNIDENTIFIED: (Indiscernible) testimony is
16 whatever his testimony is. I mean, that's (indiscernible)

17 THE COURT: (Indiscernible)

18 THE WITNESS: It's a portion of my testimony --

19 THE COURT: Don't --

20 THE WITNESS: I'm sorry.

21 THE COURT: -- answer the question. When I say
22 don't answer the question, I --

23 THE WITNESS: Oh, did you say -- I didn't hear
24 you say don't answer it.

25 THE COURT: (Indiscernible) in so many words.

1 THE WITNESS: Yeah. Okay. You can slap me.

2 MR. BERDE: What was the answer?

3 THE COURT: He doesn't get -- no, no, no, no. I
4 said that was an improper question. So I told him -- I'm
5 telling him he shouldn't answer that question. So go on to
6 your next question.

7 MR. BERDE: (Indiscernible) he shouldn't answer
8 what the purpose --

9 THE COURT: He shouldn't answer the question
10 about what the purpose -- his testimony is what his
11 testimony is. You're asking him now, well, isn't the
12 purpose of your testimony to assume -- to whatever.

13 MR. BERDE: Oh.

14 THE COURT: He already testified. Whatever his
15 testimony was, that's what it is.

16 BY MR. BERDE:

17 Q. Would you agree that the claimed balancing costs
18 that the producer/handlers claim they incur is not, in
19 fact, at a level which overlays the savings realized on
20 their exemption from paying into the pool of class one
21 blend obligation?

22 MR. UNIDENTIFIED: Objection for a variety of
23 reasons --

24 THE COURT: In a -- okay. Look, I'm going to let
25 him answer the question. So everyone sit down.

1 Answer the question, if you know the answer to
2 the question, if you understand the question.

3 THE WITNESS: I don't believe -- my opinion is
4 that they are not put at a competitive advantage strictly
5 based on their inability or the costs associated with
6 blending excess production --

7 MR. BERDE: Thank you.

8 THE COURT: Are there any other questions in the
9 proponents side of the isle?

10 Yes, Mr. Beshore.

11 MR. BESHORE: Just one question.

12 THE COURT: Identify yourself.

13 MR. BESHORE: Marvin Beshore.

14 BY MR. BESHORE:

15 Q. One question in terms of hypothetical affects.
16 Mr. Yale asked you, you know, somebody goes, you know, a
17 pound over the three million or whatever, they'd have a big
18 bill. Of course -- and you said they could -- there are a
19 lot of things you could think about, and one of those that
20 may not have been mentioned is to consider the pricing of
21 your product if you've got a different regulated, minimum
22 cost than you do now in your revenue side, might need to
23 change a little bit. Fair enough?

24 A. Absolutely. I think it's like any business
25 decision. The environment changes, whether it's low milk

1 price, or whether it's a increased regulation in the
2 marketplace. We make the best sound business decisions,
3 and I would suggest the management depth on a
4 producer/handler of the size that we're talking about is
5 there to make an informed decision.

6 MR. BESHORE: Okay. Thank you.

7 THE COURT: Go ahead, Mr. -- Mr. Yale, do you
8 have another question.

9 MR. YALE: (Indiscernible) follow-up.

10 BY MR. YALE:

11 Q. I wanted you to go back to Table 1. You call
12 this a hypothetical producer/handler, right?

13 A. Right.

14 Q. And your -- and you testified, did you not, that
15 to come to this .0145, that you read Carl Herbine's
16 testimony?

17 A. Right.

18 Q. And that you factored in the profit from the
19 marketing of that milk?

20 A. No, but if I said that, I misspoke. It really is
21 focused on the production -- milk production side of the
22 business, not the processing side of the business.

23 But my -- the context of reviewing Mr. Herbine's
24 work is looking at the economies of size at both
25 corresponding producer/handler sizes and seeing a very

1 similar relationship with respect to economies of size for
2 the processing side of the producer/handler as well as the
3 production side. And I look at them as cost and profit
4 centers within an integrated business, and they have to --
5 whether we call them transfer costs and how we compute them
6 is -- some of it's an academic discussion, but
7 realistically, I focused in Table 1 on the dairy production
8 side of the hypothetical.

9 Q. So this has nothing to do with any processing
10 sales or profits or payments into the pool --

11 A. No.

12 Q. -- or anything?

13 A. No.

14 Q. So it's not a producer/handlers, it's just a
15 producer?

16 A. Well, that's why I use the word "hypothetical
17 producer/handler." Producer/handlers have cows, produce
18 milk, and then process milk --

19 Q. But you could've called it a hypothetical
20 producer examples by herd size, and it wouldn't change a
21 thing?

22 A. Well, except that the subtitle of the section I
23 was talking about was the challenges and opportunities
24 facing producer/handlers. So I think it was an appropriate
25 title for the table.

1 Q. Well, my question is, is that by making it to
2 say, if you change the title to just producer, it would not
3 change the content of the table?

4 A. Correct.

5 Q. Now, balancing costs. What are balancing costs?

6 A. What are balancing costs?

7 Q. Yes.

8 A. The processing of surplus milk in times of
9 surpluses into products because of the perishable nature of
10 milk typically in butter and powder.

11 Q. Okay. And your testimony talks about the costs
12 of making butter and powder?

13 A. No.

14 MR. BERDE: I don't have any other questions,
15 Your Honor.

16 THE COURT: Anyone else?

17 (No response)

18 THE COURT: Okay. You may step down.

19 THE WITNESS: Thank you.

20 THE COURT: It's 5:50. Would this be a logical
21 time to stop, or do we want to do a few more witnesses
22 tonight?

23 (Everyone talks)

24 THE COURT: One of the few times we have
25 agreement from everybody. Okay. We're going to start --

1 we're going to reconvene tomorrow at 8:30, and we're going
2 to plan to go till as late as 7:30 or so tomorrow. Okay?

3 Off the record.

4 (Whereupon, the proceedings were concluded at 5:50 p.m., to
5 resume November 18, 2003.)

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